DEVELOPMENTS IN THE LAW

EMPLOYMENT DISCRIMINATION AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

[A]chievement of civil rights goals and the full exercise of equal rights by minority group members will involve more than adjustments in civil rights enforcement machinery. It will require dedication and resolve on the part of Government officials and the American people, alike.

THE UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1093 (1970).

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PREFACE

Title VII of the Civil Rights Act of 1964 [1] forbids employers and unions to discriminate on the basis of race, color, sex, religion, or national origin. Executive Order 11246 likewise forbids employment discrimination by government contractors and requires the implementation of "affirmative action programs" to assure the attainment of equal employment objectives.[2]

Of all the recent civil rights legislation, Title VII alone was aimed at the economic causes of black oppression. But its reach was broader than that; other groups, whether defined in terms of race, religion, or national origin, were provided a powerful weapon for equality in the job market. And the inclusion of sex discrimination made the Act applicable to the economic oppression of the female majority.

The analytically easy cases under Title VII are those of overt discrimination, where discriminatory intent and effect are apparent. When a black employee alleges that his transfer to a lower paying job was due to the racial animus of a foreman, the only issues are factual. The law clearly condemns the conduct alleged and provides a remedy. The problems of proof in such situations, though important, do not lend themselves to treatment here. When disparities in employment statistics result from "objective" standards that are facially neutral, however, more subtle legal questions associated with Title VII are posed. Intelligence tests, educational requirements, arrest records, seniority systems, and many other facially neutral standards may, at times, have a substantially adverse effect on some group protected by the Act. How is the balance to be struck between the interest in improving the economic status of minorities, the interest in productivity, and the interest in fairness to majority workers, or "color blindness"? How is the Act to be interpreted to deal with standards such as seniority systems which carry forward the effects of past discrimination? How can courts frame effective remedies for discrimination without creating unlawful preferences? Is the intent standard of the statute [3] satisfied by facially neutral standards which are discriminatory in effect? These questions, which can be raised in the context of any of the kinds of discrimination prohibited by the Act, are the subject of the first section of this Note.

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[1] §§ 701–16, 42 U.S.C. §§ 2000e to 2000e–15 (1964) [hereinafter cited as Act]; *see* pp. 1304–13 *infra*, for text of portions of the Act.

[2] 3 C.F.R. § 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1969); *see* pp. 1313–16 *infra*, for text of portions of the Executive Order.

[3] Act § 706(g), 42 U.S.C. § 2000e–5(g) (1964).

Discrimination based on religion, sex, or national origin is regulated by a standard that is slightly different from that applied to race and color. Discrimination is allowed "where religion, sex, or national origin is a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of [a] particular business or enterprise." [4] The meaning of this language and the size of the loophole it creates are of crucial importance in determining the effect of Title VII outside the area of racial discrimination. The second section of this Note explores the meaning of bfoq within the context of sex discrimination. Though racial discrimination accounts for the biggest portion of complaints under Title VII, most of the remaining cases are based on sex discrimination. The analysis of bfoq which is developed in this section should be readily applicable to cases of religious and national origin discrimination.

A product of extensive compromise, Title VII emerged full of procedural ambiguities which have resulted in a great deal of the early litigation under the Act. And the controversy still rages over whether Congress and the courts have provided the best procedure for vindicating Title VII rights. The third section of this Note deals with Title VII procedure: the questions that arise under the present statutory scheme and the question whether a more effective procedural scheme can be devised.

Executive Order 11246 [5] is a parallel federal prohibition against discrimination, applicable to all government contractors in both their government and nongovernment work. For many of the nation's largest employers, the Executive Order is at least as important a deterrent to discrimination as Title VII. The "affirmative action" requirement of the Executive Order may go beyond the requirements of Title VII, and may even conflict with Title VII in some instances. Questions raised by the Executive Order form the subject of the final section of the Note.

The Developments Note often discusses an area of law that is highly developed and highly articulated. This Note is written in the middle of the story. Neither the legal doctrines nor their effects can be described definitely. But if the opportunity for describing the developments in this area of the law are more limited than is customary, the opportunity for influencing developments is correspondingly greater.

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[4] Act § 703(e), 42 U.S.C. § 2000e–2(e) (1964).

[5] 3 C.F.R. § 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1969).

I. Permissible Standards for Hiring, Firing, and Promotion

"The Army is the archetypal equal opportunity employer. It doesn't discriminate on the basis of race, creed, color, national origin . . . or ability." —Tom Lehrer.

A. The Legislative Purpose

Chief among the complex of motives underlying the equal employment opportunity provisions of the Civil Rights Act of 1964 [1] was doubtless a desire to enhance the relative social and economic position of the American black community.[2] Few domestic problems have proved more intractable, or received more scholarly attention, than the depressed employment status of black Americans.[3] The statistics are by now familiar. The rate of black unemployment continues to be almost double that of white unemployment;[4] among teenagers the disparity is even greater.[5] The median family income of nonwhite families is little more than one-half the national average.[6] Discrimination has often been assumed to be at the root of the problem. Title VII, by outlawing discrimination, was to improve substantially the employment prospects of blacks. It has been suggested, therefore, that the success of Title VII (and similar state laws) can be measured by reference to statistics indicating the rate of black unemployment and the level of black income.[7] The sug-

[1] Act §§ 702–16, 42 U.S.C. §§ 2000e to 2000e–15 (1964).

[2] President Kennedy thought that the federal equal employment opportunity legislation was desirable for "it would help set a standard for the nation and close existing gaps." 109 Cong. Rec. 11,178 (1963). The President also thought the legislation was needed to meet "a rising tide of discontent that threatens the public safety." 109 Cong. Rec. 11,174 (1964). The bill posed an issue of public morality and much of the congressional discussion was cast in moral terms. Something of the spirit of the congressional debate can be gleaned from a dialogue between Senators Humphrey and Ervin. Mr. Humphrey: "What team is the Senator for?" Mr. Ervin: "I am on the team on the side of righteousness. I am for the Senators." 110 Cong. Rec. 13,724 (1964).

[3] For a reader on the civil rights struggle of the twentieth century, reflecting the diversity of skills and people it has engaged, see J. Franklin & I. Starr, The Negro in Twentieth Century America (1967).

[4] *See* U.S. Bureau of Labor Statistics, Dep't of Labor, Monthly Labor Review 69 (Oct. 1970).

[5] *Id. See generally* Tobin, *On Improving the Economic Status of the Negro*, 94 Daedalus 878 (1965).

[6] *See* U.S. Bureau of the Census, Current Population Reports, Income in 1965 of Families and Persons in the United States, Series P–60, No. 51, at 3 (1967).

[7] *See, e.g.*, M. Sovern, Legal Restraints on Racial Discrimination in Employment 15, 140–42 (1966). *But see* Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. Chi. L. Rev. 817 (1967).

gestion is fortified by the legislative history, where one finds repeated recourse to the central syllogism: the black community needs to be boosted closer to economic parity with the white community; Title VII will help provide this boost; therefore, Title VII should be passed.[8]

But Title VII was not simply an employment measure for blacks and other minorities. The Act's effectiveness in promoting minority employment was limited by the principle of color blindness. Just as the employer was not to discriminate against minority groups, he was also proscribed from showing preference to them.[9] Employers could continue to set rigorous qualifications for their job openings and test for worker productivity, as long as they did so fairly.[10] The Act thus includes an antipreferential provision,[11] affirms the legality of professionally developed ability tests,[12] and protects bona fide seniority systems.[13] Help was to come to the black community, Congress reasoned, by a newfound opportunity to be judged by objective standards.

Congress may perhaps be faulted for imposing color blindness as a constraint upon achievement of the employment objectives of Title VII. Minority-aiding quotas are quicker and surer, even if the results of color-blind hiring eventually may be as far-reaching. Tests which aid an employer in predicting job performance, and hence would be permissible under a color-blind standard, may sometimes disqualify a disproportionate number of blacks due to their cultural deprivation. The cultural disadvantages that have been the lot of many black Americans

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[8] For an instructive precis of the legislative history in the area, see Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465–66 and app. I, at 509–27 (1968). For a more extensive discussion, see H.R. REP. NO. 570, 88th Cong., 1st Sess. 2–3 (1963); *Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. *passim* (1963).

[9] The Act applies to all discrimination based on race. In addition, it makes clear that employers cannot be compelled to prefer blacks to more competent whites in hiring decisions. See the antipreferential provision, Act § 703(j), 42 U.S.C. 2000e–2(j) (1964).

[10] Proponents of Title VII had firm rebuffs to those who argued that the Act would require preferential treatment for blacks, or interfere with employers' decisions based on productivity. Senator Case submitted a memorandum stating that the Bill "would in no way interfere with the right of an employer to fix job qualifications . . . ." 110 CONG. REC. 6416 (1964), and joined with the other floor manager, Senator Clark, to submit a second memorandum stating that "[a]n employer may set his qualifications as high as he likes . . . ." *Id.* at 7213. Senator Humphrey added, "The employer will outline the qualifications to be met for the job. The employer, not the Government, will establish the standards." *Id.* at 13,088.

[11] Act § 703(j), 42 U.S.C. § 2000e–2(j) (1964).

[12] Act § 703(h), 42 U.S.C. § 2000e–2(h) (1964).

[13] *Id.*

may have been so severe that colorblind standards of hiring will not be sufficient to produce economic parity for at least a generation.

There are, however, important arguments to be made for color blindness.[14] If colorblind hiring does not yield economic parity for the foreseeable future, other measures can be used to close the gap between impoverished minorities and majority whites. Many economists have suggested that in increasing equality, productivity should not be sacrificed.[15] Instead, output should be maximized and changes made in the way that output is distributed. Such an approach is a more refined and efficient means of giving aid, since the beneficiaries can be identified more precisely and the true costs of the process can be computed with greater precision.

Moreover, color blindness may be constitutionally required. Equal protection and due process require at least that any government action which is predicated upon color must be necessary to the attainment of an overriding governmental purpose.[16] It may mean even more than this; there may be no governmental purpose which can justify state action imposing burdens on the basis of race.[17] An analogy might be drawn to school integration where courts, as a remedy for state-imposed segregation, have specified quotas for the integration of faculty and student body.[18] But that analogy is inapposite. The judicial theory of school integration has been that children are helped by integration or, at the least, that white children are not harmed by it. When the government requires that a black man be given a job in preference to a more qualified white, harm predicated on race is clear.[19]

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[14] *See generally* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 363–88 (1966). For the view that, given the contemporary social situation, strict color blindness is unfair and formally unequal programs should be developed which single out blacks for special treatment as "compensation" for past inequities, see N. HENTOFF, THE NEW EQUALITY 95–114 (1964).

[15] *See* Tobin, *supra* note 5. For a discussion of the economic effects of fair employment practice laws, see Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507 (1968).

[16] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

[17] *Cf.* McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart & Douglas, JJ., concurring).

[18] *See, e.g.*, United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (faculty).

[19] The constitutional status of hiring quotas is by no means a clear or settled question. In favor of constitutionality, it is argued that the social effects of minority-aiding quotas are very different from the stigmatization that has led courts to view racial classifications in other contexts as invidious. Thus a court might not apply a strict standard of equal protection review, instead allowing

The standard of color blindness is also supported by considerations of fairness to white workers and to employers. The individual worker or employer may have had no part in discrimination against blacks; to impose on him the costs of remedying societal discrimination seems unjust. It is all the more unjust since the burden would fall most heavily on whites who are themselves relatively deprived. And to require an innocent employer to bear the increased costs of departures from a productivity standard seems equally unfair. The benefits of economic parity for blacks and other minorities are social; the costs should also be socialized and borne by the general revenue.

Finally, a departure from color blindness in hiring might have serious countereducative effects. Gordon Allport has defined ethnic prejudice as "an antipathy based upon a faulty and inflexible generalization." [20] A crucial objective of any antidiscrimination legislation must, then, be education; it must break down faulty racial stereotypes.[21] Preferences, however, have the reverse effect. Employers, resentful of the costs imposed on them in departing from productivity considerations in their hiring, and white workers, resentful of being turned down for jobs due to minority quotas, will only have their stereotypes reinforced by a government that proclaims blacks and other minorities to be in need of special advantages in the job market.

The central objective of Title VII was to improve minority employment by requiring employers to use colorblind standards in their hiring and promoting decisions. Employment decisions are influenced by a variety of considerations and tastes, only some of which are chastely economic. Title VII focuses on a particular taste, the taste for racial discrimination,[22] and declares that it cannot be used in employment decisions.

As the law has developed through administrative and judicial interpretation, however, something more than colorblind intent has come to be required. Standards must be affirmatively related to productivity if they have a detrimental impact on any

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quotas so long as they bear a reasonable relationship to a permissible state goal. And even if the strict standard of review that is customary in race cases were applied, it might be argued that racial classification in employment is the only practical way to correct the social and economic effects of centuries of employment discrimination. Thus, quota hiring might be thought necessary to the attainment of an overriding state purpose. *See* Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 98–100 (1970). *But see* Kaplan, *supra* note 14.

[20] G. ALLPORT, THE NATURE OF PREJUDICE 10 (1954).

[21] Education has been called "the effective outer limit of these laws." Winter, *supra* note 7, at 838.

[22] The analysis of discrimination as a taste has been carried out most thoroughly in G. BECKER, THE ECONOMICS OF DISCRIMINATION 5–10 (1957).

class of people protected by the Act. This is the message of the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures,[23] which apply to all "objective" standards used to hire or promote personnel.[24] In addition, cases like *United States v. H.K. Porter Co.*[25] have approved, in principle, the Commission's interpretation that employment tests must be job-related.[26]

It is not obvious that this interpretation should prevail. Many employers have indulged tastes in employment decisions which are neither job-related nor racially motivated. Did Congress mean to proscribe these if they have an incidental effect on some particular ethnic, racial, or religious group? There is evidence in the legislative history that such management prerogatives were to be left untouched when they were not intended to discriminate against minority groups.[27]

There are, however, weighty arguments to be made for requiring employers to use job-related standards. First, there is a significant evidentiary problem in allowing employers to use standards not tied to productivity which have a disproportionate racial impact. How is a court to determine whether the company hires graduates of a local suburban high school because of civic sentiments or because the student body is all white? If an employer can justify the qualifications he demands merely by describing some tastes he has cultivated, an obvious invitation to discriminate is created. Second, the interests of the employer in non-job-related standards often are minimal. Businesses are generally meant to make money.[28] The employer's chief interest is to be as productive as possible. Discrimination on grounds other than ability is costly to the employer. To the extent his

[23] Equal Employment Opportunity Commission, *Guidelines on Employee Selection Procedures*, 35 Fed. Reg. 12,333 (1970).

[24] The Guidelines are not confined to testing but extend to all "formal scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc." *Id.* at 12,334.

[25] 296 F. Supp. 40 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969.

[26] *See* p. 1132 *infra*.

[27] As a statement submitted by Rep. McCulloch said, "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963).

[28] Where this is not the case, different standards can apply. If alcoholism or some physical handicap happens to affect some ethnic group less than others, there could be no serious objection to allowing a company especially interested in rehabilitating alcoholics or the handicapped to use such a standard, even with some differential impact.

decisions ignore considerations of productivity, and are informed by irrational tastes and sentiments, he bears real costs. When he restricts the pool that he considers for employment, he pays higher wages for the privilege. Thus, requiring some showing of job relatedness is, on an economic analysis, actually beneficial to the employer, even if it imposes some psychic costs. These psychic non-job-related interests of an employer are not strong enough, under present social conditions, to justify any significant differential racial impact. Third, there is a more general social interest in discouraging employers from the use of non-job-related qualifications. Society pays for unproductive workers as well. By interpreting the Act to require job-relatedness, Title VII can be useful in helping to maximize the employment of human resources. In a sense Title VII can be seen as an attempt to perfect the market at a pace faster than could be achieved by natural market forces. In sum, the requirement that employers demonstrate a business purpose for selection devices that have a differential impact on minorities involves few costs and appears necessary for the accomplishment of the goals of the Act.

To analyze the specific situations discussed in this Note it is necessary to develop a scheme for allocating burdens of proof and persuasion that reflects the general statutory purposes discussed above. First, it should be up to the plaintiff to show that the standard in question does have a differential impact on some class of people protected by the Act. Without such a showing, it is clear the employer should be able to continue to use the standard, whether job-related or not. Moreover, the differential impact should be substantial. A court is unlikely to overturn an employer's system of selection if the difference is slight, since it is unlikely that an employer is using the system to discriminate for such marginal benefits, and a slight differential impact could be the result of chance factors. One court has held that a differential impact of five to ten percent is not substantial enough to merit judicial attention.[29] Second, when a plaintiff has shown significant detriment to a minority group, the employer should have to come forward with evidence of job relatedness. The nature of this showing is contextual, depending in part upon the company's size, the substantiality of the impact, and the feasibility of a rigorous validation study.[30] Where a large company's testing policy has resulted in a severe impact upon blacks, for example, courts should expect a rather sophisticated, statistical analysis showing

[29] United States v. H.K. Porter Co., 296 F. Supp. 40, 77–78 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969.

[30] There are occasions when a really rigorous validation study is not feasible. *See* p. 1122 *infra*.

that the test is a valid predictor of worker productivity. Where the effect is less severe, or the company's personnel selection resources are more limited, a less rigorous showing may suffice. In any case, the court should require a convincing demonstration of business need. If this requirement is met, the standard generally ought to be approved despite its differential impact. But if the plaintiff can show that an equally good predictor of job performance exists that does not have as substantial an effect on minority employment, the court then should require the company to substitute this new predictor for the one it is using.

B. The Standards

1. *Hiring as an Object of Concern under the Act.* — It has been argued that the principal enforcement effort under Title VII should be directed at hiring.[31] The applicant rejected due to racial discrimination is thought less likely to complain, and more likely to be in urgent need, than the incumbent passed over for a better position within the company.[32] While others have disagreed, arguing that the man with least at stake is likeliest to demand his rights and that discrimination in promotion is more typical — at least in the South — than hiring discrimination, it is clear in any case that for the mass of unemployed blacks finding and keeping a job is a large first step.[33]

Hiring complaints have occupied a substantial part of the business of the Equal Employment Opportunity Commission. Approximately twenty-five percent of the complaints investigated by the Commission concern suspect hiring decisions.[34] Among the most difficult of these have been cases where allegedly neutral job qualifications have had the effect of eliminating blacks, and sometimes other minorities,[35] from employment consideration.

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[31] Blumrosen suggests that "[d]iscrimination in recruitment and hiring is the chief measurable evil against which the modern law of employment discrimination is directed," and he urges "emphasis on recruitment and hiring rather than promotion and transfer." Blumrosen, *supra* note 8, at 468.

[32] In addition, the evidentiary problem in proving racial discrimination is usually more substantial in promotion cases, where the subjective judgment of superiors often plays a major role, than in hiring cases, where the effects of the standards are less complex and easier to evaluate. Also, the remedial problems in framing reasonable relief are not so severe at the entry level. *See id.* at 466–69.

[33] It should be noted that part of the southern discriminatory pattern is locking the black workers into the lowest paid and least desirable jobs. *See e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970). *See generally* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

[34] R. NATHAN, JOBS AND CIVIL RIGHTS 47 (1969).

[35] While all minorities have been victimized by employment discrimination,

Requirements of passing scores on tests, or minimum educational or work experience, have been claimed to discriminate against black people. The question is the extent to which the courts will use Title VII to look through qualifications formally a product of business purpose to see whether, in fact, their business justification outweighs their discriminatory effects. In the following areas, important disputes remain as to the role of Title VII.

2. *Testing.* — (*a*) *The Problem in General.* — A relatively recent addition to the battery of employee selection devices is occupational testing. In one sense, testing is only a part of a larger phenomenon in American life: a preoccupation with objective measures of ability. And testing has grown increasingly popular. It has been estimated, for example, that a student who has gone through the New York City school system has been given a minimum of nineteen different standardized tests between grades one and nine.[36] Buros lists over 3,000 new tests that were developed in the period between 1940 and 1965,[37] and the Psychological Corporation reports that ninety percent of Fortune 500 companies have purchased its tests during a recent five-year period.[38] One researcher has concluded that "it is probably safe to say that there are more ability tests being given annually in the United States than there are people." [39] There is no doubt, of course, that testing can serve an important social function. While the most accurate way to learn whether an individual can do a particular job is to let him attempt it for a number of years and then assess his performance, such a procedure can be costly. It is costly to the organization which employs a "failure," and it is frequently costly to the unsuccessful individual, both in terms of personal satisfaction and material reward.[40] If tests at the time of application can inform the employer to some degree as to the probability of an applicant's job success, the employer and the ablest applicants will be better off. Unsuccessful applicants also may be better off, assuming they can find a job elsewhere for which they are more suited.[41]

Business has a special interest in testing. It cloaks employment decisions with objectivity, gives comfort to the employer who feels he now has the most qualified employee, and protects

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discrimination against blacks is the most pervasive. Hence, this discussion often uses the term "black" even though other minorities are equally affected.

[36] D. Goslin, The Search for Ability 78 (1963).

[37] O. Buros, The Sixth Mental Measurement Yearbook (6th ed. 1965).

[38] Goslin, *supra* note 36, at 97.

[39] *Id.* at 54.

[40] E. Ghiselli, The Validity of Occupational Aptitude Tests 7 (1966).

[41] *Id.*

him from charges of nepotism or discrimination.[42] Tests enable an employer to tell a disappointed job applicant that the fault was not in his stars but in himself. When challenged, the employer can appeal to science. Because of these advantages, testing has rapidly increased in prominence. One survey showed that eighty-four percent of firms used personnel tests in 1963, as opposed to only sixty-four percent in 1958.[43] Although growth may not have been so spectacular since the passage of Title VII,[44] the use of tests is still so widespread, and so careless,[45] it is not surprising that fifteen to twenty percent of all charges filed under Title VII involve a testing issue.[46]

Many commonly used tests, especially those testing general aptitudes or particular culture related educational achievements, have little if any value as predictors of performance in unskilled or semiskilled jobs, although employers frequently use them for such jobs.[47] A study in a southern aluminum plant revealed that scores on the Wonderlic test, probably the most widely used of all intelligence tests, had no relation to job performance at all.[48] Indeed, some tests have been shown to be of negative value in predicting job success: the higher the applicant's score, the less likely he is to perform well on the job.[49]

Since the utility of tests often is not self-evident, professional psychologists point out that a test should be "validated," to insure that a high statistical correlation exists between test results and performance on the job in question. That is to say, the employer must make sure that the test is a good predictor of productivity.[50] There is a hierarchy of validation techniques according to rigor of methodology and accuracy of result. Two main categories of validation are common: "empirical" and "rational."[51]

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[42] *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637–38 (1969).

[43] Psychological Services, Inc., Survey of Hiring Procedures, 1958–1963, at 1 (1964), cited in Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing, March 28, 1967, at 2.

[44] *See* Cooper & Sobol, *supra* note 42, at 1637–38 n. 4.

[45] *See, e.g.*, J. Rusmore, Psychological Tests and Fair Employment — A Study of Employment Testing in the San Francisco Bay Area, Jan., 1967, at 3–4 (Cal. Fair Employment Comm.).

[46] *See* Cooper & Sobol, *supra* note 42, at 1637.

[47] For a criticism of the use of aptitude tests for trades and crafts, see E. GHISELLI, *supra* note 40, at 51.

[48] *See* Cooper & Sobol, *supra* note 42, at 1644.

[49] *See* E. GHISELLI, *supra* note 40, at 46.

[50] *See generally* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 696–706 (1968).

[51] Ruch, *Research Notes: Critical Notes on "Seniority and Testing Under Fair*

Psychologists generally prefer empirical validation studies, and among these the ideal approach is that of "predictive," or "classical," validation.[52] Predictive validation involves first a professional assessment of what a job requires, a thoroughgoing "job analysis." The diverse factors considered include character, personality, and ability. The next step relates the results of the test to actual criteria of successful job performance. The employer would administer the test to 100 applicants,[53] hire them all regardless of test scores and without further screening. They then would be given equally cogent instruction and equally congenial supervision. If after some period of time the test scores correlate significantly with job performance, the test has been "validated." [54]

The difficulty is, of course, that predictive validation, or anything approaching it, is extremely difficult for the average employer. He usually finds it impossible to get a random sampling and to give similar work experience, and he is seldom willing to hire 100 applicants without screening.[55] If empirical validation is done, therefore, it is generally done less rigorously, according to what has been called a "feasible validation study." [56] Such a study may be concurrent, being done on present personnel to see if any differences in employee productivity could be predicted by differences in test performance, or synthetic, relying on studies done elsewhere in similar situations.[57] While the results are clearly not as reliable as a classical validation study, the Commission has

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Employment Laws," by Cooper & Sobol in the Harvard Law Review, June 1969, 7 IND. PSYCHOLOGIST 13 (1970).

[52] *See* Note, *supra* note 50, at 696–98.

[53] *See id.* at 697.

[54] *See id.* at 699.

[55] There are few instances where classical validation has been done. Only one company has been reported to hire people with low test scores to evaluate the validity of its personnel testing program. Western Electric hired some applicants who had done poorly on the test if they met all the other requirements of training, education, and experience. *Tests Should Predict Job Performance,* EMPLOYEE RELATIONS BULL. 3 (Aug. 1967) (Report No. 1060, published by National Foreman's Institute, Waterford, Conn.). Western Electric has apparently done three or four such studies, as compared to seventy-five to eighty concurrent studies in the past few years. The major difficulty such a technique poses is keeping conditions constant in the plant long enough to get a good criterion measure. Changes in supervisors and workers dropping out create obvious problems. Telephone interview with Western Electric Personnel Officer, Feb. 3, 1971.

[56] *See* Note, *supra* note 50, at 700.

[57] The latter approach is called "synthetic validity" and is not in favor with purists. Dr. Ghiselli, for example, has suggested that reliance on tests given in other similar plants is misplaced, since the test validities can be "worlds apart." Ghiselli, *The Generalisation of Validity,* 12 PERSONNEL PSYCH. 397, 398–400 (1959).

accepted them when carefully done,[58] for they do give indications of the usefulness of tests in specific situations.

Invalidity of tests, though economically wasteful, would be irrelevant for Title VII purposes if the tests did not have a devastating differential impact on blacks. There is substantial evidence that blacks and other disadvantaged groups tend to perform worse on general intelligence or aptitude tests than whites as a group.[59] Although the reasons for this phenomenon are still debated, the facts are relatively clear. Blacks as a group test "about 1 standard deviation . . . below the average of the white population in IQ, and this finding is fairly uniform across . . . 81 tests of intellectual ability. . . ." [60] It can be argued that use of a test on which blacks score lower than whites represents discrimination in employment unless the test is shown to be of value in predicting job performance. In addition, a test may provide a handy means by which employers disguise their bias, or their desires to conform to the biases of workers and customers, and evade Title VII obligations. An analysis of tests under Title VII must start with the statute and the history surrounding it, then move to the recent cases that have interpreted it.

(*b*) *Legislative History.* — The Act explicitly provides that it shall not be "an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." [61]

The section was a response to *Myart v. Motorola, Inc.*,[62] an Illinois hearing examiner's decision which scandalized Senator Tower.[63] The Senator drafted what came to be known as the

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[58] The Guidelines provide that

> [i]n cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity . . . .

Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970).

[59] *See* Cooper & Sobol, *supra* note 42, at 1638–41.

[60] *See* Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1, 81 (1969).

[61] Act § 703(h), 42 U.S.C. § 2000e-2(h) (1964).

[62] The opinion is reproduced in full at 110 CONG. REC. 9030–33 (1964).

[63] The case received a great deal of attention in deliberations over the bill. *See, e.g.*, 110 CONG. REC. 13,492–505 (1964).

Tower Amendment [64] to prevent the EEOC or the federal courts from following the case as precedent.

Leon Myart had applied for a job with Motorola in Chicago. After being given a five minute test of verbal and numerical abilities and a brief interview, he was told that he would hear from the company. He did not. He then filed a complaint with the Illinois Fair Employment Practices Commission, alleging that he had passed the test and had not been hired due solely to racial bias. Although the hearing examiner found in his favor as to the attainment of a passing score,[65] he also ordered the company to stop using the test since "[i]n the light of current circumstances and the objectives of the spirit as well as the letter of the law, this test does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and disadvantaged groups." [66]

Congress was apparently easily mobilized against the extreme position of *Motorola*. But it is not completely clear what part of the decision motivated the reaction. The decision can be taken as an endorsement of preferential hiring, implying that unqualified blacks should be hired to uplift them.[67] The examiner suggested that [68]

> [s]election techniques may have to be modified at the outset in the light of the experience, education, or attitudes of the group . . . . The employer may have to establish in-plant training programs and employ the heretofore culturally deprived and disadvantaged persons as learners, placing them under such supervision that will enable them to achieve job success.

The congressional response may thus have been directed toward insuring that tests with differential racial impact are not rendered illegitimate per se, but that when validated and suited to a partic-

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[64] Act § 703(h), 42 U.S.C. § 2000e–2(h) (1964). The Amendment was introduced in two drafts, the second of which became the actual Amendment. The two are similar except for the additional requirement in the second that the test not be "designed, intended, or used to discriminate." For the language of the first draft, see 110 CONG. REC. 13,492 (1964).

[65] The way in which the finding was made is rather mysterious. Motorola did not have the original test which the complainant alleged he had passed. It claimed that since 20,000 tests were given each year, destruction was necessary to facilitate record-keeping. The examiner based his decision on the testimony of an investigator for the Illinois Commission, who said he had subsequently administered the test orally to the complainant and he had passed. Why an investigator for the FEP Commission, aware of the problems of proof in discrimination cases, would not administer a written test is hard to understand, and must raise some doubts about this part of the decision. *See* Kovarsky, *The Harlequinesque Motorola Decision*, 7 B.C. IND. & COM. L. REV. 535, 539 (1966).

[66] 110 CONG. REC. 9032 (1964).

[67] For a discussion of this possibility, see Note, *supra* note 50, at 707–10.

[68] 110 CONG. REC. 9032 (1964).

ular job, or set of jobs, they are an appropriate basis for job selection. The test in *Motorola* was professionally developed for the job Myart was seeking, but had not been "differentially validated," a process in which data are generated separately for black and white workers to see if different average scores for the two groups predict the same degree of success on the job.[69] There is language in the legislative history to suggest that the Senators were primarily concerned with protecting tests that had a relation to the suitability of the applicant to perform the job. Senator Tower introduced the first draft of his amendment to insure that employers would still have a right to use tests to "determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." [70] And looking only to the words of the statute, the use of the phrase "professionally developed" may indicate that Congress had in mind a test that had been properly validated. The phrase might be taken to represent a commitment to a moving standard for future testing, tying what is acceptable to the state of the art in psychological testing. If the phrase invokes a general requirement of professionalism, it certainly compels validation.[71] In this view, tests in general were jeopardized by *Motorola*: Congress merely wanted to salvage professional tests that do test relevant abilities and skills. The Tower Amendment certainly was not meant to give a carte blanche to use any test, regardless of its irrelevance to productivity on the job or discriminatory effect.[72]

A second view of the legislative purpose is possible. *Motorola* can be seen as specifically threatening pre-employment general intelligence tests due to their differential impact on minority groups.[73] Congress wanted to keep the Equal Employment Opportunity Commission from regulating the employer's use of general intelligence tests. As Senator Tower himself suggested: [74]

> It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees . . . . Let me say, only, in view of the

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[69] *See* Note, *supra* note 50, at 708.

[70] 110 CONG. REC. 13,492 (1964).

[71] For a look at procedures of validation generally recommended within the profession, see AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS AND MANUALS (1966).

[72] The amendment of Tower's first draft made clear that Congress was concerned about the possibility of using occupational tests to discriminate. *See* note 64 *supra*.

[73] Most likely Congress thought that general intelligence tests had some general validity, no matter what the job. There is no evidence in the legislative history that anyone considered the possibility that general intelligence tests would not always be instructive indicators of an applicant's potential.

[74] 110 CONG. REC. 13,492 (1964).

> finding in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of Title VII, might attempt to regulate the use of tests by employers.

Senator Humphrey added, in urging that the original Tower Amendment be defeated, "These tests are legal. They do not need to be legalized a second time. They are legal unless used for the purpose of discrimination." [75] Finally, there is the statement of Senators Clark and Case: "An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign and promote on the basis of test performance." [76]

The remarks are all, of course, somewhat ambiguous — and perhaps misleading — for there is no indication in the legislative history that the Senators ever conceived of the possibility that general intelligence tests may not be related to suitability for hiring, or "trainability." Certainly they would have been surprised by the concept of negative validity.[77] Moreover, many of the statements are subject to more than one interpretation. When Senators Clark and Case say that an employer may test "to determine which applicants have these qualifications," they do not necessarily condone an employer's use of tests which do not measure job qualifications. But several things seem clear. Congress recognized the interest in allowing employers to choose employees on the basis of trainability rather than suitability for any particular job. And throughout Congress apparently presumed that testing of general intelligence would continue to play a major role in personnel selection.[78]

(c) The Administrative Response of The Guidelines: A Critique

The first interpretation has been adopted by the Commission in its new Guidelines for Employee Selection Procedures.[79] The Guidelines, which replaced earlier, less comprehensive provisions,[80]

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[75] *Id.* at 13,504.

[76] *Id.* at 7213.

[77] A test with negative validity can of course be used to sort out those who will not succeed on the job due to excessive "ability" or excessive possession of whatever skills are measured by the test.

[78] The Congressional belief in the relation between general aptitude tests and "trainability" may not be so naive in the light of research done by Dr. Edwin Ghiselli. He found that aptitude tests predict trainability of an employee with a high degree of accuracy over a wide range of jobs, even when they are not so accurate a predictor of performance on any specific job. *See* E. GHISELLI, *supra* note 40, at 51.

[79] *See* note 23 *supra*.

[80] *See* Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures, Sept. 21, 1966, 2 CCH EMPL. PRAC. GUIDE ¶ 16,904 (1967).

regulate occupational testing stringently. They do recognize that "standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies" and that "professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force. . . ." [81] But if applied literally they would raise the cost of testing for many employers beyond tolerable limits, forcing the abandonment of testing programs which, although they may be valid, cannot be validated at a tolerable cost.[82] Under the Guidelines, tests with a detrimental effect on minority groups are presumptively illegal unless: [83]

> (a) the test has been validated and evidences a high degree of utility . . . , and
>
> (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

Each of these requirements has its share of difficulties for the employer. Taken together, they will require the user of a test who wants to conform with Commission policy to have supportive information available on every objective standard he uses in hiring or promoting his help.[84]

The requirement of validation compels the selector to have empirical data demonstrating that the test is predictive of the applicant's performance on criteria of satisfactory work behavior. The relevant criteria for each job must be carefully described, and the test must be shown to have a statistically significant relationship to one of the criteria.[85] The employee may be tested for a job higher than the one for which he is applying (in which case the test can be said to measure trainability [86]), but only if the worker's progress to that job is of high probability or "nearly automatic," and the timetable for the progression is not too long.[87]

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[81] 35 Fed. Reg. 12,333 (1970).

[82] One of the reasons employers have used tests in the past is their relative economy. They have often been bought off the rack, without professional consultation or supervision. *See* Note, *supra* note 50, at 700. Now, with the possibility that rigorous validation procedures and professional services of psychologists will be required, the cost of testing has clearly gone up.

[83] 35 Fed. Reg. 12,344 (1970).

[84] See pp. 1116–17 *supra*.

[85] 35 Fed. Reg. 12,335 (1970).

[86] Belief in the importance of allowing testing for trainability is evident in Senator Tower's remarks in support of his testing amendment. 110 CONG. REC. 13,492 (1964).

[87] It is thought that over a longer period of time both the jobs for which tests

In addition, the employer must generate data separately for minority and nonminority groups where technically feasible, on the assumption that tests may have a differential validity for different races.[88] Qualifying these rather strict standards is an allowance in some situations of "synthetic validity," [89] and of "content validity." [90] Finally, the tests must have "utility," a hazy term which means an assessment of the importance of a test by considering the number of job vacancies, the proportion of applicants who become satisfactory employees when not selected on the basis of the test, and the degree of economic and social risk involved in hiring an unqualified applicant.[91] The Commission will, for example, be less inclined to call for elaborate justifications for the tests used to pick eye surgeons than for those used to select manual laborers.[92]

The imposition of these requirements has, to be sure, significant justifications. There is an obvious danger that biased employers will set testing standards for menial jobs, knowing that few blacks can meet their requirements. And certainly productivity is not affected when an employer is constrained to use testing procedures which have a relation to job performance. But it is possible to read the Guidelines so strictly as to make testing virtually impossible. Indeed, they may have been intended to serve a scarecrow function, since the Commission itself has not applied them literally in a variety of situations.[93]

The Guidelines' language is too stringent in several ways. First, the requirement that the employer not test for skills higher than those needed to fill entry positions unless promotion is "nearly automatic" is too narrow. It is true, of course, that an IQ test for unskilled jobs which are "blind alleys," in that there are no formalized promotion procedures, is likely to be of little usefulness except for discrimination; verbal aptitude seldom

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are given and the employees' potential may be expected to change in significant ways. 35 Fed. Reg. 12,334 (1970).

[88] *Id.* at 12,335.

[89] *See* pp. 1122–23 *supra*.

[90] 35 Fed. Reg. 12,334 (1970). A test has content validity when the items in the test adequately sample the skills that are presumed to be required in the job situation. Content validity may be viewed as sufficient in tests of practical skills, such as typing, where a certain minimum of words per minute may be required without more rigorous validation, if the standards are not clearly out of line with prevailing skills of incumbent typists in the company. Interview with Dr. William Enneis, EEOC Psychologist, in Washington, D.C., Oct. 19, 1970.

[91] 35 Fed. Reg. 12,335 (1970).

[92] Utility seems to be a notion informed more by common sense balancing than rigorous psychological theory. Enneis Interview, *supra* note 90. No statistic describing utility has been developed.

[93] *See* pp. 1131–32 *infra*.

qualifies a man for essentially mechanical tasks. But "blind alley" jobs are relatively rare in industry.[94] Even if there is no high probability that employees will advance to higher positions, there is often a significant possibility. If a test helps the employer to predict whether a worker will be promotable, it will be in his interest to hire as many predicted "promotables" as he can at the going wage rate, so that the quality of the group from which he makes his final selections will be maximized. Proscribing tests in this situation discriminates against applicants who are more productive, and thus may offend the color blindness constraint of Title VII. An entry level employee who is trainable for a number of tasks is simply more valuable than one who is not. Moreover, the legislative history suggests that some senators saw "trainability" as an appropriate qualification for which to test.[95]

A second instance of the Guidelines' excessive stringency is the requirement that to escape mere "provisional compliance" tests must be "differentially validated." "Differential validity" is the notion that tests can be valid for one race but not for another, or that a lower score for one race may be equally as predictive of job success as a higher score is for another. But differential validity is a "hypothesis for which, at the present time, there is insufficient factual evidence to affirm or deny with confidence." [96] Even if the concept has merit, applying it raises almost insurmountable difficulties.[97] In requiring generation of data separately for each minority group, the Commission significantly increases the expense and difficulty of validation, despite the lack of evidence that differential validity is a phenomenon that occurs with any significant frequency. One prominent psychologist has suggested that only one of twenty corporations could adequately validate a test for different races.[97] Moreover, if there are situations in which tests are differentially valid, the phenomenon may be more a product of cultural deprivation than of race. Whites who are culturally deprived may be as much the victims of differential validity as are blacks. Where this is true, requiring tests to be validated by racial groups rather than by socio-economic groups and making adjustments in the passing score according to race, could be very damaging to culturally deprived white workers. They would be judged by the high standards applied to their more advantaged racial fellows, while suffering from the same deprivations as minority workers.

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[94] *See* Ruch & Ash, *Comments on Psychologocal Testing*, 69 COLUM. L. REV. 608, 611 (1969).

[95] 110 CONG. REC. 13,492 (1964).

[96] Ruch & Ash, *supra* note 94, at 611.

[97] Barrett, *Gray Areas in Black and White Testing*, 46 HARV. BUS. REV. 92, 94 (1968).

A third respect in which the Guidelines are too strict is the requirement that an employer affirmatively show that alternative suitable hiring, transfer, or promotion policies are not available to him. This requirement applies although the employer has a valid test that predicts job performance for both blacks and whites. If this test leaves blacks underrepresented in his company, the employer must show that there are no other criteria as high in predictive validity by which a larger number of blacks could be hired. This is no easy showing. For example, assume the hiring officer has a validated test which results in an eight percent black work force in a twenty percent black region. How does he go about showing that an extended interview, with elaborate rating scales, would not give equally productive workers and increase the black percentage? And if he has two valid tests, one of which has a more significant differential impact on minorities than the other, must he use only the test which leads to greater employment of blacks even if the two tests, used together, significantly enhance his predictive powers? [98] The alternative showing requirement is, on its face, impossible to follow.

The Guidelines, if applied as strictly as their language allows, would encourage many employers to use a quota system of hiring. Because of the impracticality of the validation and alternative showing requirements, and the fact that the Commission will scrutinize closely "higher rejection rates for minority candidates than non-minority candidates," [99] the easiest way for an employer to stay out of trouble and avoid exhaustive validation techniques is to hire an acceptable proportion of blacks by applying a lower cutoff score to black applicants. Then the Guidelines will never be triggered, and the employer can continue to use his test, though he may be unlawfully discriminating against whites. Another option is available to him, of course. He could drop his objective

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[98] In this area, as in many others, the Guidelines are subject to ambiguities. Just as any multiple item "test" can be viewed as a collection of many shorter tests, the employer's two "tests" can be viewed as only one test. Since an employer is allowed to use a "test" with a stronger differential impact on minorities if its predictive validity is significantly higher than that of alternative tests, there should then be no question that the employer could use his single "test" composed of two tests if it significantly enhances his predictive powers. But the EEOC's staff psychologist has treated this as an open question. Enneis Interview, *supra* note 90. Since "test" is such a flexible concept, the Guidelines could be interpreted to require that item analyses be performed on each of the tests used by employers, and that items, or subtests, be thrown out if they have an adverse impact on black employment and do not add significantly to predictive validity. One expert has suggested that in validation, items, rather than tests, should be the central concern. J. RUSMORE, PSYCHOLOGICAL TESTS AND FAIR EMPLOYMENT 7 (California Fair Employment Practice Comm., Jan. 1967).

[99] 35 Fed. Reg. 12,334 (1970).

standards and hire on a first come, first served basis. This will often appear unattractive. The employer is likely to believe that his test has some merit, even if he does not have the resources to prove it, and he is probably unwilling to take anyone without some form of screening. His best option then might be to bend his standards to keep minority representation respectable, even while continuing to apply his test.[100] Such an approach not only is open to economic objections, but violates the colorblind constraints of the statute itself.[101] In sum, the Guidelines appear designed to scare employers away from any objective standards which have a differential impact on minority groups because, applied strictly, the testing requirements are impossible for many employers to follow.

If theoretically objectionable, the Guidelines have apparently not been rigorously applied in practice. They do speak of "feasibility," and this notion has influenced the Commission's interpretation of the validation and alternative showing requirements.[102] Many tests have been approved which do not satisfy the standards of "classical validation." Where such validation would not be feasible, the Commission has often settled for concurrent validation, which can be carried out with present employees and without having to hire a group of applicants who have not passed the test, or synthetic studies.[103] In addition, it has allowed the use of "rational" validation techniques like "content validity" [104] which are occasionally disapproved by testing purists.[105] Similarly, the requisite of an alternative showing has been interpreted to mean only that if the employer has customarily used several selection devices which are equally accurate predictors of future productivity, he must choose the one which yields the highest proportion of black workers.[106] While this approach does not satisfactorily deal with situations in which tests have a greater validity when used together than any single test would possess, it avoids at least the restless cosmic search for alternatives. The Commission's bark, therefore, has been worse than its bite. The practical application of the Guidelines may reflect a goal more educative than coercive:

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[100] While there is no apparent need under the Guidelines to validate tests that have no differential impact, Dr. William Enneis has suggested that "the Commission is not unmindful of the fact that the potential for discrimination exists" even in this case. Unpublished paper presented at the annual meeting of the Pennsylvania Psychological Association, June 7, 1969.

[101] *See* p. 1114 *supra*.

[102] Enneis Interview, *supra* note 90.

[103] *See* note 57 *supra*.

[104] *See* note 90 *supra*.

[105] *See* note 57 *supra*.

[106] Enneis Interview, *supra* note 90.

to force an assessment by businesses of the usefulness of the tests they use.

(*d*) *Judicial Analysis of Testing Problems.* — The Guidelines have provoked divergent lines of authority. Their requirement that tests be job-related [107] has been accepted by one set of cases,[108] rejected by another.[109] Currently the Supreme Court is considering which view is the better law.[110]

Two major district court decisions have endorsed the EEOC's view that occupational tests must be job-related. In *United States v. H.K. Porter Co.*,[111] the court sustained the challenged tests only after a lengthy discussion of the relationship between the aptitudes tested and the skills required in the performance of the job. The court agreed in principle "with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs. . . ." [112] The test there was the General Aptitude Test Battery (GATB) of the United States Employment Service, a lengthy battery of twelve tests requiring two and one-half hours to administer. Nine aptitudes were measured, from "general intelligence" to "manual dexterity." [113] The court found that H.K. Porter tested only a few of these aptitudes for any particular job, and that the tests bore a superficial relationship to the jobs for which they were used.[114]

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[107] Job relatedness must be distinguished from validation. Although some courts have held job relatedness a necessary justification for a testing program, few have yet required that job relatedness be demonstrated by the technical validation proposed by the Guidelines. *See, e.g.*, United States v. H.K. Porter Co., 296 F. Supp. 40, 76 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969.

[108] *See* Penn v. Stumpf, 308 F. Supp. 1238, 1242–43 (N.D. Cal. 1970); Arrington v. Massachusetts Bay Transit Authority, 306 F. Supp. 1355, 1358–60 (D. Mass. 1969); United States v. H.K. Porter Co., 296 F. Supp. 40, 71–87 (N.D. Ala. 1968); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413, 430–34 (S.D. Ohio 1968).

[109] Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term); Broussard v. Schlumberger Corp., 315 F. Supp. 506 (S.D. Tex. 1970). *See also* United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. Jacksonville Terminal Co., 316 F. Supp. 567 (N.D. Fla. 1970); Parham v. Southwestern Bell Tel. Co., 60 CCH Lab. Cas. ¶ 9297 (E.D. Ark. 1969), *rev'd on other grounds*, 433 F.2d 421 (8th Cir. 1970).

[110] Certiorari has been granted in *Griggs* and the case is being considered this Term. *See* note 109 *supra*.

[111] 296 F. Supp. 40 (N.D. Ala. 1968).

[112] *Id.* at 78.

[113] *See* 3 U.S. DEP'T OF LABOR, MANUAL FOR THE GENERAL APTITUDE TEST BATTERY 13–15 (1967). *See also* Cooper & Sobol, *supra* note 42, at 1657.

[114] *See* p. 1121 *supra*.

Although the court's endorsement of job relatedness may serve as a useful judicial building block in eventual ratification of the Guidelines, it falls far short of demanding the rigorous procedures the Guidelines require. First, it did not hold validation necessary to prove job-relation, but merely assumed for the sake of argument that some form of validation is necessary.[115] Then the court indicated that if some validation is necessary, it will be satisfied by a validation process that is more rule of thumb than systematic. The personnel manager, who majored in psychology (among other things) in college,[116] had "studied the performance on the job of employees who had been tested in light of their test scores." [117] No data were presented, nor were any statistically sophisticated studies conducted. The court seemed to take the personnel manager at his word,[118] and indeed made clear that a layman can conduct an adequate validation study.[119] Such a loose definition of validation dilutes considerably the court's approval of job relatedness. Third, *H.K. Porter* rejected the requirement that tests be differentially validated.[120] Differential validity, where found, would require employers to apply different cutoff scores to different races. This, the court felt, would be unlawful since it would constitute "prohibited discrimination." [121] The fact that 5–10 percent more blacks might fail the test is no justification for imposing different standards.[122] Fourth, the test was approved though there was evidence that the company had made no "weighting" of it, one step in an analysis of a test's utility under the Guidelines.[123] That is, it did not use it as one factor among others, and give it weight in light of its validity. Finally, the court explicitly allowed testing for higher skills than those required for the entry job.[124] *H.K. Porter*, then, appears to say that if the application of a test to applicants has substantial dif-

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[115] United States v. H.K. Porter Co., 296 F. Supp. 40, 76 (N.D. Ala. 1968). The court said there is "considerable legislative history" to support an argument that validation of a professionally developed test is never necessary under Title VII. *Id.* at 75. But it found "quite conceivable" that a case might arise where validation ought to be required. *Id.* at 76.

[116] *Id.*

[117] *Id.*

[118] There was the additional testimony of two black educators who considered the personnel manager a man of integrity who was trying to use the tests in a fair and nondiscriminatory way.

[119] 296 F. Supp. at 76.

[120] *Id.* at 79.

[121] *Id.*

[122] *Id.* at 77–78.

[123] *See* 35 Fed. Reg. 12,335 (1970).

[124] 296 F. Supp. at 83.

ferential impact on minorities, the employer must examine through some arguably competent underling whether the test is related to the performance of entry or higher jobs. The approval "in principle" of job relatedness is quite far from the Guidelines in both language and tone.

A second case has often been cited as supporting the requirement of job relatedness. In *Dobbins v. Electrical Workers Local 212*,[125] an examination was held illegal which, though objectively fair and objectively graded, was graded with unnecessary stringency. The court said that "the fair test of an individual's qualifications to work in the electrician trade in this geographical area is the actual ability to work on the job in the trade for the average contractor operating in the trade." [126] It was shown that the test had been taken by forty-four presently employed electricians. Three passed, forty-one failed.[127] The union's nationally known expert described the 1967 examination as "unfair" and "a mistake." [128] Moreover, the test was given in the context of a long history of overt discrimination.[129] Again, however, the nature of the validation required here may vary significantly from that required by the Guidelines. For the court simultaneously upheld a test administered by an apprenticeship committee composed of union and employer representatives, on the grounds that that test was "reasonably related to the proper aptitudes" and "properly selected" by an expert consultant.[130] The court never made clear what informed its judgment that the tests were properly selected, but it would seem far less than the validation process of the Guidelines.

Further clarification of the showing that must be made under a job-related standard is provided by the case of *Colbert v. H-K Corp.*[131] There the employer administered two types of test that were challenged. One, a mechanical test of stenographic skills, the court approved without difficulty since it was so clearly like the work that had to be done on the job. The other test considered was of "general intelligence." Here the court approved the general job-related standard proposed by *H.K. Porter* and *Arrington v. Massachusetts Bay Transit Authority*,[132] but distinguished those cases from the case at hand. In those cases, and

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[125] 292 F. Supp. 413 (S.D. Ohio 1968).

[126] *Id.* at 434.

[127] *Id.* at 433.

[128] *Id.*

[129] *Id.* at 433–34.

[130] *Id.* at 439.

[131] 1 CCH EMPL. PRAC. GUIDE ¶ 9514 (N.D. Ga. 1970), *appeal docketed*, No. 30,497, 5th Cir., Aug. 27, 1970.

[132] 306 F. Supp. 1355 (D. Mass. 1969).

in *Penn v. Stumpf*,[133] the tests had no apparent facial relation to the tasks to be done; the relation between the mental ability required to do well on the test and the skills necessary to be, respectively, a manual laborer, transit driver or token collector, or Bay Area policeman were far from obvious and so some empirical validation could be required. Here, however, the position tested for was office secretary where the court felt it reasonable to demand verbal skills and general intellectual competence. Since the test was used for higher, related jobs as well, since the employer was small, and since the court found psychologists themselves in disagreement about proper standards of validation, the court allowed the use of the tests without empirical study.[134]

Several recent decisions have been added to the *Dobbins* and *H.K. Porter* line. In *Arrington v. Massachusetts Bay Transit Authority*,[135] the court found the application of standardized tests to blacks and whites produced "de facto racial patterns of classification adversely affecting . . . minority groups" [136] and hence was invalid under 42 U.S.C. §§ 1981 & 1983. Relying heavily on the test, the MBTA had offered seventy-five percent of the whites tested a chance at the first two-thirds of positions available, against only twenty percent of the blacks and other minorities. Since the test, a general aptitude test, had no demonstrated connection with ability to perform the jobs in question, the court found it illegal. Although it is not clear from *Arrington* how the required connection can be demonstrated, the court implies a process more rigorous than casual observation is necessary. And in finding that the differential impact was of evidentiary significance, the court complements the decision in *H.K. Porter*. These two cases suggest that the line of substantiality of differential impact necessary to invoke relief lies somewhat between ten and fifty-five percent. In another recent testing decision involving applicants for the police force in Oakland,[137] the district court held that a test which had a differential impact on minorities

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[133] 308 F. Supp. 1238 (N.D. Colo. 1970).

It should also be noted that tests do not always measure what they appear to measure. A long examination taken under time pressure which asks specific work-related questions may, in fact, be more a test of reading ability than of knowledge of the job. Or it may test knowledge that can be easily and quickly taught. Cases are now pending which challenge tests that are superficially related to job skills but for one reason or another are claimed to be invalid. *See, e.g.*, Chance v. Board of Examiners, Civil No. 70-4141 (S.D.N.Y., filed Sept. 24, 1970). *See also* Cooper & Sobol, *supra* note 42, at 1644.

[134] Colbert v. H-K Corp., 1 CCH EMPL. PRAC. GUIDE ¶ 9514 (N.D. Ga. 1970), *appeal docketed*, No. 30,497, 5th Cir., Aug. 27, 1970.

[135] 306 F. Supp. 1355 (D. Mass. 1969).

[136] *Id.* at 1358.

[137] Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970).

and had not been "professionally developed or otherwise validated" [138] raised an issue of law under Title VII. Once more there is little discussion of what constitutes sufficient validation; since there was no evidence that the test had been developed by professional psychologists, the court found that the test would be questionable even under a more permissive standard.[139] And the statistics the court used to find differential impact are unrelated to how blacks actually fared on the test. They merely show that blacks in the Oakland area are disproportionately underrepresented on the police force according to population figures. Such statistics, as the court appears at times to recognize, are hardly dispositive of whether the test has a discriminatory impact, even if they stir suspicions that discrimination from some source is afoot.[140] They may tend to show unlawful recruitment practices,[141] or that minority groups have a relative disinterest in police work, but the test itself should only be found discriminatory upon adequate evidence that it disqualifies proportionately more minority applicants than white applicants.

The most explicit endorsement of Guidelines job relatedness is found in the recent case of *Hicks v. Crown Zellerbach Corp.*[142] The evidence in that case indicated that 37.3 percent of the whites, as compared to 9.8 percent of blacks, were passing the Wonderlic test that the company required of job applicants. In addition the company had given the Bennett test, for which the disparity was even greater. There sixty-four percent of whites passed as opposed to only 15.4 percent of the blacks.[143] In light of the substantial differential impact of the tests, and since no "sig-

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[138] *Id.* at 1242.

[139] The court held that even under the "liberal standard" of *Griggs* ("professionally developed" plus no intent to discriminate) the tests would "appear to be impermissible." 308 F. Supp. at 1242. *See* p. 1137 *infra*.

[140] 308 F. Supp. at 1243.

[141] *See* p. 1152 *infra*. The following cases have used employment statistics in evaluating compliance with antidiscrimination laws: United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 n.7 (8th Cir. 1969); United States v. Hayes International Co., 415 F.2d 1038 (5th Cir. 1969); Contractor's Ass'n v. Schultz, 311 F. Supp. 1002 (E.D. Pa. 1970); EEOC v. Plumbers Local 189, 311 F. Supp. 468, 471–73 (S.D. Ohio), *rev'd on other grounds*, 3 CCH Empl. Prac. Dec. ¶ 8110 (6th Cir. 1971); United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 992–93 (W.D.N.Y. 1970); United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D. Ind. 1969); United States v. H.K. Porter Co., 296 F.Supp. 40, 65 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969; Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[142] 310 F. Supp. 536 (E.D. La. 1970).

[143] *Id.* at 537.

nificant study" had been done to see whether the tests in fact predicted anything, the court disallowed the tests. "Title VII," the court affirmed, "does not permit an employer to engage in unsubstantiated speculation at the expense of Negro workers." [144] In coming to this result, the court made clear that validation demands great professional expertise and hence the Guidelines ought to be given "great deference" as an indicator of when business necessity has been shown.

Certain principles emerge, then, from this line of decisions. All of the cases call for some showing of job relatedness, but the showing required has been diverse: no unvarying standard of empirical validation has been required. Size of the company, substantiality of the disparate effect, and the frequency of progression to higher, related jobs must all be taken into account in determining whether a reasonable showing of business purpose has been demonstrated.

The major threat to judicial enforcement of the Guidelines has been the decision in *Griggs v. Duke Power Co.*[145] There plaintiffs attacked the use of two tests, the Wonderlic Aptitude Test, and the Bennett Mechanical Test. The company justified the use of these tests by testimony that its business was becoming increasingly complex.[146] Although the plaintiffs contended both that the tests were not job-related and that there had been no showing of business need or introduction of valid statistics as to the relation between test and job performance, the court held that a test developed by professional psychologists need only have a "genuine business purpose" and not be connected with an intent to discriminate.

The majority stated that the construction given Title VII by the Commission in the Guidelines was not conclusive for the courts since it was directly contrary to the legislative history.[147] "At no place in the Act or in its legislative history does there appear a requirement that employers use only those tests which measure the ability and skill required by a specific job or group of jobs." [148] Moreover, an amendment requiring a direct relation between the test and the skills needed for a specific position was proposed in 1968 and was soundly defeated.[149] Finding no intent to discriminate,[150] the court rested on the employer's affirmation of a gen-

[144] *Id.* at 538.

[145] 420 F.2d 1255 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term).

[146] *Id.* at 1229.

[147] *Id.* at 1234–35.

[148] *Id.* at 1235.

[149] *Id.*

[150] Duke Power Co. had begun to hire and promote blacks, and the court found no evidence of any continuing desire to discriminate. *Id.* at 1229.

uine business purpose. In dissent, Judge Sobeloff rejected the majority's interpretation of the legislative history and argued that the reading given the statute by the Commission should have been given greater deference.[151]

The difference between the two lines of cases hinges on what is thought to be the difference between job relatedness, which the first line embraced in principle, and genuine business purpose, which *Griggs* and its progeny [152] propose. It may be difficult to conceive of a genuine business purpose not ultimately tied to the performance of a given job or set of jobs. There may, of course, be tastes unrelated to business ends which play a role in setting standards for employment. The employer may want his work crews to whistle Bach or write more cultured graffiti on the restroom walls. But what is genuine *business* purpose not connected with job performance? The answer seems to lie in the asserted desirability of upgrading the general quality of the work force. Instead of seeking a one-to-one correlation between aptitudes and job skills, the *Griggs* court is perhaps saying that one must look at the pool of skills possessed by the entering workers. The employer can seek to maximize the quality of that pool without matching each skill with a potential job placement. To upgrade the pool of skills in a company is an ambition the *Griggs* court would protect, for it broadens the base for promotional decisions and gives the employer more options in arranging the management of his firm. The *Griggs* court thought that requiring an aptitude score similar to that achieved by a high school graduate (or, in the alternative, requiring a high school diploma) promoted a legitimate interest of the employer regardless of a relation to any specific job requirement. Therefore the test was illegitimate only to the extent it locked in blacks who had been hired previous to the imposition of the requirement.

In theory there should be a substantial difference between a legal standard requiring that job relatedness be shown and a standard that can be satisfied by showing any business purpose. But, with one recent exception,[153] the decided cases tend to blur this distinction. While one line of cases requires job relatedness, the job may be a higher one than the entry position. While the other group of cases stresses intent, even in *H.K. Porter* the court found important the testimony of two black educators that the man who "validated" the test was known to be of good faith,

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[151] *Id.* at 1240–41.

[152] Broussard v. Schlumberger Corp., 315 F. Supp. 506 (S.D. Tex. 1970), also follows the business purpose test.

[153] Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970).

and to have no discriminatory motives.[154] And perhaps the *Griggs* court would have inferred intent to discriminate had the jobs tested for been "blind alley."[155] Even the cases that have endorsed job relatedness have not articulated standards for the kind of showing that must be made. And courts have, for the most part, resisted imposing validation requirements when tests appear to have some arguable relation to job duties.

(*e*) *An Alternative Judicial Approach.* — The EEOC's Guidelines, with some justification, take a much more skeptical view of testing practices than do the reported cases. Yet courts in interpreting the Guidelines would do well to avoid ratifying them in their entirety because they leave the Commission too many opportunities for excessive stringency. The best approach would be the general one discussed above.[156] Given a showing of substantial differential impact, the employer should be required to show that his test is job-related. Job relatedness should be interpreted in a somewhat broader way than that suggested by the Guidelines, so that the employer can test for trainability for higher jobs if he regularly assesses his entry level employees for promotion to those higher jobs and a significant portion of his employees do, in fact, advance to those higher positions. The kind of showing required should depend directly on the feasibility of the validation technique for the employer and the severity of the differential impact. Large companies will generally be able to produce data based on sophisticated statistical studies of their own work force, and they should be required to do so when the tests they are using have a significant differential impact on minority employment. For a smaller company, when such studies are not feasible, a court should accept data generated in other comparable work situations. Moreover, in circumstances where the test and job duties seem to be clearly related, an empirical study may not be required. An example of this might be typing tests for typists. But if the impact on minority employment is substantial enough, even a small employer should be required to abandon a test which has not passed strict standards of validation. Courts must balance two considerations. First, they must guard against the possibility that tests are being "used to discriminate."[157] But they must also be careful not to offend the color blindness constraint of the statute by requiring employers to abandon tests when there is reason to believe that the tests enable the employer to identify some ap-

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[154] 296 F. Supp. at 76.

[155] The court seemed to find important the fact that some upward mobility had begun to be created for black laborers. 420 F.2d at 1229.

[156] *See* pp. 1118–19 *supra*.

[157] Act § 703(h), 42 USC § 2000e-2(h) (1964).

plicants as more productive than others.[158] Finally, courts should allow plaintiffs to produce evidence that equally good tests are available which would have a lesser adverse impact on minorities. If the evidence is convincing, the employer should be prohibited from using any test other than the one with the least adverse impact on minority employment.

(*f*) *A Modification of the Present Administrative Position: Certification.* — The stringency of the Commission's position on testing may have an unfortunate scarecrow effect. Tests have been shown to be of some validity over a significant range of jobs.[159] When professionally developed and administered, they can benefit employers, potential employees, and society at large. Courts have tended to emphasize these potential benefits in their generally more tolerant view of testing practices.

It might be possible, however, to supplement the case-by-case adjudication of testing problems with clearer administrative directions. The Commission, perhaps in cooperation with the Office of Federal Contract Compliance and the United States Employment Service, could develop a catalogue of recommended tests for the guidance of employers. The Commission could use the government's job classificatory scheme, as did Dr. Ghiselli in his noted survey of occupational testing,[160] and select tests — based on validation studies conducted by others in the past — for job categories when there appears to be substantial evidence that the tests do predict job success. The recommendation would include the parameters in which the test may be validly used, including size of plant, composition of geographical area, and precise skills required. It could, in addition, recommend against the use of tests in situations where they have been previously shown to have no validity. Use of the tests as prescribed by small employers would constitute a presumption that the testing practice was not a violation of Title VII. Large employers, with the resources to finance their own sophisticated studies, and with a work force large enough to provide an adequate sample size, might still be required to produce studies conducted on their own work force to justify use of a test with a substantial differential impact. Such a service could educate employers as to the validity of tests as predictors of potential productivity while encouraging the use of tests which "aid in the utilization and conservation of human resources generally." [161]

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[158] Dr. Ruch points out that a test with a validity coefficient of .2 can result in 10% more productive employees. Ruch, *supra* note 51, at 13.

[159] *See generally* E. GHISELLI, THE VALIDITY OF OCCUPATIONAL APTITUDE TESTS (1966).

[160] *Id.* at 10–14.

[161] Proposed EEOC Reg. § 1607.1(a), 35 Fed. Reg. 12,333 (1970).

3. Measures of Background. — The probing of an applicant's background raises many of the problems discussed under testing. When an employer imposes background requirements that can be met by relatively few minority group members, the requirements become an object of Title VII concern. Color blindness requires that the employer have a neutral reason, which in the usual case must be productivity, for imposing the standard.[162] To the extent that the examination of background is standardized or scored, the Guidelines require validation.[163] The general analytical framework proposed for testing is applicable here, but the different types of background probing raise unique questions which require separate discussion.

(*a*) *Education.* — The imposition of a minimum educational attainment has long been popular with personnel officers.[164] A quick look over the want ads reveals the range of qualifications sought: high school diploma, some college work (often two years), or a college degree. As the television slogan puts it: "To get a good job, you need a good education." [165]

The high school diploma requirement is a popular device for personnel selection because it is thought to provide a handy, if rough, measure of quality. It is supposed to weed out quickly those who, for want of ambition or aptitude, could not finish the required program (hence saving administrative costs of processing many incapable applicants). Moreover, the employer can boast that he is promoting the social interest in encouraging students to stay in school.

Objections to such criteria are clear. Like testing, the re-

There may be problems with the administration of these certification procedures. With all the tests on the market, certification might require considerable time and resources. And while the process was continuing, some test manufacturers might be put at a competitive disadvantage if their tests had not yet come up for certification, while other similar tests had already been approved. But the difficulties are not insurmountable. Uncertified tests might still be used under restricted circumstances and, over time, any temporary competitive advantage would disappear.

[162] *See* p. 1117 *supra*.

[163] *See* note 24 *supra*.

[164] This is true despite the presence in the ranks of high management of many who have not completed high school. "It is interesting in talking to management about the need for a high school diploma in entry jobs to find that many of the officials you talk to could not meet the criterion themselves." Interview with Russell Spector, former assistant general counsel of the Commission, in Washington, D.C., Oct. 19, 1970.

[165] Such a functional view of education, put out over the networks as a public service by advertising associations, works two ways. It encourages the potential dropout to stay in school out of pecuniary motives, and allows the employer to think he is performing a social service by demanding a good education for his good jobs.

quirement of a certain number of years of formal education is often applied mindlessly, without reason to believe that it has any value as a predictor of job performance. Diplomas are required for such diverse jobs as laborers, railway trainmen, and janitors, as well as for a host of apprenticeship programs.[166] And if high school diploma requirements weed out some students without the perseverance to stay in school, they also weed out those without the finances to stay in school. Indeed, if the suggestions of some are correct, the stifling nature of ghetto schools drives the brightest and most creative youngsters out onto the streets.[167] Similar difficulties exist with respect to more elevated educational qualifications. A college degree, for example, is often demanded of insurance salesmen, clerks in large companies, and a wide variety of other workers.[168] These arbitrary limits might be left alone by government as merely another example of industrial overkill were it not for the fact that they can have an adverse effect on minority group employment. Statistics show that only 55.7 percent of nonwhites complete four years of high school as opposed to 72.5 percent of whites.[169] The disparity is even greater for college and advanced degrees.[170] Since education requirements can have such detrimental effects on minority employment, they should undergo a process of validation like that proposed for testing. When an employer imposes or maintains an educational standard knowing that only one-half of his black applicants will meet it while three-fourths of his white applicants will pass, we may require the employer to justify his requirement. If he is fixing an irrelevant qualification which has a significant differential impact on black employment, he is discriminating on the basis of race. So far, however, the cases have not faced this argument.

High school diplomas have been found to be a discriminatory requirement, but only in the context of past racial discrimination. In *Griggs*, for example, the company had in the past hired blacks

[166] *See, e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term), where the company imposed a high school graduation requirement for applicants for its labor department on the grounds that the business was becoming increasingly complex.

[167] *See, e.g.*, P. GOODMAN, COMPULSORY MIS-EDUCATION 63–71 (1964).

[168] *See generally The Industrial Psychologist: Selection and Equal Employment Opportunity (A Symposium)*, 19 PERSONNEL PSYCHOLOGY 1 (1966). For a study of the relationship between educational credentials and work performance, see Berg, *Rich Man's Qualifications for Poor Man's Jobs*, TRANS-ACTION, March 1969, at 45.

[169] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1968, 111 (89th ed. 1968).

[170] 14.6% of whites complete four years or more of college, compared with 8.3% of nonwhites. *Id.*

only for its labor department and had prevented them from transferring into other departments. Whites were also hired for the labor department but could transfer into higher departments without high school educations or the passing of any standardized test. Then, in the mid-1950s, the company imposed a diploma requirement across the board as a prerequisite for transfer out of the labor department. This effectively locked in those blacks who had been hired before the new standard was developed; they would have had to remain in the labor department, even though whites with less seniority and no more education were allowed to keep their jobs in other departments. The *Griggs* court found that this was the result of past intentional discrimination and barred the company from using the requirement to halt the advancement of those blacks who had been hired prior to its imposition. But the court sustained its use for the employees hired later with no apparent attempt to find any job relation. Just as the court upheld standardized testing [171] because it found a genuine business purpose and no discriminatory intent,[172] the diploma requirement was also sustained without requiring validation. Similarly, in *Broussard v. Schlumberger*,[173] the court found that while the requirement of a high school education could not be used to lock into menial jobs the victims of past discrimination, it was a lawful and useful device for personnel selection.[174] Many courts have simply assumed, as does *Dobbins v. Electrical Workers Local 212*,[175] that the high school requirement is valid.[176]

The reluctance of courts to tamper with such requirements is understandable, given the faith that American society has always reposed in education. But it ignores the substantial discriminatory impact which educational requirements can have, without justification, on minority group employment. Frequently the impact of such a requirement will be insubstantial. In some regions and for some jobs, the educational background will not be a significantly greater hurdle for minority job applicants than for

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[171] 420 F.2d at 1232–33.

[172] *Id.* at 1232.

[173] 315 F. Supp. 506 (S.D. Tex. 1970).

[174] *Id.* at 510.

[175] 292 F. Supp. at 433.

[176] In another case of a high school education requirement, the district court found the requirement was valid without any validation study. Parham v. Southwestern Bell Tel. Co., 60 CCH Lab. Cas. ¶ 9297 (E.D. Ark. 1969). Since it reasonably appeared to be valid, and was done in good faith, it should be allowed to stand. *Id.* at p. 6749. Courts must not read into Title VII a "requirement that an employer tailor his hiring requirements to the needs of deprived minorities." *Id.* The decision was subsequently overturned by the Eighth Circuit on other grounds, 433 F.2d 421 (8th Cir. 1970), the court finding there was insufficient data to rule on the diploma requirement.

whites. But where the effect becomes significant, the courts ought to require from employers the best showing feasible that the standard is born of business needs. The type of showing required will vary, first, with the kinds of jobs at issue. For some jobs, a common sense relation of the skills represented by the education to the tasks required in the job should be sufficient. It is reasonable for an employer to want his electrical engineers to have a college degree in electrical engineering, his accountants to have studied accounting at an accredited business school, his skilled machine operators to have had high school or equivalent industrial arts training in the use of similar machines. Moreover, clerical jobs which involve the ability to read, spell, do simple mathematical operations, and file may generally be performed best by those who have been exposed to these skills through a high school education. In other cases, where the employer is unable to specify convincingly a relationship between his educational requirement and the skills required in his job, more sophisticated data should be required. A second factor which should influence the showing to be required is the size of the employer. A big employer can be expected, when there is no clear relation of jobs to school-taught skills, to produce statistical data from his own plant — at the least, data from an employer with a very similar work situation.[177] If he has no non-high school graduates at his plant due to a longstanding policy, he can hire some. For a smaller employer, a somewhat less rigorous validation may be sufficient. But here, too, the court should want to know what reasons the employer has for believing his requirement is related to skills in either an entry job or a higher position, promotion to which is a real possibility. Often the results from similar studies done elsewhere will be appropriate. In assessing these showings, the courts must keep in mind that if there is good reason to believe a particular educational requirement helps in predicting job success,[178] it would be a departure from color blindness to require

[177] No court has yet demanded anything more than a commonsense rationale for such educational standards. *Broussard* appears to look at the imposition of such a requirement as the legitimate exercise of business judgment. 315 F. Supp. at 512. But some more rigorous showing should be necessary upon demonstration of differential impact.

[178] An interesting problem arises when the educational standard is not arbitrary or irrelevant, but due to consumer bias. For example, an employer may find that high school graduates with some college experience (who tend to be white and middle class) do sell more insurance than people without such educational backgrounds, since they relate more easily to a predominantly white culture and market. A less educated black salesman may be as technically competent to present a compelling argument for the company product, but find himself making fewer sales due to different cultural interests or ghetto English. In this situation, productivity does not seem to be a useful touchstone. Just as an employer cannot refuse to hire

the employer to abandon it. A judicial standard not tied to feasibility and common sense may lead to abandonment of potentially useful selection procedures.

(*b*) *Work Experience.* — Work experience is another example of an apparently neutral requirement that can turn out to be discriminatory in fact. In many cases it is a legitimate selection device. For a job that requires any degree of skill, a requirement of experience in a similar job is job-related on its face. What could be more relevant for the businessman than data which describe the familiarity of the applicant with the tasks required

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black salesmen because he has evidence that they sell less than whites in a white market — even if this is invariably true — he cannot refuse to hire a proportionate number of blacks on the basis of a test which has validity for predicting job performance only because it is a measure of blackness. Assuming that it could be validated that a college dropout will typically sell more than someone with no college background, one finds a conflict between job relatedness (with its presumptive legality) and the principle that consumer bias is no defense.

The difficult problem in this area is evidentiary. If, when controlling for race, the correlation between education and job performance disappears, the answer is clear: disallow the test. Its validity derives merely from its ability to sort out whites and blacks. But in the more likely case part of the test's validity will result from its power to discriminate, and part from its ability to measure qualities other than race per se that are important in salesmanship: glibness in standard English, social contacts, fluency in college football rhetoric. If this latter part is only a small part of the test's validity, it may still be thrown out. But the more significant these factors become, the tougher the case becomes. Normally an employer could not hire blacks at a differentially lower rate due to their lack of these qualities; these characteristics are, indeed, inherent in any comprehensive definition of race. But when these qualities are causally related to productivity, courts may not want to intervene. The most persuasive rationale for requiring an employer to ignore consumer preferences in this area is educative: consumer bias against minority salesmen will only erode when there are minority salesmen to buy from, and someone must stop the cycle. If there is relatively uniform enforcement, people will no longer have the option of buying only from whites and will learn to accept it. But it may be even harder to educate people out of their class preferences than to convince them of the invalidity of racial stereotypes. College-educated salesmen would continue to be hired, even if in lesser numbers, and those who prefer them could still buy insurance from them. The inefficiency costs in this area would be permanent. Although the courts may well require companies in validating their educational requirement to break down their data according to submarkets defined by education and income (the model just discussed obviously does not apply to a minority or a low income market) further regulation may often be feckless.

The assumptions of this admittedly theoretical discussion may be unrealistic. College education may not be related to sales ability; if it is it may be due to skills acquired in college business administration courses rather than to consumer predilections. It is clear, in any case, that in a culture with strong preferences and biases there will be circumstances in which whites may be more productive than equally skilled blacks. An employer who concentrates solely on productivity will acknowledge consumer bias. Courts should be aware that educational requisites may be used as a handy vehicle for discrimination in such circumstances.

of him? Outside the context of past discrimination, a reasonably drawn work experience requirement will probably be uniformly endorsed for any jobs that require a significant degree of skill. It is obvious, however, that in an occupation which has previously discriminated and has remained all white, a demand of work experience from an applicant will perpetuate the discriminatory status quo. The courts have had little difficulty finding this practice discriminatory under Title VII, though the remedy afforded may be limited where work experience is an important factor in ability to perform the job.

A typical case is that of *United States v. Sheet Metal Workers Local 36*.[179] In a "pattern or practice" action under Title VII,[180] the Attorney General alleged that the local unions involved had made a practice of referring for work only those people who had experience before the enactment of the Civil Rights Act of 1964 and that this constituted unlawful discrimination. The locals had a four-tiered referral grouping. The qualifications for Group I (the most preferred group) were local residence, five years experience in the industry, passing a written examination, and employment for one of the last four years of the collective bargaining agreement. Since prior to the Act blacks had been systematically excluded from the union hiring hall, had not been allowed to take the written examination necessary to apply for apprenticeship, could not join the union, and could not log any experience under the collective bargaining agreement, the low priority jobs of Group IV were the only ones available to them.[181] The court found the continued use of such experience requirements illegal under the Act, since they extended the effects of past discrimination into the present.[182]

Having found discrimination, the court felt free to refashion the terms of the collective bargaining agreement.[183] The residency requirement was found reasonable and retained, but the experience criteria were radically modified. Experience under the collective bargaining agreement was proscribed as a qualification

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[179] 416 F.2d 123 (8th Cir. 1969).

[180] The Attorney General is entitled to bring an action in his own behalf when he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter. . . ." Act § 707(a), 42 U.S.C. § 2000e-6(a) (1964). *See* p. 1228 *infra*.

[181] The Group IV jobs were leftovers. 416 F.2d at 131.

[182] *Id.*

[183] For a look at the problems in enforcing Title VII in collective bargaining agreements, see Gould, *Racial Discrimination in Jobs and Unions, Collective Bargaining and the Burger Court*, 68 MICH. L. REV. 237 (1969); Gould, *The Negro Revolution and the Law of Collective Bargaining*, 34 FORDHAM L. REV. 201 (1965).

for future referrals. Blacks with four to five years of industry experience were allowed to take the objective journeyman examination; if they passed, they were to be put immediately into Group I. Blacks who were beyond apprenticeship age but who had been local residents for five (Local I) or four (Local 36) years, could get into Group I immediately if they passed the test. Finally, the union was required to carry out more extensive public relations efforts to inform the black community that it had ceased discriminating. In using such a flexible approach in tailoring a remedy, the court was making a conscious effort to insure that black applicants were "reasonably qualified" and productive, even while freeing them from the effects of past unfairness. The principle of color blindness is maintained. Even though the requirements for Group I for blacks and whites have become technically disparate, the court attempted to insure that both groups can be equally productive. But it emphasized that it called for no preferences, no quotas.[184] There was to be no unfairness to whites.[185]

Work experience requisites commonly have a discriminatory effect when they are used in connection with nepotistic hiring practices. In *Asbestos Workers Local 53 v. Vogler*,[186] the union was the exclusive bargaining agent for all asbestos workers, and uniformly required four years of experience as an improver or helper before recognition as a full-fledged asbestos worker. But only sons or stepsons of present workers were hired as improvers or helpers. Since the present membership had been kept purely white, the "neutral" experience criterion operated to continue the effects of past discrimination. Even though the court emphasized that nepotism might have other than racial justifications (such as family security [187]) it struck down the requirement in the context of the union's past history and called for the development of other, nonracially oriented, "objective criteria." [188]

Since a past experience requirement which is not job-related cannot be a standard for the future where experience has been denied to minorities in the past, the real question is to what extent affirmative action can be required of unions who have a history of discrimination. Does a union have to give blacks, for example, synthetic work experience through compensatory training and superseniority? To rectify the past wrong, it may seem only just for the union that has turned down a competent black applicant some years earlier now to hire, train, and qualify him to the level

[184] 416 F.2d at 133.
[185] *Id.*
[186] 407 F.2d 1047 (5th Cir. 1969).
[187] *Id.* at 1054.
[188] *Id.* at 1055.

he would have attained in the absence of prior discrimination. Although commentators have occasionally urged this remedy,[189] courts have been chary of imposing it. In *Dobbins v. Electrical Workers Local 212*,[190] it was held that the union could no longer require work experience under a collective bargaining agreement when that experience had been denied as a result of discrimination. But it need not actively seek out black applicants, nor need it start a school to train blacks who had previously been denied equal job opportunity.[191] The court reasoned that these remedies would be violations of the antipreferential provisions of the statute.[192] The court may eliminate the last vestiges of previous prejudice, but it may not call for special affirmative programs for blacks or it will offend the color blindness limitation on the statute's remedial scope.[193]

There are several possible objections to this reasoning. First, a wrongdoing company or union should bear the cost of undoing the consequences of its discriminatory behavior, especially when it was post-Act and directed at identifiable persons. Two typical situations illustrate the problem of remedying continuing post-Act discrimination. In the first, a union does not admit blacks until 1965. A black who was denied admission in 1964 sues, claiming the union must now train him to the competence he would have possessed had he been admitted in 1964. Here plaintiff should lose. It would be unfair to require such compensation for an act that was perfectly legal at the time it was committed. In the second, blacks have work experience in the craft dating from 1962, but not as members of a union under the local collective bargaining agreement from which they were discriminatorily excluded. They sue for admission to a craft level under the bargaining agreement that requires four years experience under the agreement. Plaintiff should win. The union's requirement serves to perpetuate the

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[189] Professor Gould has been a notable advocate of such affirmative action though, as he has noted, courts have not yet demanded substantial training or other costly remedies. *See* Gould, *Seniority and the Black Worker: Reflections on* Quarles *and its Implications*, 47 TEXAS L. REV. 1039, 1066–70 (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).

[190] 292 F. Supp. 413 (S.D. Ohio 1968).

[191] *Id.* at 445.

[192] *Id.* at 444. More equal recruitment, however, has not been viewed as preferential by writers suspicious of preferential treatment. *See* Kaplan, *supra* note 14, at 369.

[193] 292 F. Supp. at 444. Similarly, the court in Quarles v. Phillip Morris Co., 279 F. Supp. 505 (E.D. Va. 1968), held in an analogous case that the defendants need do no more for the victims of discrimination than for white workers. Since the costs of special compensatory treatment are too burdensome, the court appears to say, they will not be imposed. *Id.* at 518.

effect of past discriminatory practices. The qualification in addition that the class be somehow limited and identifiable serves to protect the employer from training the world.[194] Within these constraints, post-Act discrimination against identifiable persons, courts should not default on their responsibility to remedy denials of equal employment opportunity.

Moreover, the compensation of minorities for past discrimination can be logically distinguished from the preference proscribed by Title VII. The former merely places the discriminatee in the place he would have occupied had he not been illegally barred; it grants him no special favors. And it is possible to frame a remedy that both protects the employer's concern for productivity and alleviates the unfairness to black workers.[195] Courts are free to substitute new job-related standards which have less significant discriminatory impact — like screening tests or years of experience in the industry — for old standards which serve to exclude minority workers. To the extent training has been denied to someone because of discrimination occurring after passage of the Act, courts can require compensatory training and seniority to undo the harm.

Generally, however, courts have not taken a restrictive attitude toward affirmative relief under Title VII.[196] Although courts have not yet been willing to impose on businesses or unions relief that would require substantial expenditures for schools and special training, judges have a responsibility under Title VII to root out discrimination, and for this purpose they possess a diversified arsenal of remedies.[197] If courts keep clear the distinction between remedial measures and preferential measures, they should not hesitate to remedy discrimination by means such as remedial training programs, even when the remedy is

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[194] The difficulties in giving recovery to a whole neighborhood are clear. The liability would have few limits. *See* Gould, *Seniority and the Black Worker: Reflections on* Quarles *and its Implications*, 47 TEXAS L. REV. 1039, 1061–64 (1969).

[195] *See* p. 1147 *supra*.

[196] *See, e.g.*, United States v. Papermakers Local 189, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1968); Long v. Georgia Kraft, 62 CCH Lab. Cas. ¶ 9437 (N.D. Ga. 1970); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970); Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970); Johnson v. Continental Can Co., 1 CCH EMPL. PRAC. GUIDE ¶ 9481 (W.D. La. 1970); Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969); Quarles v. Phillip Morris Co., 279 F. Supp. 505 (E.D. Va. 1968); Lewis v. Ironworkers Local 86, 61 CCH Lab. Cas. ¶ 9364 (Wash. Super. 1969). *But see* United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970), *appeal docketed*, No. 35,183, 2d Cir., June 12, 1970.

[197] *See, e.g.*, Cooper & Sobol, *supra* note 42, at 1632–36.

costly. The purpose of the Act, to prevent employment discrimination, requires that the costs be borne by the discriminatory employer or union. Of course, costliness does become significant in extreme circumstances. A remedy should not be imposed which threatens a business with extinction. Putting an enterprise in such straits cannot help discriminatees and is unfair to innocent incumbents. Again, courts should consider feasibility and frame effective remedies that are viable for the business or union found guilty of discrimination.

(*c*) *Personal References.* — The problem of personal references arises most often with the nepotistic company or union. Typically, the desire to provide for family security is at least as important a motive underlying nepotistic practices as any bias toward blacks.[198] It is often not so much a discrimination against as a discrimination for. Though nepotism can be costly for productivity, the government has generally been willing to let the market resolve the problem. But again the problem in the context of racial discrimination becomes far more serious, and the government is unwilling to condone a practice that has such an adverse effect on minority employment. This is especially true since, unlike the requirements of testing, educational background, or work experience, nepotism has not even a putative connection with ability to perform the job. Hence, courts have not hesitated to abolish such requirements across the board.

Two recent cases have recognized the nonracial justifications for nepotistic hiring, but have eliminated the practice nonetheless. In *Asbestos Workers Local 53 v. Vogler*,[199] though the motives behind the nepotistic personal reference system were mixed, the court held the system unlawful because of its effects on blacks. The court did not explain how the decision would have been affected had there been no early evidence of discriminatory intent and references from present members were still a requisite.

This question was taken up in *United States v. Ironworkers Local 86*.[200] In a similar fact situation, the court struck down a nepotsic personal reference hiring policy without considering whether there had been an original discriminatory intent. Rather, the court found "probative" of actual present discrimination statistical evidence showing that blacks were proportionately underrepresented in the industry. There are, of course, obvious limits to the use of statistics in Title VII cases,[201] especially when

[198] *See* Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[199] *Id.*

[200] 315 F. Supp. 1202 (W.D. Wash. 1970).

[201] Were all such misproportions "probative" of discriminatory practices (instead of the several other things they could reflect) courts would in effect be enforcing a quota system.

they relate to minority representation in an industry rather than to the differential impact on minorities of a particular selection procedure. The enthusiasm for statistics here was less important, since the standard was neither job-related nor costly to remove. Here only the differential impact was critical, and since the personal reference was apparently the only union selection standard, the industrywide statistics were a good measure of the discrimination.

(*d*) *Police Records.* — A recent case has suggested that the use of arrest records in hiring can violate Title VII. In *Gregory v. Litton Systems, Inc.*,[202] the court held that since blacks are arrested more often than whites, and these arrests are sometimes the result of discrimination, Litton cannot ask of applicants whether they had been arrested. The reasoning of the court is not clear. The decision seems to rest in part on a misplaced due process analysis.[203] But the rationale most appropriate would seem to be that of the Guidelines: Litton did not present evidence of job-relatedness to rebut the inference of discrimination that was raised by statistics showing the differential effect of one of its hiring standards.[204]

There are unusual problems in validating arrest and conviction records. Synthetic validation is difficult, since there is little research on the relation of records to productivity; few companies have done studies on which to draw. A concurrent validation study, using data drawn from existing employees, would be impossible unless the employer could identify enough employees with arrest records to make satisfactory statistical comparisons. A final option is a pilot program. But to require the employer to run a pilot program in which ex-convicts or people with extensive arrest records are hired may seem too severe if there are reasons to suspect that it may be dangerous for the employer to do so.

These practical difficulties argue against the application of a bright line test, in which no police records could be used without statistical validation whenever the use of records has a differential impact on minority employment. There are, after all, many identifiable situations where it appears a priori that the requirement is sufficiently likely to be job-related that the employer should not be forced to make a showing which it is not feasible for him to make. Let us assume, for example, that some minority groups are arrested and convicted for theft more frequently than whites. A worker with no arrests or convictions for theft seems likely to be a better job risk for a bank teller's job than a worker with a

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[202] 316 F. Supp. 401 (N.D. Cal. 1970).

[203] *Id.*

[204] *Cf.* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 165 (1970).

conviction for theft and several arrests for theft (the charges still pending). To force the employer to ignore such a relevant fact in order to hire more minority workers violates the principle of color blindness. Again, the showing required should vary in different situations. Upon a demonstration that the employer's application of his police record data has a substantial differential effect on minorities, the employer must specify how the requirement is related to the job for which it is used. If he disqualified those who have a conviction, or a significant history of arrests, for relevant crimes (for example, a conviction for theft in a plant where pilferage is possible), the court may accept his specification without requiring elaborate statistical proof. For arrests in facially job-related areas, the employer can be called upon to probe deeper into the meaning of the arrests. Are the charges still pending? This will probably be enough to disqualify the applicant. Were the charges dismissed because of lack of evidence, finding of no probable cause, acquittal? Here the most axiomatic of our criminal presumptions — that a man is innocent until proved guilty — seems to suggest that the arrest means nothing at all. Any predictive significance for job performance it may have will have to be validated by more than mere specification.

Where the conviction or history of arrests has no facially apparent relation to the job, as is often the case with convictions for crimes like vagrancy or loitering, the courts ought to require a more rigorous statistical validation. They may condition approval of use of the records on the completion of a pilot study. Small companies should be permitted to resort to studies done in other plants to the extent that reasonably comparable work situations exist. Even here the precise nature of the requirement will be important. If the employer's interest in arrests or convictions is triggered only by extensive records of scrapes with the local police, his showing will need to be less sophisticated than if he makes an arrest automatically disqualifying.

C. *Recruitment: To Whom Are the Standards Applied?*

Once the boundaries of permissible job requirements are delineated, there remains the important question of how the employer can apply them. Is it enough for him to be a passive applier of fair requirements, or must he actively seek out minorities on whom to apply his standards? An employer can maintain a relatively segregated work force by means other than discriminatory selection criteria. He may target virtually all of his recruitment effort at whites. Or he may do no active recruiting,

hiring exclusively on a walkin basis. This, also, can have a significantly adverse impact on minority employment. After he has developed a consistent record for discrimination over a period of years, his reputation becomes known. Minorities spread word of the employer's bias. Other potential applicants, afraid of similar rebuffs, do not bother to apply. Consequently, the employer is left with a pool of applicants who have heard of vacancies by word of mouth from present (white) workers. The question is whether the employer with a taste for discrimination can benignly rely on this inertia to maintain a predominantly white work force.

Section 703(a) of the statute suggests that it is unlawful to "fail or refuse to hire" on racial grounds.[205] If "fail" is not merely a legislative redundancy, it may describe an affirmative duty to have an integrated work force.[206] More basically, the Act's prohibition against discrimination in employment must mean that a potential employee cannot have a lower chance of being hired due to his race. It should be immaterial whether the lower chance results from the hiring standards applied, from discriminatory recruitment, or from a decision to do walkin hiring and rely on the recruiting services of employees.

The leading case on recruitment is *Parham v. Southwestern Bell Telephone Co.*[207] The company in that case had no affirmative recruitment program until 1967. It relied on walkin hiring, gaining most of its employees from word-of-mouth referrals and applicants who fortuitously ventured in to find work. In 1967 it began an affirmative action program, in which it actively solicited black employees through community organizations, and engaged in special training programs to give them high school equivalency.[208] Parham applied for work prior to 1967 and was rejected, apparently for good reason.[209] He then brought a class action, alleging that Southwestern Bell's recruitment practices were discriminatory. He introduced statistics which showed that in 1964, only 51 out of 2,736 workers at the company were black, and they were mostly in menial jobs.[210] The court held that these statistics established a violation of Title VII as a matter of law. A company cannot rely on its present employees to refer new employees when the practice has such a serious differential impact on minority workers.[211] With regard to discrimination,

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[205] 42 U.S.C. § 2000e-2(a) (1964).
[206] *See* Blumrosen, *supra* note 8, at 475–508.
[207] 433 F.2d 421 (8th Cir. 1970).
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*

the court suggests, "statistics often tell much, and courts listen." [212]

It may be, however, that such statistics can tell too much. Statistics based on community racial proportions are ambiguous. They assume equal interest in the line of work and equal skills to do the work. To compel an employer to change a recruiting system that has contributed to a disproportionately white work force could be either worthless or illegally preferential, if either of the assumptions is invalid. The statistics in *Parham* were extreme, and such evidence should properly be very hard to rebut. The court in *Parham* seems to have gone too far, however. in holding that such statistics establish a recruiting violation as a matter of law so that rebuttal would be impossible. The employer should be allowed to show, for example, that his recruiting system generated enough minority applicants but a greater proportion were unqualified, or that the system did not generate a reasonable proportion of minority applicants but through no fault of the employer. But if, as is often the case, a walkin system of hiring does not generate sufficient proportions of blacks and other minorities because of a tradition of hiring discrimination in the past, it perpetuates past discrimination and should be disallowed. In any case, statistics of this variety ought to be listened to with a critical ear.

Two other cases provide some support for imposing a duty of fair recruitment upon employers. In *United States v. Electrical Workers Local 38*,[213] the Fifth Circuit held that the union must make special efforts to enlist local blacks in its apprenticeship programs, and must abandon facially neutral devices (like tests) which result in discrimination in fact. The special efforts included providing publicity adequate to inform minority groups of job vacancies and qualifications. The court rejected the argument that this remedy violated the antipreferential section of the Act.[214] In another case, nepotism had been the dominant factor in union hiring but now was being replaced by active recruitment, but only of whites.[215] The court held that once recruitment began it must be carried out equally among blacks and whites.[216] Media which serve a primarily white audience do not suffice.[217] There must be a real effort to communicate with the black community.

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[212] *Id.*, quoting Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 371 (1962).

[213] 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

[214] *Id.* at 149–50.

[215] United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970).

[216] *Id.* at 1236.

[217] *Id.*

It seems clear that, once discrimination is found, some form of announcement which is both convincing and practical [218] can be required of the discriminator. In effect, such a demand is little more than the notices required of employers found guilty of unfair labor practices, informing the world that they have reformed.[219] The precise extent of the duty of fair recruitment is not yet settled, however. The amount of advertising required will obviously depend on the size of the company and its past recruitment practices. If it has engaged in heavy advertising in white media, substantial new public relations efforts may be demanded in media serving minority communities. But it may not be economically feasible for small or marginal companies to engage in extensive recruiting. Perfectly satisfactory workers may be obtained at no cost through walkin hiring and word of mouth. Where a small company has always relied on walkin hiring, it would be unfair to make it spend substantial sums on recruiting. But to the extent it recruits at all, it should be required to recruit throughout the entire local community, selecting diverse methods and media to insure balance. And if it has not actively recruited at all, but has a disproportionately white work force, it should be required to inform organizations in minority communities that it is interested in minority employees and post some notices in minority neighborhoods. Like the notices required in labor law, they will, of course, become increasingly less important as the employer begins to practice what he now preaches.

D. Promotion and Layoff: The Role of Seniority

Many of the standards relevant to hiring decisions are also relevant to promotion. Tests, for example, are often used to see whether employees have the aptitude or knowledge for a better job.[220] Previous experience, work references, and education may all be taken into account in evaluating an employee for promotion. Whether hiring or promotion is at stake, the analysis developed

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[218] A problem may arise in determining how much recruiting effort should be directed toward blacks and other minorities. If the measure of sufficient recruiting effort is found in rigidly applied statistics about the inflow of job applicants from particular groups, there may be the departure from color blindness that generally accompanies quotas. Statistics applied with flexibility can be an indicator of whether the new recruiting effort is ample to counter the previous discriminatory recruitment. Basically, however, the task of the court is to gauge how much publicity is necessary to convey the idea that the employer will treat minority group applicants fairly. Once that quantum of publicity is reached, the court must simply insure that a proportional part of the employer's total recruiting effort is targeted at minority workers.

[219] This is a traditional remedy under the NLRA. *See* J.P. Stevens Co. v. NLRB, 380 F.2d 292 (2d Cir. 1967).

[220] *See* Cooper & Sobol, *supra* note 42, at 1637.

above is relevant in assessing the standards imposed by the employer.

There is, however, a pervasive regulator of promotions, bumpbacks, and layoffs that has not yet been discussed. Seniority systems constitute a problem central to any attempt to eliminate discrimination in employment. As one of the most important bastions of status in our economy,[221] enshrined in countless collective bargaining agreements, seniority occupies a unique position in American labor relations.

Seniority may take two forms. Under "benefit seniority," [222] a set period of experience with the company entitles an employee to certain perquisites, such as vacations, pensions, and parking privileges. Such benefits are usually left unimpaired by divisional or departmental transfers, since they involve only the relation between employer and employee.[223] The second form of seniority determines the relations of employees to one another. "Competitive status" seniority establishes an internal ranking among union members for purposes of promotion, transfer, bumps and layoffs. It is not easily transferred, since the complex of rights distributed among employees is usually too strongly entrenched to be frequently adjusted.[224] Most seniority cases under Title VII involve this latter type of seniority.[225]

Seniority is very important to the average worker, determining his competitive status and potentially providing him with considerable job security. Seniority is the sole factor determining layoffs in twenty-five percent of all collective bargaining agreements.[226] It is the determining factor in forty-one percent, one factor among others in sixteen percent.[227] Some sort of seniority provision is found in ninety percent of all American collective bargaining agreements. Seniority is of no less importance for promotion. It is a sole consideration in two percent of the agreements, a determining factor in thirty-one percent, one factor among others in nine percent, and a secondary factor in twenty-

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[221] *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962).

[222] See the discussion in S. SLICHTER, J. HEALY, & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 106–14 (1960).

[223] *Id.* at 117.

[224] Expectancies quickly become reliance, and the reliance they induce perhaps justifies the nontransferability of competitive status seniority. *See* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 164 (1957).

[225] Anything said herein of competitive status seniority can also be said, however, for benefit seniority. The Act clearly covers both.

[226] BUREAU OF NATIONAL AFFAIRS, INDUSTRIAL AND BUSINESS PATTERNS IN UNION CONTRACTS — SENIORITY 23–24 (1965).

[227] *Id.*

nine percent.[228] One-third of the time of union officers is spent in employee grievances over seniority.[229] Substantial litigation has resulted under Title VII from disputes over allegedly discriminatory seniority systems. "More than any other provision of the collective bargaining agreement . . . seniority affects the economic security of the individual covered by its terms." [230]

1. The Utility, Impact, and Discriminatory Effect of Seniority Systems. — A variety of justifications have been suggested for the maintenance of seniority systems.[231] First, a seniority agreement gives the union an objective standard by which it can settle disputes, without intimation of favoritism or chicane. Second, although a system of seniority may result in marginal losses in productivity,[232] since longevity rather than ability often determines job assignment, it benefits management by discouraging rapid turnovers in company personnel. Third, a seniority system allows the worker to plan more carefully and confidently for the future, gives promise of softer jobs as old age nears, and contributes a certain continuity and stability to his life experience.[233]

But seniority is open to the same criticisms as some of the non-job-related standards previously discussed. Seniority often is not related to worker productivity. Indeed, it tends to divorce promotion from ability.[234] Although the lockstep security of seniority arrangements works well for those who have a good jump on the field, it also serves to slow down those who are trying to catch up. Blacks who have been discriminated against in the past by being relegated to lower jobs find little improvement when they are allowed to compete for better jobs, since their accumulated seniority only relates to the lower jobs that they have been allowed to hold. When companies merge lines of progression according to pay scales, they guarantee that the minorities which

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[228] *Id.*

[229] L. Sayles & G. Strauss, The Local Union 29–30 (1953).

[230] *See* Aaron, *supra* note 221, at 1535.

[231] *See* Cooper & Sobol, *supra* note 42, at 1604–07.

[232] A rigid seniority system does not take into account differences in natural skills. When seniority is only one factor among others in assessing someone for promotion, however, the costs are less. It has even been argued that seniority systems in general have no effect on efficiency. *See, e.g.*, Healy, *The Factor of Ability in Labor Relations*, Arbitration Today 45 (Proceedings of the Eighth Annual Meeting of the National Academy of Arbitration) (1955).

[233] A good example is the railroad industry where trainmen work up from the rigorous duties of brakemen on local freight trains to the relatively easy and more lucrative life of the passenger conductor.

[234] There are, of course, jobs in which there is sequential promotion through ever more difficult tasks, each new job requiring the skills developed in the last. This was alleged to be the situation in Whitfield v. Steelworkers Local 2708, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959).

have been hired for the least paying and least attractive jobs will stay in them for the foreseeable future. This is but another example of the typical pattern: a facially neutral standard with differential impact.

Three types of explicit seniority discrimination have been most common.[235] In the first, separate seniority lists have been maintained for white and black workers doing the same work, resulting in the most junior white being preferred over the most senior black. In the second, a group of jobs has so much functional interrelation in terms of skills required that the jobs would normally constitute a single unit or "district" for seniority purposes. In this pattern, both blacks and whites fill the lowest or entry positions, but only whites can advance to the more lucrative jobs.[236] In the third, two or more groups of related jobs have been organized into separate seniority districts, but each group of jobs considered as a whole has little functional relation to the other. Only blacks are hired for jobs in one group, only whites for jobs in the other. Each of these patterns worked to insure that the black worker was at a significant disadvantage in terms and conditions of employment. When they were abolished after the passage of Title VII, blacks were on the bottom, behind many junior whites. The application of facially neutral seniority principles at this point could serve to keep them there for the indefinite future. A formula for judicial action was needed that would adequately reflect both the justification for seniority practices and the legitimate interests of the black worker.

The formula was provided by a Note [237] which has played a significant role in the development of the law in the area of seniority.[238] The Note laid out three possible solutions to seniority problems: (a) "freedom now," requiring displacement of white incumbents by blacks who, without discrimination in the past, would have had their places; (b) "rightful place," allowing a black to compete for a promotion on the basis of his total company service rather than seniority in his old job; and (c) "status quo," preserving intact the rights of white incumbents except where the application of such rights would require the invocation of racial principles (the way of simple facial neutrality).[239] The

[235] *See* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

[236] *Id.*

[237] *Id.*

[238] The approach suggested by the Note was used in a variety of cases. *See, e.g.*, Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 510 (E.D. Va. 1968); United States v. H.K. Porter Co., 296 F. Supp. 40, 62 (N.D. Ala. 1968).

[239] Note, *supra* note 235.

rightful place test has become established Title VII law.[240] Its correctness can be evaluated by examining whether its results are consistent with the statute's language and history, and whether it can be practically applied by courts.

2. Legislative History. — The provisions of Title VII make clear that an employee's status should not be prejudiced by his race. Section 703(a) declares it unlawful for an employer to "limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities or adversely effect his status as an employee because of . . . race, color, religion, sex, or national origin." [241]

This section provoked fears that the passage of the bill would lead to widespread displacement of white workers and the destruction of long-entrenched seniority agreements.[242] The picture of whites being thrown into the streets was finely etched by southern congressmen.[243] As a result, the so-called Mansfield-Dirksen amendment was passed, adding a provision to section 703(h) of the bill to protect the "bona fide seniority or merit system" not the result of an "intention to discriminate." [244]

The legislative history here, like that underlying the testing provisions, is somewhat in doubt. It appears that some understood the provision to be an affirmation of the validity of a neutrally applied seniority system regardless of whether discrimination had previously existed. A Department of Justice memorandum said that "Title VII would have no effect on seniority rights existing at the time it took effect." [245] It was also said that "the

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[240] *See* note 238 *supra*.

[241] 42 U.S.C. § 2000e-2(a) (1964). The full text is as follows:

> [It shall be unlawful . . . for an employer] (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[242] *See, e.g.*, 110 CONG. REC. 7207 (April 8, 1964) (remarks of Senator Hill of Alabama).

[243] *Id.*

[244] 42 U.S.C. § 2000e-2(h) (1964). The text of the amendment reads:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

[245] Interpretative memorandum prepared by the Department of Justice, 110 CONG. REC. 7207 (April 8, 1964). It goes on to suggest that:

> if . . . a collective bargaining contract provides that in the event of layoffs those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in

bill is not retroactive and it will not require an employer to change existing seniority lists." [246] An AFL-CIO interpretation said that the law did not "interfere with existing job rights." [247] But there is also evidence indicating that congressional approval of seniority systems was not so sweeping.[248] And the courts have generally interpreted the qualification that a protected seniority system must be "bona fide" to require the rejection of a system which carries forward the effects of past discrimination.[249]

3. Judicial Interpretation of the Act. — Cases considering the role of seniority as a permissible standard for employment decisions have tended to turn on a pre-Title VII duty-of-fair-representation case,[250] *Whitfield v. Steelworkers Local 2708*.[251] In that case, five blacks brought an action urging that a requirement that blacks start at the bottom when two lines of progression were merged in their company was discriminatory in the light of past segregation in the plant. In addition, they objected to being required to pass a test for promotion which was not administered to whites.[252] The court held for the union and dismissed the complaint.

Whitfield set out two distinct rationales, one moribund, the other still viable. The first rationale was evident in the holding that there must be present discriminatory acts to justify judicial action. Since only present intended discrimination violated the duty of fair representation, the imposition of a neutral seniority system which tends to freeze previous racial categories was closed

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the case where owing to the discrimination prior to the effective date of the title, white workers had more seniority than Negroes . . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race.

[246] *Id.* at 6996 (April 6, 1964).

[247] AFL-CIO, CIVIL RIGHTS: FACT VS. FICTION 3 (1964).

[248] *See* Cooper & Sobol, *supra* note 42, at 1611–14.

[249] Quarles v. Phillip Morris, Inc., 279 F. Supp. at 517. The qualification imposed on seniority systems that they be "bona fide" was an early source of confusion in understanding of the Act. *See* Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COM. L. REV. 473, 480 (1965).

[250] The duty of fair representation overlaps with Title VII. *See, e.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). Such analogies from previous discrimination law have been held relevant to Title VII adjudication. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970); Hall v. Werthan Bag Corp., 1 CCH EMPL. PRAC. GUIDE ¶ 5002 (M.D. Tenn. 1969). *But see* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 91 S. Ct. 566 (1971) (No. 835).

[251] 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959).

[252] *Id.* at 549.

to judicial scrutiny.[253] The decision is in essence an appeal to the status quo, with a concern for fairness to white workers apparently uppermost in mind.

As such, it developed a certain following. The lower courts in *Griggs v. Duke Power Co.*,[254] *United States v. Electrical Workers Local 38*,[255] *United States v. Sheet Metal Workers Local 36*,[256] and *United States v. H.K. Porter Co.*[257] all agreed with the position; all but *H.K. Porter* have been subsequently reversed.[258] The attack on the rationale began slowly, under the influence of a rightful place test. The most influential early case was *Quarles v. Phillip Morris, Inc.*[259] Phillip Morris had maintained all-white and all-black departments. Workers in the previously all-black department were permitted to transfer to previously all-white departments after passage of Title VII, but they entered on the bottom rung.[260] Future progress was governed by departmental seniority. Quarles, a black employee, was prevented from transferring directly into a truck driver position, and he sued for injunctive relief. The court held that Quarles' present opportunities had been restricted as a result of discriminatory patterns that antedated Title VII. The court denied that the legality of the system was outside the coverage of the Act by saying that "[t]he plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act."[261] *Quarles* was followed in its result by a number of other cases.[262]

Quarles and its progeny sought to distinguish *Whitfield* by resort to that decision's other rationale — the business necessity test. In *Whitfield* the court expressly found every lower job to be a necessary qualification for every higher job. The "minimum guarantee of business efficiency," according to the *Whitfield* court, demanded that the blacks first get a toehold at the bottom and

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[253] *Id.* at 551.

[254] 292 F. Supp. 243 (M.D.N.C. 1968), *rev'd in relevant part*, 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term).

[255] 59 CCH Lab. Cas. ¶ 9226 (N.D. Ohio 1969), *rev'd*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

[256] 280 F. Supp. 719 (E.D. Mo. 1968), *rev'd*, 416 F.2d 123 (8th Cir. 1969).

[257] 296 F. Supp. 40 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969.

[258] *See* cases cited notes 254–56 *supra*.

[259] 279 F. Supp. 505 (E.D. Va. 1968).

[260] *Id.* at 512.

[261] *Id.* at 515.

[262] *See, e.g.*, Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

then work their way up.[263] Only if they passed a screening test should they shortcut the process established by the seniority system.[264] As long as a "system (is) conceived out of business necessity, not out of racial discrimination," it is lawful.[265] In both *Quarles* and *Dobbins*[266] it is clear that an economic purpose behind a plan for merging seniority lines will be accepted absent signs of discriminatory intent. This rule will require courts to make a discriminating analysis of the plan for merging seniority that was instituted by the employer. The merger is permissible so long as the jobs are functionally related in such a way that lower jobs prepare the employee for higher jobs; the employer should not be permitted to use a merged seniority system that requires experience in a lower job as a condition of promotion to an unrelated higher job.

The business purpose test also applies to the situation where the seniority system has not been explicitly discriminatory, but has been applied in a context where hiring and transfer discrimination has been common. In the case where jobs in the system are not functionally related, blacks and other minorities are detrimentally affected without a productivity justification, and the system should be abolished. Where there is a functional relation between the jobs, as in *Whitfield*, employers may still be required to give compensatory training and synthetic seniority to identifiable victims of post-Act discrimination, allowing them to bid for openings on the basis of seniority they would have accrued absent the discrimination.[267]

The continued vitality of the business purpose test reflects once more the confluence of analytic strands in judicial application of Title VII. When seniority has little economic justification, the courts are willing to attack and uproot the present and continuing effects of past prejudice upon a showing of significant differential impact. But when seniority is connected with productivity, as in *Whitfield* where the stepped jobs allegedly required cumulatively greater skill, the courts are willing either to accept the system (even with differential impact) absent an intention to discriminate, or to impose an additional requisite (like a screen-

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[263] 263 F.2d at 550.

[264] *Id.*

[265] *Id.*

[266] *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. at 518; Dobbins v. Electrical Workers Local 212, 292 F. Supp. at 446.

[267] Past seniority, while useful for bidding purposes, has been held not to "carry over" into the new job. United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 994-95 (W.D.N.Y. 1970), *appeal docketed*, No. 35,183, 2d Cir., June 12, 1970. This would be unfair to white incumbents and outside the rightful place analysis, the court reasoned. *Id.*

ing test) to make sure that interference with productivity is not inordinate.

The business purpose test as yet has no clear boundaries. Some have asserted that no amount of business purpose should be accepted as justification for a seniority system with a significant detrimental impact on minorities.[268] It is still uncertain how the burden of going forward should be distributed once the issue is raised. But in the context of the earlier analysis [269] it seems that congressional intent would best be served by the following system for allocating the evidentiary burden. Once the plaintiff has produced evidence showing that the employer's seniority system has a substantial adverse effect on minority opportunities, the employer must sustain the burden of showing that the jobs covered by the seniority agreement are functionally related in the sense that one job serves as preparation for another. It would then be up to the complainant to produce evidence of discriminatory intent, in addition to the statistical showing of differential impact, sufficient to rebut the employer's showing of business purpose. Since jobs in a system may often not be interrelated and there are often indications of discriminatory intent,[270] the burden would generally not be too great for the complainant. If the employer survives the evidentiary showing, his seniority system may remain intact, but he still should be required to provide compensatory training to enable identifiable victims of post-Act discrimination to jump seniority barriers. This analysis is responsive both to the rights of black workers and to the color blindness constraint that the productivity of individual workers is not to be ignored in making promotional decisions.

4. Remedies for Seniority Discrimination: Restructuring Seniority Standards. — Once discrimination is discovered, the courts have a high degree of flexibility in remedying the wrong.[271] Where feasible, the victim of discrimination should be put in the place he would have otherwise occupied. Because of the deterrent effect it has on employers and unions and the incentive it holds out to workers, back pay plays a crucial role in the remedial process.[272] But more than back pay may be required to remedy

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[268] Interview with David Cashdan, Attorney, Office of the General Counsel, EEOC, Washington, D.C., Oct. 19, 1970.

[269] *See* pp. 1118–19 *supra*.

[270] *Quarles*, for example, took place in the context of a history of clear racial bias. Present statistical differentials could easily be supplemented by showing past discriminatory practices.

[271] *See* cases cited at note 196 *supra*.

[272] *See* pp. 1243–44 & note 277 *infra*. *See also*, Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 513–21 (1965).

the harm that results from a particular discriminatory act. Thus an employee who is wrongfully passed over for promotion should receive, in addition to back pay, the training and seniority he would otherwise have possessed. When legitimate business necessity bars an employee from moving into the slot he would have had without discrimination, he can at least be paid the salary for the higher position.[273]

Injunctive remedies are also possible. Where the discriminatory practice has been the segregation of seniority lines, the most appropriate remedy, absent some compelling business need, is that seniority be made companywide. Allocation of work by means of experience with the company seems both a practical and fair way of giving the victim of discrimination his rightful place. The class of workers affected is relatively easy to determine and the remedy not difficult to apply. In cases where seniority has been denied by discriminatory referral or hiring practices, and the occupation is, for all practical purposes, white only, courts can follow the lead of *United States v. Sheetmetal Workers Local 36*.[274] There the court used age and years of residency in the community, supplemented by ability tests, to determine how the work was to be allocated in the future. Since the class deserving compensation cannot in these situations be defined precisely, greater precautions should be taken to assure worker productivity. Still, a remedy like that in *Local 36* seems both practical and fair.

E. The Utility of Objective Standards

The Congress that passed Title VII apparently never questioned the possibility of choosing workers by objective standards predictive of job success. Color blindness in employment, it believed, would be achieved by the fair application of objective standards. Congress recognized, to be sure, that objective measures could be abused. Thus, while testing was permitted, the tests had to be "professionally developed" and not "used to discriminate." Seniority systems were protected, but only if they were "bona fide." But throughout one finds indicia of a faith that measures can really measure, and that fair measures will help minorities.

Both propositions, it must be pointed out, are not apodictic. It has been alleged that "most employment decisions are based on dreams: dreams that tests can sort out good employees, that diplomas have some meaning. Personnel selection is nothing but

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[273] *See* Cooper & Sobol, *supra* note 42, at 1635–36.

[274] 416 F.2d 123 (8th Cir. 1969).

dreams and guesses." [275] Under this view, minority-aiding quotas are more attractive. If some workers are not predictably more efficient than others, it makes less difference when some of them are arbitrarily preferred over others. If rational employee selection is impossible, Title VII is already anachronistic and the idea that color blindness can be achieved by assessment of a worker's potential productivity is nonsensical. Hiring may sometimes be more a product of faith than of reason. But since it is possible to make rational decisions about hiring and promoting, courts should be careful that in developing the law under Title VII they do not foreclose this possibility.

The second congressional belief, that objective standards will help blacks, has also been questioned.[276] Sometimes the application of more subjective standards has proved to be beneficial for blacks.[277] Such standards may see through technical deficiencies resulting from cultural deprivation to real potential. On the other hand, there is some merit to the suggestion that colorblind standards help the victim of racial discrimination. Once he qualifies under the standards, the way is cleared to future progress. And in a society where racial prejudice is endemic, an enormous policing effort would be required to insure that subjective standards do not harm minority workers. Quotas, of course, offer a third option, if neither objective nor subjective standards are satisfactory. But government imposed quotas present their own problems of unfairness and interracial strife, as well as dubious constitutionality.[278] Title VII should not be interpreted to require employers to resort to quota-hiring, where there has been no clear legislative resolution of these problems — indeed where all indications are that to the extent Congress faced these issues, it rejected the quota solution.[279]

F. Conclusion

It is important to realize that the case law of employment discrimination is at a very early stage of development. None of the important issues have as yet been authoritatively determined by the Supreme Court, and the present judicial authority does not speak univocally on the major issues. But certain general-

[275] Interview with Russell Spector, formerly Ass't General Counsel of the EEOC, in Washington, D.C., Oct. 19, 1970.

[276] *See* Cooper & Sobol, *supra* note 42, at 1677 & n. 31.

[277] *Id.*

[278] *See* p. 1115 *supra*.

[279] But the importance of the antiquota provision is not accepted unequivocally within the EEOC. As a commission staff member has put it, "The anti-preferential hiring provisions are a big zero, a nothing, a nullity. They don't mean anything at all to us." Interview, in Washington, D.C., Oct. 19, 1970.

izations can be drawn from the major authorities. Employment discrimination has many disguises. The variety of its appearance in different employment situations is so great that no pat formula exists for the solution of Title VII problems. The best that one can do in offering guidance for this development is to suggest a general approach. Congress in Title VII attempted to aid minority employment within the constraints of color blindness and noninterference with employer decisions that are based on legitimate business considerations. Courts in many instances have had too much faith in the standards used by employers for hiring and promotion. The present tendency of the Equal Employment Opportunity Commission is to emphasize minority employment at the expense of color blindness by forcing employers to abandon standards when there is good, if not conclusive, reason to believe these standards are useful in predicting job performance. The congressional purpose will best be furthered if the two considerations are kept in balance. Courts are rightly suspicious when there is evidence that the application of hiring or promotional standards has a substantial differential impact on minority employment opportunities. In such cases they should require a substantial showing by the employer that his tests are useful in predicting ability to do the job. And where discrimination is found, the full panoply of the court's remedial powers should be used to end the discrimination and compensate its victims. At the same time, courts should be cautious lest they require such a high degree of proof from the employer that standards which very probably are valid must be abandoned because of the impracticality of demonstrating validity.

II. Sex Discrimination

A. Introduction

As originally conceived, Title VII [1] was to operate as a vehicle by which minorities would enter the mainstream of American life assured of the opportunity to compete for jobs on a nondiscriminatory basis. In 1964, it was a commonplace notion that membership in a minority race, religion, or national origin could unfairly hinder a job applicant. Discrimination on the basis of sex was perceived in a different light. Women, the victims of almost all sex discrimination in employment, actually constituted a majority of the population, and approximately two-fifths of the work force. Much of the discrimination against them was originally intended as protection for a group considered less able to

[1] Act §§ 701–16, 42 U.S.C. §§ 2000e to 2000e–15 (1964).

protect themselves than were men. Far from being outside the mainstream, women were seen as having a definite place in every level of American life, though not exactly the same place as men. Gunnar Myrdal's observation, made in 1952, went unnoticed: [2]

> As in the case of the Negro, women themselves have often been brought to believe in the inferiority of their endowment. As the Negro was awarded his "place" in society, so was there a "woman's place."

The addition of sex as a forbidden basis of discrimination in employment was offered as a floor amendment to Title VII in the House, without any prior legislative hearings or debate. The original proponent of the measure was a southern congressman who voted against the Act, and whose strategy was allegedly to "clutter up" Title VII so that it would never pass at all.[3] The passage of the amendment, and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America.

The American people have always recognized the fact that basic differences, cultural and biological, exist between men and women. In recent years, however, an awareness has grown that many of these differences are being used to deny employment opportunity to one sex or the other without a firm basis in reason or fact; and since the passage of Title VII, without a basis in law. As the traditional view that certain occupations are inherently "male" or "female" clashes with the reality of increasing numbers of trained women entering the job market, the operation of Title VII in the area of sex discrimination may eventually have wide-ranging effects.

In 1968, 29.2 million women were in the labor force, comprising thirty-seven percent of all workers [4] — a figure likely to increase.[5] As a group, however, when compared with men, women fare far worse at every stage in the employment process. Women workers face a higher unemployment rate,[6] earn less,[7] and hold proportionately fewer of the more prestigious and remunerative

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[2] G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1077 (2d ed. 1962). This work was cited in debate on the inclusion of sex in Title VII by Congresswoman Griffiths, arguing for the inclusion. 110 CONG. REC. 2578 (1964).

[3] *See* 110 CONG. REC. 2581 (1964) (remarks of Congresswoman Green).

[4] U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS (WOMEN'S BUREAU BULL. No. 294) 9 [hereinafter cited as HANDBOOK].

[5] *Cf. id.* at 15.

[6] *Id.* at 67–68.

[7] *Id.* at 132.

professional and executive positions than their male counterparts,[8] despite substantially equal educational attainments.[9]

Women in general suffer from widely held notions — sometimes enacted into law — that they are intrinsically inferior to men for purposes of employment. Most common among these stereotypes of women are that they are emotionally incapable of leadership positions;[10] are too weak to perform heavy physical labor; [11] and are too delicate for hazardous occupations.[12] When compared to men, women are assumed to have a higher rate of absenteeism,[13] a higher turnover rate,[14] and to have less need for the financial benefits of a job.[15]

Against this background of discriminatory attitudes and costly underutilization of females,[16] the 1964 Civil Rights Act included sex as a prohibited criterion in employment choices. Section 703(a)[17] declares it to be an unfair employment practice for an employer [18] to hire, fire, or otherwise discriminate in respect to

[8] *Id.* at 92–94.

[9] As of 1968, the median number of years of school completed for those in the labor force was 12.4 for women, compared to 12.3 for men. *Id.* at 178.

[10] PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON PRIVATE EMPLOYMENT 13 (1963), called for a study of the emotional fitness of women for responsible and supervisory positions. That the Commission felt this idea needed further study, rather than immediate rejection, indicates the pervasiveness of the notion.

[11] Ten states plus Puerto Rico have a maximum-weight restriction on women workers. HANDBOOK 278–79.

[12] *See, e.g.*, N.Y. LAB. LAW § 405 (McKinney 1965) (no women in mines). Twenty-six states have some sort of restriction on jobs in which women may work. HANDBOOK 277.

[13] One recent study has shown that the average number of days per annum lost because of injury and illness was 5.3 for women and 5.4 for men. HANDBOOK 80.

[14] Although some studies have shown women to have a higher turnover rate than men, Department of Labor studies have indicated that labor turnover rates are more influenced by such factors as skill level of the job, age of the worker, job stability of the worker, and length of service of the worker, than by the sex of the worker. In comparing turnover rates by sex, these other factors should be held constant. HANDBOOK 76.

[15] A survey taken in 1964 indicated that about one-half of married female workers listed economic necessity as their major reason for taking a job. HANDBOOK 8. Self-supporting women obviously need the job's economic rewards.

[16] When sex discrimination compels women to take jobs requiring less than their capacities, or to remain out of the work force altogether, society suffers the loss of needed talent and the women themselves suffer justified feelings of frustration. *See* PRESIDENT'S COMMISSION, *supra* note 10, at 1.

[17] 42 U.S.C. § 2000e-2(a) (1964).

[18] Title VII also contains substantive prohibitions against sex discrimination committed by employment agencies, Act § 703(b), 42 U.S.C. § 2000e-2(b) (1964), and labor organizations, Act § 703(c), 42 U.S.C. § 2000e-2(c) (1964). This discussion centers around discrimination by employers partly because the problems encountered there are representative of the problems elsewhere, and partly because almost all of the conflicts have arisen between employees and employers. An ex-

the compensation, terms, conditions, or privileges of employment because of sex; or to limit, segregate, or classify employees by sex in ways which would tend to deprive an individual of an employment opportunity or otherwise adversely affect one's status as an employee. Notwithstanding section 703(a), section 703(e)[19] provides an exception to the enumerated unfair employment practices for employer action based on sex "in those certain instances where . . . sex . . . is a bona fide occupational qualification [hereinafter bfoq] reasonably necessary to the normal operation of that particular business or enterprise." Much of the confusion — and litigation[20] — about sex discrimination under Title VII concerns the scope and application of the general prohibition in light of this statutory exception. As used in this discussion, the term discrimination will be applied to any action that is in violation of section 703(a), whether or not it may be justified under 703(e).

The burden of proving discrimination is on the claimant whose rights under Title VII have allegedly been infringed.[21] If the action of the employer is in fact a justifiable one, Title VII permits such a showing to be made. Common statutory interpretation, as well as common sense, puts the burden of proving an exception to a general regulatory scheme on the party claiming the benefit of the exception, in this case the employer.[22] The employer is in a better position than is the employee, prospective or otherwise, to know whether the particular facts of his operation justify the use of sex as a bfoq. Before the question of possible justifications can arise, however, what constitutes discrimination under section 703(a) must be analyzed and defined.[23]

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ample of the type of problem that is encountered with the other two sections of the Act is a decision that for the purposes of section 703(b) a newspaper is not an employment agency, and is therefore not liable for printing want ads on a sex-segregated basis. Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (N.D. Cal. 1970).

[19] 42 U.S.C. § 2000e-2(e) (1964).

[20] For a numerical breakdown of the proportion of Title VII cases relating to sex discrimination, see Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act*, 56 WOMEN LAW. J. 28, 30 (1970).

[21] *See, e.g.*, Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199, 214–15 (C.D. Cal. 1968).

[22] "[W]hen dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it." Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969). A similar burden is cast upon the employer under the NLRA to show that certain otherwise unfair labor practices are justified by legitimate business considerations. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

[23] *See generally* Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 688–94.

B. The Meaning of Sex Discrimination

1. Explicit Sex Discrimination. — The paradigm case of explicit sex discrimination is where sex itself, as a broad generic classification, is the sole basis of the action taken by the employer. Such a case occurs when an employer simply refuses to hire women for a certain position. Whether based upon an unsubstantiated stereotype of the sexes, or upon valid factual data on their intrinsic differences, treatment of a person in a manner which but for that person's sex would be different is a prima facie unlawful employment practice as defined in section 703(a). Thus, any classification scheme which used sex as a definitional factor of one of the classes should fall within the section's proscribed practices.[24] This definition would include those classification schemes which, rather than using the terms "male" and "female," make the classification contingent upon those characteristics which are physically possible in only one sex, such as ability to become pregnant.[25] Thus, for example, offering extended medical leave only to an employee about to give birth,[26] and not to employees with other medical problems, would, for the purposes of 703(a), constitute a discrimination against male employees.[27]

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[24] At least one case of alleged sex discrimination has been dismissed on the simple ground that plaintiff had made no showing that her sex had motivated the action taken by the employer. *See* Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968).

[25] Courts have recognized that an employer cannot exclude all women from a job on the grounds that some of them may become pregnant. *See, e.g.*, Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 759–60 (M.D. Ala. 1969).

[26] Six states plus Puerto Rico prohibit the employment of pregnant women at some stage of their pregnancy. *E.g.*, N.Y. LAB. LAW § 206-b (McKinney 1965). Federal law gives civil servants maternity leave, 5 U.S.C. §§ 6301–11 (Supp. IV, 1969), and many private employers offer it to their employees. In 37 states plus the District of Columbia, however, unemployment compensation is not available to women in the latter stages of pregnancy, even if pregnancy is not the reason for their unemployment. HANDBOOK 52–54.

[27] Since, in addition to whatever other medical problems they have that are common to male employees, only women require maternity leave, a policy offering no extended medical leave without pay to anyone might well have a sufficient disproportionate effect on women to constitute a de facto unlawful discrimination, absent a valid business justification. *See* pp. 1116–18 *supra*. The EEOC has been hatching guidelines on maternity leave for two years without releasing a standard. Although the Commission's present position states that a provision for maternity leave should be made absent a showing that business necessity requires otherwise, U.S.E.E.O.C., FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS 21 (1966) [hereinafter cited as DIGEST] (Opinion Letter issued June 23, 1966), it hedges the command by saying each case will be met on its individual facts. The various aspects involved include whether the entire duration of the leave should be mandatory or optional, at what point the woman should be able to take leave, and what type of provisions concerning job position and seniority should be made available to the woman on her return. Given the wide variation in detail of the

2. "Sex-plus" Discrimination. — If the situation discussed above appears simple, the case of classifications based on sex plus one other characteristic would hardly seem more troubling. The latter situation, however, has caused lower courts some difficulty. A sex-plus classification is illustrated by a policy which requires the resignation of all female airline stewardesses who marry, while permitting male stewards to marry and retain their positions. This policy was held by a district court to be nondiscriminatory on the confused ground that Title VII did not prevent discrimination against married persons in favor of single persons.[28] The court focused on the fact that the additional characteristic, marriage, was determinative in the employment decision, not the fact of the difference in sex. Yet the fact that it is only within the class of married persons that females are disadvantaged does not detract from the result that men have the freedom to marry, while women do not. It is the extension of this freedom to men only that constitutes discrimination. The two classes for comparison should not be married versus single stewardesses, but married males versus married females.

In a case decided by the Supreme Court this Term, *Phillips v. Martin Marietta Corp.*,[29] the Fifth Circuit had held that the company's policy against hiring women with young children was not a violation of section 703(a), even though the company hired men in similar circumstances.[30] The Fifth Circuit never reached the issue of whether sex was a bfoq for the jobs to which the company applied its sex-plus policy. In a per curiam opinion, the Supreme Court held the Martin Marietta policy a violation of section 703(a), though it remanded for an evidentiary hearing on the company's justifications for its policy, presumably to be presented under the bfoq exception.[31]

While the Martin Marietta policy does not discriminate against all women, it does single out the plaintiff for disfavored treatment which she would not have received if she were a man. The *Martin Marietta* circuit court opinion did concede that the classification might be arguably discriminatory, but concluded that it did not in fact operate in a discriminatory manner because

operations of those employers covered by Title VII, a case-by-case approach seems best suited.

[28] Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 783 (E.D. La. 1967); *accord*, Lansdale v. United Air Lines, Inc., 62 CCH Lab. Cas. ¶ 9417 (S.D. Fla. 1969). Another court has reached the opposite result, Sprogis v. United Air Lines, Inc., 308 F. Supp. 959 (N.D. Ill. 1970), and one suit is in progress, with the employer being allowed to present evidence that his policy is pursuant to a bfoq. Schrichte v. Eastern Air Lines, Inc., 1 CCH EMPL. PRAC. GUIDE ¶ 9519 (N.D. Ga. 1970).

[29] 91 S. Ct. 496 (1971), *rev'g* 411 F.2d 1 (5th Cir. 1969).

[30] 411 F.2d at 4.

[31] 91 S. Ct. at 498.

while seventy to seventy-five percent of those who applied were women, seventy-five to eighty percent of those holding the jobs were women.[32] This type of statistical analysis applied to a sex-plus classification overlooks the fact that civil rights legislation is designed to protect the individual from being treated differently because she is a member of a wider group, sex-defined in this case, and not to protect simply a majority of that group to the exclusion of the rest.[33] In addition, the statistics themselves are inconclusive because the existence of the sex-plus barrier might have deterred many women who would otherwise qualify from applying at all.[34] Allowing an employer to add another qualification to one forbidden by the Act would enable him to hide his explicit discrimination against women by finding some remotely relevant job qualification which very few people could meet. Hiring only those women whose fathers and grandfathers had preceded them in the trade in question, while accepting male applicants who cannot meet this criterion, would undoubtedly have an exclusionary effect upon women.

Legislative history, moreover, seems to indicate awareness and disapproval of the statutory interpretation offered by the circuit court in *Martin Marietta*. The House rejected an amendment to Title VII which would have qualified the Act to prohibit only employer practices based *solely* on sex, race, national origin, or religion.[35] This amendment was objected to on the ground that such a restriction of the Act's prohibited practices would have emasculated it.[36] The treatment of sex-plus classifications as not discriminatory is a judicial addition of the word "solely" to Title VII, narrowing its reach to the point where it is much less effective. A job qualification that excluded all blacks with young children, but not whites with young children, is as explicitly discriminatory as a similar sex-plus classification. Only if sex were shown to be a bfoq should there be any analytical difference.

3. Discrimination Based on Statistical Differences. — Some classification schemes which use sex as a factor by which to place employees in one class or the other do so pursuant to a statistically valid difference between the sexes. This type of classification presents a subtle problem with regard to the definition of

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[32] 411 F.2d at 2.

[33] *See generally* Comment, *Sex Discrimination: State Protective Laws v. Title VII of the 1964 Civil Rights Act*, 1968 U. ILL. L.F. 418, 428.

[34] For a discussion of this "hired-group percentages test," see Comment, *Civil Rights Act of 1964: An Exception to Prohibitions on Employment Discrimination*, 55 IOWA L. REV. 509, 512, 514–19 (1969).

[35] 110 CONG. REC. 2728 (1964) (amendment offered by Representative Dowdy rejected in the House).

[36] *Id.* at 13,825 (remarks of Senator Case).

explicit discrimination prohibited by section 703(a).[37] The problem seems most complex with respect to life insurance and other terms of employment calculated with reference to life expectancy.[38]

The bulk of employers must deal with the existing insurance industry if they wish to offer a life insurance benefit program. They are likely to be faced with two industrywide propositions: first, sex is an accurate enough predictor of life expectancy that actuarial tables are drawn on that basis; second, since women on the whole have greater longevity than men, an equal amount of life insurance can be purchased for less per premium payment for a woman than a man. Thus, an employer who offers life insurance benefits to employees in conjunction with a life insurance company has two options. Either the employer will pay equal insurance premiums and thus provide women higher benefits, or the employer will give equal life insurance benefits to all by paying higher premiums for his male employees. The Commission has approved both alternatives as nondiscriminatory.[39]

The nub of the problem is that while the former alternative explicitly provides different benefits on the death of each employee, the latter alternative costs the employer more for his men employees than for his women employees.[40] This cost differential seems to be just as discriminatory as a differential in benefits; yet a closer examination of the concept of individual merit, as opposed to sex-group stereotypes, will demonstrate that the logical result of Title VII's mandate requires equal benefits despite this cost differential.

If two classes are different with respect to a certain characteristic, treating them the same with respect to that character-

[37] Congressional intent concerning the effect of Title VII on use of such statistical differences between the sexes was unclear. Senator Humphrey felt that differences of treatment of the sexes in industrial benefit plans, including early retirement options for women, were not illegal under Title VII because of the addition of section 703(h) to the Act. 110 CONG. REC. 13,663–64 (1964). The relevant part of section 703(h) provides that differences in compensation paid to employees are not illegal if authorized by the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1964). The effect of this amendment is that interpretations of the two statutes, which are administered by different agencies, will not contradict each other. Since the Equal Pay Act makes no provision whatsoever for a sex-based difference in retirement age or benefits, Senator Humphrey's interpretation is quite puzzling.

[38] Other examples would be different retirement ages or different pension amounts for the two sexes.

[39] DIGEST 22 (Opinion Letter issued Jan. 28, 1966).

[40] This concept of cost is the same whether the employer offers the life insurance benefits entirely on his own, or does so by purchasing insurance from an insurance company.

istic is commonly considered unequal. In its application to statistical differences, however, that view loses sight of this Note's basic premise: that Title VII, in the field of employment, requires evaluation on an individual basis rather than a prediction made on the basis of a sex-defined group. The use of statistics in areas other than life insurance can illustrate this point.

Automobile insurance statistics show women to be safer drivers than men.[41] Even assuming the validity of this statistic, a trucking company could not refuse to hire men on the theory that they are, on the whole, less safe drivers. A ban on sex discrimination must mean that attributes of one sex cannot be used to burden any single employee who may not share that attribute. Since some men are safe drivers, and some women are not, this type of policy constitutes explicit sex discrimination. The employer is not, strictly speaking, hiring only safe drivers; he is hiring only women safe drivers.

Although life expectancy is an attribute that seems somehow more intrinsic to sex than does driver safety, for the purposes of Title VII it is the same. No individual employee can claim that equal insurance benefits or equal hiring opportunity discriminates against him or her because of a statistically shown difference from the other sex. Just as an employer could not penalize an individual woman applicant for a characteristic which women in general possess, but which the applicant cannot be proven to possess, an individual woman cannot claim that she is discriminated against because the employer does not take recognition of an attribute held by women in general, but which she herself may not possess. Therefore, it follows that an individual woman employee cannot claim a higher lump sum death benefit as a term of employment on the ground that women in general live longer than men in general.[42]

This is so because Title VII focuses on presenting each employee in an individual light, free from any conclusions that may be drawn from the individual's membership in one sex or the other. Because of this focus, Title VII in some cases prohibits employers from making judgments that are economically rational. If an employer cannot hire only women drivers when statistics show them to be safer, he is forced into an economically irrational decision.[43] Yet Title VII requires that such consid-

[41] *See, e.g.*, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, PRICE VARIABILITY IN THE AUTOMOBILE INSURANCE MARKET 255 (Dep't of Transportation, Automobile Insurance and Compensation Study, 1970).

[42] The Commission has taken the position that equal treatment of the sexes by offering equal life insurance benefits does not constitute a de facto discrimination against women. DIGEST 22 (Opinion Letter issued Jan. 28, 1966).

[43] This assumes that a sufficient number of women applicants are available.

erations be secondary to the perceived need to make employment decisions sex-blind, as well as colorblind.[44] This sex-blind hiring policy imposes costs on women in general, since some jobs that would have been held by women are being held instead by men. The same type of cost is imposed on women when an employer must offer them the same life insurance benefits as men, when they, on the whole, entail a smaller actuarial risk. In both cases, the costs to employers unable to operate in an economically rational way, and the costs to women, are necessary results of a statutory scheme that seeks to eliminate the consideration of sex from employment decisions. It is these costs that make a policy of offering equal life insurance benefits seem discriminatory.

Although application of Title VII to life insurance in the context of employment compels the provision of equal benefits, in other contexts the actuarial use of sex in determining different costs of insurance is commonly viewed as an acceptable practice.[45] Even in employment, life insurance may seem distinct from other uses of statistical differences. Life expectancy is a characteristic that is not related, in the normal sense, to job capability. Being branded as a member of a sex with a greater life expectancy is not quite the same as being the victim of a debilitating stereotype, such as the case with driver safety. Moreover, requiring employers to make unequal contributions on the basis of sex may create a wage cost incentive to them to hire those employees whose sex means lower premium contributions.

Given the monolithic structure of the insurance industry in this regard, and the almost universal desirability of life insurance, most employees without a group policy would purchase life insurance on their own if money were provided by the employer, and in the process would face sex discrimination. Thus, when the employer merely consolidates the process, and effects a savings available through group coverage, the sex discrimination seems more a fact of life than an invidious discrimination.

Since the Act as written does not recognize such considerations, the best way to accommodate them might be a statutory amendment which either expressly creates an exception for equal premium contributions by an employer, with unequal benefits,

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[44] Once an employer practice is shown to be in violation of section 703(a)'s command not to "discriminate in respect to the compensation, terms, conditions, or privileges of employment because of sex," as is the case when employers provide unequal life insurance benefits, the practice can be justified *only* by reference to the bfoq exception of section 703(e).

[45] Congress has never legislated to prohibit the actuarial use of sex which results in unequal costs of life insurance to each sex.

or which extends the sex discrimination ban to the insurance industry in general.

C. *Bona Fide Occupational Qualification*

1. Legislative History. — Unlike discrimination based on race, discrimination based on sex can be justified, in certain instances,[46] if it is pursuant to a "bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of that particular business or enterprise."[47] That sex was, along with religion and nationality, to be subject to a bfoq exception seems to have been more intuitively felt than explained by the Act's draftsmen. The sponsor of the addition of sex to the clause, Representative Goodell, merely posed the example of an elderly woman in a nursing home who desires a female nurse.[48] Other congressional examples of cases in which sex was a bfoq were an all-male baseball team[49] and a masseur.[50] The Act thus evidences a judgment that certain functional differences, both physically and culturally defined, exist between the sexes, and that employers can legitimately accommodate such differences in their hiring patterns. Congress, of course, chose to ignore any potential race-defined differences by excluding race from the bfoq exception. Presumably, Congress felt that sex was more likely than race to be a predictor of differences legitimately relevant to employment.

2. The Commission and the Courts. — Commission guidelines on sex as a bfoq stress that the exception should be narrowly interpreted.[51] Generally held assumptions about the characteristics of women as a class of workers do not justify sex discrimination.[52] Nor, they state, do the costs of separate facilities[53]

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[46] As applied to an employer, the words of the Act state it is not an unfair employment practice to "hire and employ" on the basis of sex where sex is a bfoq. Since employers are also forbidden to discriminate in aspects of employment other than the initial hiring process, the question arises whether the bfoq exception applies beyond the threshold determination of whether to hire a person or to employ him in a new position. The words "occupational qualification" seem to connote only a threshold determination. Since section 703(a) expressly prohibits unequal treatment of the sexes in terms of employment, the words "hire and employ" should not be construed, in the absence of an explicit congressional exception, to allow an employer to discriminate once the initial hiring decision is made. *But see* Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 713, 719.

[47] Act § 703(e), 42 U.S.C. § 2000e-2(e) (1964).

[48] 110 CONG. REC. 2718 (1964) (remarks of Representative Goodell).

[49] *Id.* at 7212-13 (1964) (interpretative memorandum introduced by Senators Clark and Case).

[50] *Id.* at 2720 (1964) (remarks of Representative Multer).

[51] 29 C.F.R. § 1604.1(a) (1970). *See also* note 71 *infra*.

[52] 29 C.F.R. § 1604.1(a)(1)(ii) (1970).

[53] *Id.* § 1604.1(a)(1)(iv).

— restrooms, showers, and the like — or the preferences of customers or coworkers.[54]

Federal courts, in applying the strictures of section 703(e), have not agreed upon a standard of justification for an employer seeking to fit his hiring policies within the bfoq exception. One of the first Title VII sex discrimination cases, *Bowe v. Colgate-Palmolive Co.*,[55] involved an employer's rule that female workers were not permitted to lift weights exceeding thirty-five pounds, thus restricting many positions to men. The district court approved the practice, holding that an employer could discriminate between men and women pursuant to a reasonable distinction substantially related to a permissible business goal — production, profit, or business reputation.[56] This approach, however, begs the real question of what means an employer may utilize to achieve these ends, given the confines of Title VII. In allowing any arguably rational basis for discrimination to support a bfoq, the *Bowe* court abdicated its role as the institution that should decide which interests will be sufficient under the bfoq clause to outweigh the mandate of section 703(a).[57]

The most serious drawback of the *Bowe* formulation lies in its broad acceptance of sex-based distinctions, made without regard to individual capabilities. The lower court opinion in *Bowe* stated that due to the unique nature of defendant's operation, individual testing of each applicant's abilities was not practical.[58] But if the only criterion that is relevant is the ability to lift thirty-five pounds, all applicants can be tested to determine if they have the ability to lift as much and as often as the job requires. The Court of Appeals, in reversing the lower court, implicitly recognized this fact and directed the district court to devise a system giving those women employees who so desired a reasonable op-

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[54] *Id.* § 1604.1(a)(1)(iii).

[55] 416 F.2d 711 (7th Cir. 1969), *rev'g in part* 272 F. Supp. 332 (S.D. Ind. 1967).

[56] 272 F. Supp. at 362. This test is akin to the test of validity of a statute under the equal protection clause, *see, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191 (1964); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1076–87 (1969), although in light of the fact that an employer and not an elected legislative body was making the judgment a stricter burden would apply to determine the factual validity of the classification. The test used by the *Bowe* lower court, and much of its analysis of the problem, was taken from a law review note. *See* Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778 (1965).

[57] The broad construction given the bfoq clause by the *Bowe* court was criticized in a subsequent case as being inconsistent with the purpose of Title VII. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

[58] 272 F. Supp. at 356–57.

portunity to demonstrate ability to lift more than thirty-five pounds.[59]

What the *Bowe* courts, both lower and appellate, seem to have missed was a simple yet powerful conception that illuminates the meaning of the bfoq exception. The clause makes reference to "sex" itself as an "occupational qualification." It does not incorporate those attributes more common to one sex than the other as legitimate bases for sex discrimination. While some courts, hesitant to overturn existing employment practices and sex roles, have rejected such a contention,[60] statutory language and all that exists to evidence its purpose point unswervingly in that direction. The few examples given in legislative debate are of positions where sex itself, rather than abilities which are roughly correlated with it, is an essential component of job function.[61] Moreover, examples offered of bfoq exceptions for religion [62] and nationality [63] demonstrate unique qualities inherent

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[59] 416 F.2d at 718.

[60] *See* Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968). In *Gudbrandson*, the court seemed to accept defendant's argument that individual testing of women applicants would read the bfoq clause out of the Act. What that position ignores, however, is a reading of the bfoq clause which limits its scope to those jobs for which maleness or femaleness itself is a job criterion. *See* pp. 1181–86 *infra*. Title VII is not a carte blanche for employer discrimination because of alleged inconvenience of a nondiscriminatory policy. In addition to individual testing, job qualifications can be framed in terms of nonsexual criteria, such as minimum height and weight. However, even these two alternatives may be used to discriminate de facto against women, if the qualification sought is not job related. *See* pp. 1116–18 *supra*. For example, an employer could not, as a subterfuge to hide his otherwise illegal intent to discriminate against women, require all applicants for a job requiring only minimal lifting to be able to lift two hundred pounds.

[61] The Supreme Court's per curiam opinion in *Martin Marietta* seemed to indicate that if substantially all women with young children were disabled from efficient performance of the job, then the employer's policy would be justified under the bfoq exception. Only Mr. Justice Marshall, in a separate opinion, noted that while the case was remanded to the lower court to consider the question of a possible bfoq, the exception would only apply if sex itself, and not an overinclusive correlative of sex, was the characteristic that was the basis of the claim. 91 S. Ct. 496, 498–99 (1971).

[62] The example commonly offered in congressional debates was a theology professor at a religious college. Presumably, belief as well as learning is relevant to such a position. The debate proceeded on the assumption that the janitor's job at such a school would not have religion as a bfoq. 110 CONG. REC. 2585–93 (1964). For a sampling of some of the unique problems presented by claims of religious discrimination, see Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 91 S. Ct. 566 (1971) (No. 835); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969).

[63] The example given in Congress was that of an Italian chef in an Italian restaurant. 110 CONG. REC. 2549 (1964). Even that example should probably be limited to cases in which restaurant patrons are aware of the chef's nationality.

in the religion or nationality itself, rather than characteristics commonly associated with members of those groups. The broad sweep of affirmative obligation on employers not to discriminate ought not to be diluted by a reading of the exception that invites the very sex-based judgment attacked by the statute's main policy. Without evidence that Congress meant to create broad exemptions within the bfoq clause, and without a firm basis in the words of the statute itself, courts should be extremely hesitant to allow employers to judge the individual ability of the applicant on the basis of the average ability held by those of the applicant's sex. If a certain ability — such as strength — is needed to perform a job efficiently, then the employer must make his hiring decision on the basis of job-related abilities, without regard to sex. It is only where the intrinsic attributes of one sex or the other are a necessary qualification for the job that the bfoq clause should come into play.[64]

3. The Weeks Test. — The case that comes closest to this result in practice, if not in theory, also promulgated the most widely accepted interpretation of the bfoq clause. In *Weeks v. Southern Bell Telephone & Telegraph Co.*,[65] the Fifth Circuit held that the employer must show a factual basis, as opposed to a commonly held stereotype, for a reasonable belief that all or substantially all members of one sex would be unable to perform the duties of the job safely and efficiently. The discrimination in *Weeks* involved the alleged inability of women to lift more than thirty pounds. The employer offered no evidence on the issue of the lifting ability of women, but rather based its policy on an unproven assumption.[66] It was on this ground that the court held the policy to be a violation of Title VII.

While the *Weeks* test advanced the judge-made law of bfoq well beyond any earlier decision, its formulation of the bfoq clause has several shortcomings. In allowing discrimination on the basis of sex when less than all women are incapable of performing the job adequately, the *Weeks* test provides none of Title VII's safeguards to those women who can do the job. By keeping out those few women who may be qualified for the job, because all the others would not be, the employer perpetuates the notion that women on the whole are not in fact capable. If one who can perform does not receive an opportunity to do so

[64] *See* pp. 1181–82 *infra*.

[65] 408 F.2d 228 (5th Cir. 1969).

[66] *Id.* at 235–36. In Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969), the court detailed medical evidence offered by both parties concerning physiological differences between the sexes relating to ability to lift heavy weights. The court decided that selection on the basis of sex was reasonable, but was unlawful under *Weeks* since 25–50% of females could do the job.

and to kill the stereotype, the image will become self-perpetuating. By the use of its "all or substantially all" test, the *Weeks* formulation excuses the employer from showing that individual testing is not possible. It might be possible to rephrase the qualifications needed in other terms — such as height and weight — so that they are just as efficient in predicting job success,[67] but do not discriminate on the basis of sex. Even in cases where substantially all women would not fulfill a valid qualification for the job, the cost of testing individual ability might be negligible.[68]

In other cases, though, where jobs have traditionally been held only by one sex, the cost of developing a test more efficient at predicting job success than sex may be substantial.[69] Such a case raises the broader question of the relationship between the employer's obligation not to discriminate on the basis of sex and the economic consequences to him of that obligation.[70]

The statute offers no exception based on cost — either costs of testing or any other cost associated with ending discrimination — to be borne by employers ordered to cease sex discrimination.[71] The words of the exception allow an employer to discriminate only when the job requires sex itself as a bfoq, and not when the characteristics commonly associated with sex or the savings accompanying discrimination on the basis of sex make the job's operation more profitable for the employer. If the cost of changing a discriminatory hiring policy gave rise to a bfoq, it would allow an employer to enshrine the status quo that the Act was meant to change.

The final problem with the *Weeks* formulation is that it fails to articulate exactly what types of "duties of the job" are valid

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[67] *See* note 60 *supra*.

[68] In a footnote, the *Weeks* court hinted that if an employer could show individual testing was impossible, he could discriminate on the basis of sex by applying a *reasonable* general rule, rather than by applying the stricter "all or substantially all" test. 408 F.2d at 235 n.5.

[69] The costs of validating a test may be quite high. *See* p. 1122 *supra*.

[70] In one survey of 78 business executives, one in seven said that there were more costs in the employment of women than men. Cited as factors were insurance benefits for maternity, annuities due to greater life expectancy, transportation at night, sanitary facilities, training, men doing the lifting for women, and greater turnover and absenteeism. BUREAU OF NATIONAL AFFAIRS, SEX & TITLE VII 7 (Personnel Policies Forum, Survey No. 80, April, 1967).

[71] Commission guidelines state that employer discrimination due to the cost of separate facilities is not justified unless the expense is unreasonable. 29 C.F.R. § 1604.1(a)(1)(iv) (1970). The Commission has applied the exception narrowly. When a ship owner claimed that he could not hire any women crew members because Coast Guard regulations required showers to be segregated by sex, with separate showers for each eight crew members, the EEOC said eight women could occupy places formerly held by men and therefore effect a costless solution. 1 CCH EMPL. PRAC. GUIDE ¶ 6081, at 4123–24 (1969).

ones to which an employer may apply the standard. For example, one of a lawyer's duties may be to attract clients. Some potential clients will refuse to hire female lawyers because they believe men are more competent at performing legal tasks. Yet a law firm's refusal to hire females on this basis is precisely the kind of sexual stereotyping and product of past discrimination the Act aims at eliminating. In order to understand what types of jobs may give rise to a bfoq, the purpose of the exception must be examined.

4. Sex as Essential to Performance. — There are certain jobs for which the sex of the employee is so essential to the service offered that a member of the opposite sex simply could not do the same job.[72] The simplest example of a position for which the employee's sex would be such an essential ingredient would be one that required the physiological structure of one sex, such as a wet nurse. If a position is not one which allows only one sex to perform any of its functions, sex cannot be a bfoq. Sex, in other words, can be a bfoq only when an unbiased, reasonable person would perceive the service offered by two employees as essentially different if the employees' sexes were different.

(a) Fulfilling Customer Psychological Needs. — Commission guidelines state that the preferences of clients or customers for employees of one sex do not as a general rule give rise to a bfoq.[73] The purpose of certain jobs, however, is to make a person react emotionally or psychologically in a certain manner. Unless the customer psyche can be affected in the desired way, the purpose of the service offered may be negated. The attributes of one sex may, in certain instances, be an essential ingredient if the desired effect is to be achieved. Thus, a customer demand for authenticity would make sex a bfoq for acting or modeling positions.[74]

Though a member of one sex disguised as a member of the other could pass in some situations requiring authenticity, popular attitudes about transvestitism would surely result in a less effective performance once consumers discovered the switch. Jobs which demand authenticity require their occupants to imitate various roles which occur outside the work situation, roles which often have sex as an essential component. Though Title VII attempts to correct misapprehensions and stereotypes based on sex, it does not attempt to further the proposition that men and

[72] For another formulation of the notion that in order for the discrimination to qualify as a bfoq it must be essential to the operation of the business, see Note, *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment*, 42 S. CAL. L. REV. 183, 196–97, 200 (1969) (necessity should be the test).

[73] 29 C.F.R. § 1604.1(a)(1)(iv) (1970).

[74] The E.E.O.C. agrees with the conclusion stated in text, though its reasoning is not articulated. *See id.* § 1604.1(a)(2).

women are interchangeable for other, nonemployment purposes.

The sex of an employee cannot be an essential element of a job that caters to a psychological need of the customer, unless the job is one such that the need for the job's service automatically carries with it a need for an employee of one particular sex. For example, a party seeking legal help has no specific need for one sex or the other. If that person questions the competency of the attorney only when he sees that the attorney is a woman, fulfilling the "need" of the client for a male attorney would not give rise to a bfoq. This is so because a customer belief that either sex is incapable of performing a task whose performance is in all its essentials irrelevant to sex is precisely the target of Title VII's ban on sex discrimination. On the other hand, if a man pays a dating service for an escort for the evening, the inseparable relationship of femaleness to the customer's need would make the employee's sex an essential ingredient of the job.

An occupation which has troubled the courts and the Commission in applying the bfoq exception is that of flight cabin attendant. Airlines claim that such attendants, besides being combination hostess and waitress, also serve the important psychological function of reassuring passengers who are anxious about flying. Many airlines further claim that most females can perform this function better than most males, and accordingly refuse to consider males for the position. Although Commission guidelines, promulgated after hearings on the subject, state that sex is not a bfoq for flight cabin attendants,[75] a federal district court in Florida held to the contrary in *Diaz v. Pan American World Airways, Inc.*[76] The *Diaz* opinion is notable in its treatment of customer preference as a basis of a bfoq exception. The defendant airline produced as an expert witness psychiatrist Dr. Eric Berne, who testified that an airplane cabin is a unique psychological environment which presents a stress situation to some of the passengers. The court accepted his testimony that the nature of the differences in the passengers' psychological perceptions of flight cabin attendants makes female flight cabin attendants far more effective in fulfilling these special psychological needs.[77] A second expert testified that no test of the necessary qualities is as effective a predictor as sex.[78] If sex were not a bfoq, the court concluded, the quasi-therapeutic job of alleviating the psychological strain experienced by the passengers would be done less effectively.

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[75] 33 Fed. Reg. 3361 (1968).

[76] 311 F. Supp. 559 (S.D. Fla. 1970).

[77] *Id.* at 565–66.

[78] *Id.* at 567.

Yet even if women are generally more successful in reassuring passengers, a proposition which is hardly self-evident, sex should not be a bfoq for the position. So long as the sex of the employee is not *determinative* of the question of whether the employee possesses the necessary qualifications, sex cannot be an *essential* ingredient of the job. Some men are capable of meeting the qualifications for flight cabin attendants, although individual testing may not be as good a predictor as sex. If passengers at present do perceive females as more reassuring than most males, then for a time some will suffer more anxiety when these males are in attendance. But careful hiring of males sensitive to passenger needs should eventually counter such feelings. Moreover, real harm to anxious passengers in the interim is not readily foreseeable.

(*b*) *The Inseparability and Dominance of Sex-Based Aspects of the Job.* — Examples given thus far of jobs for which sex is a valid bfoq — wet nurse, actress, model, and escort — are positions which involve one basic function whose effective performance is integrally related to the sex of the performer. There remains, however, a wide range of jobs which require a multitude of duties, only some of which demand a particular sex for their performance. For such positions, the need for one sex to perform a particular duty is insufficient in itself to qualify for the exception. Were this not the case, employers could too easily avoid the strictures of section 703(a) by so defining their jobs as to include at least one duty capable of fulfillment by only one sex.

If an employer can establish that sex is essential to a particular duty, a second level of inquiry should focus on whether it is plausible to require the employer to separate the sexual from the nonsexual aspects of the job. Because of the heavy presumption against allowing one sex to monopolize an occupation whose duties can be performed by members of either sex, employers should be required, wherever possible, to separate the functions for which sex is essential from those for which sex is nonessential, and to hire on a nondiscriminatory basis for the latter. The position of dean of women at a college [79] may serve to illustrate the separability concept. The occupant of such a position must perform a variety of functions, including counseling, administrating, and meting out discipline. Assuming, arguendo, that the college could prove that only a woman could adequately counsel female students, sex should not be a bfoq for the deanship because the school could reasonably be required to split the job

[79] The need for sex as a bfoq was pointed out in congressional debate by just this example. 110 CONG. REC. 2721 (1964) (remarks of Congresswoman Green).

functions, hiring only women as counselors while hiring without regard to sex for the administrative and disciplinary tasks.

For most positions in which sex is at least partially essential, however, separation of function will seriously hamper the sex-based aspect of the job. Yet even these positions should not give rise to a bfoq unless the sex-based function so pervades and dominates the nonsexual duties of the job that what is being offered by the employer is simply not the same if the employee is not of a particular sex. What proportion of job functions must be sex-related in order to qualify under this standard cannot be stated with mathematical precision. Some benchmarks for analysis would be the employer's, the employee's, and the consumer's common understanding of the nature of the position, the atmosphere in which the job is performed, and common practice in the trade in question.

The area in which this analytical framework is most likely to be utilized is the use of sexual attraction of employees to lure customers.[80] Title VII cannot be read to require all employers to be sex-blind in this regard. Although jobs which require sex appeal may exploit their occupants as sex objects, Title VII was designed only to change existing patterns of employment and the stereotypes that abound concerning the capabilities of each sex for particular jobs. It was not designed to change other views that society holds about sexuality.

If one duty of the position is luring customers of the opposite sex, sex is clearly essential to the performance of that duty. And for most cases of this sort, the function of sexual allure cannot be separated from the nonsexual functions of the position without substantial loss of effectiveness. Where the employee is present to give personal service and is likely to come into close physical contact with customers, utilization of two employees — one to do nothing more than look sexy and the other to perform more mechanical functions, such as retail selling or waiting on tables — will simply not produce the psychological reaction the employer is seeking.

In cases of bfoq claims for jobs involving sex appeal, therefore, the issue can generally be narrowed to whether the sexual aspects of the position sufficiently dominate the other aspects to

[80] In *Diaz*, the court noted, in a narrative of the history of the position of flight cabin attendants, that women stewardesses were first used to attract passenger service. 311 F. Supp. at 562. Until recently, Delta Airlines had a flight between Newark and Chicago for men passengers only; the flight's appeal was based on the attention the passengers would receive from the pretty hostesses. This flight was discontinued after complaints from the National Organization for Women. For other, more explicit, examples of the commercial use of sex appeal, one need only look at any advertising medium.

allow discrimination in hiring. For some occupations — a topless waitress, for example — the aura of sex appeal so pervades all other functions of the position that being a woman is a necessary condition for successfully performing the other tasks involved.[81] While no bright line separates positions whose dominant function is sex appeal from those whose dominant function is otherwise, the nature of the employer's operation may illuminate such an inquiry. The small class of dominant-function positions will almost invariably be associated with an atmosphere of vicariously sexual recreation, as in a nightclub.

For many other occupations, sex appeal may be useful in attracting customers of the opposite sex, but its absence will not significantly alter the essential purpose of the employer's operation. Occupations concerned primarily with providing a service of nonrecreational and nonsexual utility do not, as a general rule, demand sex appeal to the degree necessary to label sex a bfoq. Allowing the need for sex appeal to give rise to a bfoq exception in such a case would enable employers to discriminate freely on the basis of sex by tacking sex appeal onto the job requirements of virtually any position that required contact with customers of the opposite sex.

Denying sex as a bfoq in those positions where sex appeal is not the dominant function of the job would not, of course, end the commercial use of sexual attractiveness. Even an employer hiring a sexually integrated work force could require of both men and women employees the quality of sexual allure if it were job-related. Thus, an employer retains the option of using sex appeal in a nondiscriminatory manner.

(*c*) *Unalterable Conditions.* — Finally, there are a few tasks the performance of which an unbiased person would say is irrelevant to sex, but which may nevertheless give rise to a bfoq because of unusual conditions which are considered unalterable.

In the congressional debates, the societal desire for sexual privacy was considered such an unalterable condition.[82] The occupation of restroom or locker room attendant, for example, is one which is conventionally considered appropriate only for a

[81] A related concept is the use of members of one sex to add a certain atmosphere to the business, such as the use of male waiters who allegedly add "class" to a restaurant. Of course, the very premise underlying such a feeling — that males are superior beings and that being served by males is thus a more elevating experience — is itself so inconsistent with the philosophy of nondiscrimination as to require out-of-hand rejection. Such a qualification as "class" is too subjective and amorphous ever to be permitted, as no rational cutoff point could be drawn. The EEOC has ruled that just such a claim is not the basis of a bfoq. 1 CCH EMPL. PRAC. GUIDE ¶ 8583 (1969).

[82] In debate, Representative Goodell offered the example of an elderly woman who desires a female nurse. *See* note 48 *supra*.

member of the sex that uses the facility.[83] While such strongly held taboos are analytically similar to consumer preferences which are forbidden by the Act,[84] they may be less objectionable since their net effect does not foreclose a significant portion of the job market to either sex. Moreover, operation of these taboos does not brand one sex or the other as incompetent to perform the job.[85] Rather, it posits that the mere presence of a member of the wrong sex would be too disruptive.[86]

Sex may also be a bfoq for positions whose occupants face cultural bias outside the effective reach of the statute. For example, men only could be hired for a position that called primarily for business dealings with a foreign culture in which women are totally unacceptable in a business context.

D. The Problem of State Protective Laws

One of the most troublesome areas in the development of the law concerning the scope of the bfoq exception under section 703(a) has occurred as a result of the many state laws which purport to protect women in their dealings with employers.[87] For example, a state may have a statute prohibiting the employment of women in jobs that require lifting more than thirty-five pounds.[88] If an employer refuses to hire a woman for such a job, he is obeying the state statute. But unless his action is pursuant to a bfoq, or he applies the stricture of the state law to men as well as women, he violates Title VII. If the two statutes are in direct conflict, the Supremacy Clause [89] dictates that Title VII take precedence — the state statute cannot, in such a situation, provide a defense to a Title VII action.[90] In general, though, courts

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[83] In protesting the addition of sex to Title VII, one Congressman raised with alarm the prospect of a masseuse in the House gymnasium. 110 CONG. REC. 2720 (Feb. 10, 1964) (remarks of Representative Multer).

[84] *See* p. 1181 *supra*.

[85] *Cf.* Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 231, 240 (1967) (separate dormitories or toilet facilities do not imply inferiority).

[86] In much the same category is the case in which the person who is receiving the service performed by the employee is acknowledged to have a mentally disturbed state of mind. Sex would be a bfoq for any position that required close contact with a dangerous psychopath who is likely to become violent when in proximity to a woman attendant. In such a case, considerations of mental health as well as worker safety should predominate.

[87] *See generally* Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L.J. 344, 347 (1967).

[88] *See* note 11 *supra*.

[89] U.S. CONST. art. VI.

[90] *See, e.g.*, Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968).

— applying principles of federalism [91] — would strive to avoid a direct conflict. Since the common view of such state statutes is that they, as well as Title VII itself, were enacted to protect women, a conflict of good intentions has caused a great deal of confusion with respect to how the two types of statutory schemes should mesh.[92]

Some state protective laws require that employers extend a benefit to women, such as a minimum wage [93] or a rest period.[94] A second type of protective legislation places limits on the time or nature of work performed by females. Included in this category are laws which regulate the number of hours women can work,[95] the number of pounds they can lift,[96] the times of day they can work,[97] and the amount of occupational safety risk they can assume.[98]

1. Evolution of the EEOC Position. — The Commission in its five-year history has taken alternating positions on the question of restrictive state protective laws. The initial guidelines on sex discrimination released in December, 1965, stated that those state protective statutes that actually protect women would be a basis for a bfoq exception,[99] but those that subject women to discrimination would not.[100] Restrictions on lifting weights which were

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[91] *See* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435–36 (1953); *cf.* Maurer v. Hamilton, 309 U.S. 598, 614–15 (1940); Gilvary v. Cuyahoga Valley Ry., 292 U.S. 57, 60 (1934). *See also* Hill v. Florida, 325 U.S. 538, 547–56 (1945) (Frankfurter, J., dissenting).

[92] *Compare* Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 326 (1968) (state protective laws presumptively valid) *with* Note, *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment*, 42 S. CAL. L. REV. 183, 204 (1969) (all state protective laws should be invalidated by Title VII in the interest of efficiency).

[93] *See, e.g.*, MINN. STAT. § 177.07(1) (1967). Seven states have minimum wage laws operative only for women or for women and minors. HANDBOOK 261.

[94] *See, e.g.*, KY. REV. STAT. § 337.365 (1962). Twelve states plus Puerto Rico have provided for specific rest periods, as distinct from a meal period, for women workers. HANDBOOK 274.

[95] Forty-one states plus the District of Columbia and Puerto Rico have some type of maximum hour restriction applicable to women and not to men. HANDBOOK 271.

[96] *See* note 11 *supra*.

[97] Eighteen states plus Puerto Rico prohibit night work for women in certain occupations. HANDBOOK 275.

[98] *See* note 12 *supra*.

[99] Several commentators have expressed the idea that some state protective laws should be given a presumptive validity in light of the benevolent purpose they serve and the fact that many women might want this type of protection. *See* Kanowitz, *supra* note 92, at 326; Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 139 (1968).

[100] 30 Fed. Reg. 14,926–27 (1965).

set at an "unreasonably low level which could not endanger women" were given as an example of a protective statute which would discriminate rather than protect. In cases where the state regulatory scheme provided for administrative exceptions to the general rule — such as exempting certain women employees in key positions from the maximum hour restrictions during peak periods of operation — the employer was expected to make a good-faith effort to obtain such exceptions.

In August, 1966, the Commission announced it would not make determinations on the merits in cases involving state protective legislation where administrative exceptions were unavailable.[101] The EEOC would advise the charging parties of their right to sue and to get a judicial determination of the validity of the state law, reserving the right to appear as amicus curiae in such cases.

In February, 1968, the Commission returned to its original policy.[102] In August, 1969, the present position was adopted:[103]

> (1) Many States have enacted laws . . . with respect to the employment of females . . . .
>
> (2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws . . . will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

2. The Remedy of Extension. — There are three possible resolutions of the conflict between a state law that requires different treatment of the sexes and a federal law that seeks to establish sex-blind employment criteria. First, the federal court in which the Title VII claim is adjudicated could require the employer to extend the treatment mandated for women by the state to men employees as well.[104] This approach has the merit

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[101] DIGEST 23 (1966) (Commission Guidelines issued Aug. 19, 1966).

[102] 33 Fed. Reg. 3344 (1968).

[103] 29 C.F.R. § 1604.1(b) (1970). The attorneys-general of several states have issued opinions saying that the protective legislation of their jurisdictions was preempted by Title VII or invalidated by state nondiscrimination laws. *See, e.g.*, 1 CCH EMPL. PRAC. GUIDE ¶ 5105 (1969) (Att'y Gen'l of Oklahoma); *id.* ¶ 5101 (1970) (Att'y Gen'l of Wisconsin).

[104] *See* Potlach Forests, Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970) (employer ordered to comply with both Title VII and state law that required

of accommodating the interests expressed by both the state and federal statutes.[105]

State laws that extend benefits to women are particularly susceptible to this treatment.[106] It is both simple and effective to order an employer to provide both men and women with a short rest period, or with premium pay for overtime. On the other hand, those laws which limit the hours or type of women's employment cannot in all cases be extended to men without serious difficulties.

Extension is a remedy to be used only where it operates to further, rather than deny, the interests of both legislatures involved in the potential conflict. Thus, extension is absurd for state laws that totally disqualify one sex from a particular occupation, because the intent of the state legislature could not have been to ban such occupations entirely.

For those state laws whose extension will result in practical burdens on only some employers, the issue becomes more subtle and complex. A maximum-hour law for women, for example, could be extended to men as well by certain employers with little or no difficulty. On the other hand, the operations of some employers would be so heavily burdened that extension is undesirable because it does not successfully accommodate both statutory interests. But the line at which to set the acceptable burden on employers in imposing maximum-hour restrictions on all employees is not easily drawn by a court sitting in judgment of a Title VII case. A practicality-of-extension test would subject employers who have not yet faced litigation to a substantial uncertainty about their own legal obligations. Employers who attempted to obey federal law by violating a state statute, under the impression that federal law gave them an immunity from state prosecution,[107] might be liable under the state statute if their federal obligation were merely to extend the state-mandated treatment to all. Since employers would in most cases prefer to ignore the state restrictions on female employees, rather than restrict their males as well, an intolerable amount of friction would ensue. The degree of uncertainty present in the case where the employer's liability under state law would depend on the impracticality of extension would be highly burdensome. With a concept as elusive as the practicality of extension, prior decisions would offer little guidance to an individual employer. Moreover,

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daily computation of overtime for women by extending treatment to men employees); Kanowitz, *supra* note 92, at 335.

[105] *See* pp. 1194–95 *infra*.

[106] *Cf.* DIGEST 24 (Opinion Letter issued Mar. 1, 1966).

[107] *See* pp. 1191–92 *infra*.

uncertainty about liability under a criminal statute is generally a greater burden than possible civil liability.[108]

In addition to the problems inherent in an extension doctrine applied on a case-by-case method, it is difficult for a federal court to determine whether to extend the state statute even in those cases where it is possible. The calculus of social and economic costs and benefits involved in a statute such as maximum-hour legislation is a complex one, and federal courts are unlikely to express with any accuracy the judgment of the state legislature in deciding whether a maximum-hour law, or any other restrictive policy, ought to be applied to men as well as women. If the *raison d'etre* of the extension remedy is accommodation, laws which restrict utilization of females do not present a persuasive case for its use.

3. The Need for Federal Supremacy. — When extension is unavailable for such restrictive statutes, the remaining choice is between ordering the employer to violate the state statute by employing women for a previously restricted position,[109] and allowing the employer to continue his state-supported discrimination by labeling sex a bfoq.[110] Placed in the context of the prior analysis of the bfoq clause, state protective laws do not meet the necessary criteria. Almost all such laws are overinclusive, since they disqualify many women from employment in situations where their individual ability does not merit disqualification — as would be the case with maximum-weight restrictions.

State protective laws that are by their terms applied on the basis of sex fall prey to the same faults that were pointed out in the *Weeks* formulation of the bfoq clause. Even if factual evidence shows that substantially all women cannot perform the job safely — and not all state protective laws possess such a valid underlying premise [111] —Title VII guarantees women that their employment qualifications will be judged on individual merit.

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[108] In order to avoid the uncertainty concerning conflicting liabilities where a federal Title VII suit reaches one result and a state criminal prosecution might reach the opposite result, some employers have brought a declaratory judgment action in federal court to have prosecution of the state protective statute enjoined. *E.g.*, Caterpillar Tractor Co. v. Grabiec, 1 CCH EMPL. PRAC. GUIDE ¶ 9522 (S.D. Ill. 1970) (invalidation of Illinois statute setting maximum hours for women). Employers not covered by Title VII would presumably still be subject to state prosecution.

[109] *See, e.g.*, Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968) (California maximum-weight law for women not the basis of a bfoq).

[110] *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967), *rev'd*, 408 F.2d 228 (5th Cir. 1969).

[111] For a list that contains the extremes to which state protective laws go, see HANDBOOK 273–79.

Such state laws abridge that guarantee with respect to those women who neither need nor want the state's protection.

On behalf of such state protective laws, it can be argued that they serve to protect the health, safety, and morals of female workers. Moreover, the field of regulating employment relations has always been occupied at least in part by state law, making it arguable that Title VII was not intended to end all such regulation.[112] Given the bfoq exception as a convenient handle with which to reconcile the otherwise direct conflict of state and federal law, it is not surprising that some courts have adopted the compromise approach of allowing such state-directed sex discrimination.

Nevertheless, the arguments for ordering employers to ignore conflicting state law seem compelling. While congressional intent is no more lucidly expressed on this issue than on any others in the sex discrimination field, it at least provides evidence that Congress made no attempt to preserve state protective laws with the bfoq exception. The bfoq clause seems designed to preserve sex discrimination in only a small range of highly specialized jobs.[113] And Title VII's one antipreemption provision [114] was added to the Act before sex was added as a forbidden category for discrimination.[115] The provision clearly was intended to preserve intact state fair employment practice laws,[116] and its draftsmen, given the statutory chronology, could not have meant expressly to preserve state protective legislation.

More fundamentally, the Supremacy Clause does not allow sex to be made a bfoq at the command of state statutes. Such a compromise of Title VII's scope would make the state protective law "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [117] State protective legisla-

[112] *See* H.M. HART & H. WECHSLER, *supra* note 91, at 435–36.

[113] *See* pp. 1181–86 *supra*.

[114] Section 708 of the Act provides that Title VII does not relieve anyone from liability under any state law other than one which purports to require the doing of an act which would be unlawful under Title VII. Act § 708, 42 U.S.C. § 2000e–7 (1964).

[115] The Bill as originally described in a House report appearing in November, 1963, ocntained an antipreemption section. H.R. REP. No. 914, 88th Cong., 1st Sess. 13 (1963). Sex was added to the Act on Feb. 8, 1964. 110 CONG. REC. 2577 (1964).

[116] A House report on an earlier version of Title VII without its sex discrimination provisions specifically described a section identical to § 708 as an antipreemption provision, directed precisely to such state F.E.P. laws. H.R. REP. No. 1370, 87th Cong., 2d Sess. 14 (1962).

[117] Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Justice Douglas, in the leading case of Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), stated that state and federal regulation of the same or related fields could not coexist when:

> the object sought to be obtained by the federal law and the character of

tion by definition does express a policy in conflict with the general purpose of Title VII. A state law which applies to women and only women as a class directs the employer to treat them differently because of their sex even when the differential treatment in an individual case may not be justified. On the other hand, Title VII seeks essentially to make sex irrelevant to hiring decisions, unless a valid sex-based distinction is present in every individual case. Although Title VII is thought to protect women, since women are more often than men the victims of sex-based hiring criteria, the protection is not paternalistic,[118] and the approach taken by Title VII clashes abruptly with the state protective legislation that applies to only one sex.

While overinclusive protective statutes may withstand constitutional attack based on the equal protection clause,[119] the effec-

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obligations imposed by it . . . reveal [a congressional purpose to exercise all regulatory authority] . . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

Id. at 230. *See also* Hill v. Florida, 325 U.S. 538, 542–43 (1945).

The supremacy of federal law in cases of statutory conflict, moreover, is not denied simply because the state law "is enacted in the exercise of otherwise undoubted state power." *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964). And trends in constitutional adjudication under the equal protection clause make the power of states to classify on the basis of sex something less than undoubted. *See, e.g.*, Kirstein v. Rector & Visitors, 309 F. Supp. 184 (E.D. Va. 1970); note 119 *infra*.

[118] *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) (with reference to a claim that women could not safely work late hours: "Title VII rejects just this type of romantic paternalism . . . .").

[119] *See generally Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1086–87 (1969).

Constitutional attacks on state protective legislation have not met with great success. In the earliest cases, the statutes were attacked not on the ground that they operated to discriminate against women, but that they abridged the notion of economic due process that was articulated in Lochner v. New York, 198 U.S. 45 (1905). Long after the emphasis of the attack has shifted, courts are still answering the new grounds of argument based on the equal protection clause with the justifications used in 1908 in Muller v. Oregon, 208 U.S. 412 (1908), to meet the old economic due process claim.

In *Muller*, the Supreme Court upheld a maximum-hour law for women, saying that there was significant legislative opinion supporting the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." 208 U.S. at 420. In Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 950, 954–55 (C.D. Cal. 1968), a three-judge district court, hearing a challenge to the constitutionality of a California regulation prohibiting women from working more than a set number of hours per week, felt bound by *Muller* even though the district court recognized that *Muller* was based on medical evidence that is now 60 years old and was influenced by a social view of women as inferior to men that is much less prevalent today, and that economic conditions existing at the turn of the century are no longer present.

Equal protection arguments are met with a Supreme Court decision that is

tiveness of Title VII depends on eliminating the stereotyping of women in the field of employment. Although the legislative judgment of a state may deem it in the public interest to sacrifice the interests of a few women for a greater social goal, the legislative judgment of Congress, embodied in Title VII, seems to require that individual women stand on their own merits, and that neither sex possess an advantage in employment opportunities. Moreover, if Title VII did not preempt state protective statutes, the federal interest in uniformity of antidiscrimination policy would be left to the mercy of fifty state legislatures, each faced with employer and male-worker lobbying pressure. Accommodation of state protective policies might thus be an invitation to subversion of the federal interests expressed in Title VII.

This view of the relation of state protective laws to Title VII — demanding the invalidation of virtually all such state legislation — has the further consequence of making unnecessary the application of the abstention doctrine in litigation under Title VII where the validity of a state protective law is joined as an issue. Several federal courts, working overtime to accommodate state and federal interests, have refused to adjudicate such issues on the ground that unsettled questions of state law in the application of the statute require that the federal judiciary await a state court settlement of the question.[120] This doctrine remits a plaintiff to attacking the statute on non-Title VII grounds in a state court,[121] or waiting until someone with proper standing — pre-

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far more damaging than *Muller* — the case of Goesaert v. Cleary, 335 U.S. 464 (1948). There, Mr. Justice Frankfurter declared that a state could without question forbid all women from working behind a bar, since the "Constitution does not require legislatures to reject sociological insight, or shifting social standards . . . ." 335 U.S. at 466. However, the rising tide of feminine equality may soon make sex a "suspect" basis for classification, triggering a strict standard of judicial review. *See* Kirstein v. Rector & Visitors, 309 F. Supp. 184 (E.D. Va. 1970) (all-male state university violates equal protection). *See generally Developments in the Law, supra*, at 1124–27. *But see, e.g.*, Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968) (different Social Security benefits to the two sexes is not violative of equal protection since there is rational relationship between permissible goal and means used).

Several commentators have argued for a strict standard of review on the grounds that the right to employment is a basic right. *See* Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 166 (1968); Rawalt, *Litigating Sex Discrimination Cases*, 4 FAMILY L.Q. 44 (1970).

[120] *See, e.g.*, Sarfaty v. Nowak, 369 F.2d 256 (7th Cir. 1966), *cert. denied*, 387 U.S. 909 (1967); Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968); *cf.* Coon v. Tingle, 277 F. Supp. 304 (N.D. Ga. 1967).

[121] The federal courts have exclusive jurisdiction under Title VII. Act § 706(f), 42 U.S.C. § 2000e-5(f) (1964).

sumably an employer covered by the Federal Act — validly asserts Title VII as a defense to a state prosecution in which the undecided question is resolved. The former approach in many cases [122] leaves open to an aggrieved party only a constitutional attack on the statute in a state court,[123] a course which offers little hope of success compared to a Title VII action. And the latter alternative is grossly inadequate since the plaintiff must wait for other parties to initiate the action. The inadequacy of the state forum in most cases should be enough to motivate federal adjudication of the scope of federally protected rights. More essentially, if state legislation restricting females is presumptively invalid, the rationale for abstention is substantially lost. If a state law must fall regardless of the gloss put upon it in the state court, no state interest is served by awaiting that gloss before federal adjudication proceeds.[124]

4. Alternatives for Preserving State Protective Interests. — Even assuming the necessity for state protection of those women who desire it, the alternative exists of defining the protected class in nonsexual terms. If such "protection" is desirable for the women who need it, then it should be offered to the men who need it as well. In the interim between judicial invalidation of a state protective statute and any nondiscriminatory legislative response, some of those who need the statute's protection will be without it. When confronted with a state protective statute prohibiting overtime work for women, for example, some courts may hesitate to impose the "burden" of such work on women who might not want it.[125] If an employer would find it more profitable to make his female employees work overtime once the legal barriers to such work were removed, he would presumably

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[122] Other grounds in a state court attack on protective legislation might be based on a state fair employment practices act, *see, e.g.*, Longacre v. State, 448 P.2d 832 (Wyo. 1968), or on the state constitution, *cf.* Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956, 960 (C.D. Cal. 1968).

[123] *See* note 119 *supra*.

[124] Abstention should not be ordered where the state statute would be invalid no matter how it was construed by the state courts. *See* Harman v. Forssenius, 380 U.S. 528, 534–35 (1965); Baggett v. Bullitt, 377 U.S. 360, 375–79 (1964). An exception might be made for those cases in which a state law arguably violates the state constitution, since the state courts do retain an independent interest in adjudicating their own constitutional questions. *Cf.* Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968).

[125] One judge warned that if maximum hour restrictions were removed:

> it would not then be just a matter of allowing women to work overtime when they choose to do so, but they would be subjected to the obligation to work more hours whether they want to or not under the penalty of being discharged. We are not convinced that all women would want such obligation.

Ward v. Luttrell, 292 F. Supp. 165, 168 (E.D. La. 1968).

do so. Being fired for refusal to work overtime is not within the protection offered by Title VII.[126] Such solicitude is ill placed, though, in view of Title VII's establishment of individual ability over sex-group stereotyping. Men have gotten along well without such prohibitions against overtime. Overtime itself is often a sought-after commodity, providing an opportunity to supplement normal paychecks. This is enhanced by the operation of the Fair Labor Standards Act which requires premium rates of pay for overtime hours.[127] The rationale behind the premium pay provision is that it is supposed to act as a deterrent to excessive overtime. This protection is all that most legislatures feel that men require.[128]

Even if women need protection from compulsory overtime much more than men, solicitude for the fact that most women workers must also tend house and raise children could be better served in ways other than restricting their work hours. State-provided child day-care centers [129] could be extended, and greater tax deductions for the added costs of employment could be allowed to women who must pay more as a necessary expense of working outside the home.[130] Judicial invalidation of state protective legislation applicable to those employers covered by Title VII will allow women to face the job market free from restrictive requirements, and will force state legislatures to deal with the attendant problems in a nondiscriminatory manner.

III. Procedure Under Title VII

A. Introduction

Title VII proscribes discrimination based on race, religion, color, sex, or national origin in practically every phase of the

[126] Digest 26 (Opinion Letter issued Oct. 12, 1965). A requirement of compulsory overtime may have a disproportionate effect on women, who generally are responsible for tending to their children in the evening. Absent a valid business justification, a compulsory overtime scheme may be de facto unlawful discrimination against females.

[127] 29 U.S.C. § 207(d)(5) (1964).

[128] Some commentators have argued that maximum-hour legislation would have been passed for men also but for the fact that decisions such as Muller v. Oregon, 208 U.S. 412 (1908), made it seem that it was only the factor of women's frailty that saved the maximum-hour laws from economic due process attack. *See* Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 239–40 (1965).

[129] In a message to Congress accompanying his program for reform of the welfare system, President Nixon proposed a major expansion of day-care facilities so that welfare recipients could find employment. H.R. Doc. No. 91–146, 91st Cong., 1st Sess. (1969).

[130] *See* Int. Rev. Code of 1954, § 214 (deduction of expenses for care of children under thirteen in order to enable female taxpayer to be gainfully employed).

employment relationship. Although the substantive provisions of the Act appear quite sweeping, closer analysis reveals a number of tensions inherent in this product of political compromise.[1] Underlying Title VII is the public interest in eliminating employment discrimination in order to guarantee to minorities the economic status necessary to a free society [2] and to insure maximum utilization of human potential.[3] But the Act also reflects the private individual's interest in securing equal employment opportunity. Similarly, there is a tension between the judgment that informal, private, and local methods of eliminating employment discrimination are preferable,[4] and the desire for prompt, judicial redress of discrimination grievances.[5]

These tensions are apparent in the Act's procedural mechanisms. The Act provides for three instrumentalities of enforcement: the aggrieved individual; the Equal Employment Opportunity Commission (EEOC); and the Attorney General. The aggrieved party bears the primary responsibility for enforcing Title VII through the mechanism of a private action in federal district court.[6] The EEOC, which as the bill was originally conceived [7] bore the primary enforcement responsibility, lost its adjudicatory and coercive enforcement powers through a series of political compromises.[8] This shift in responsibility for enforcement of the Act has been characterized as a

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[1] *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 64–68 (1964); Vass, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966) [hereinafter cited as Vass].

[2] *See* Affeldt, *Title VII in the Federal Courts — Private or Public Law*, 14 VILL. L. REV. 664, 666 (1969) [hereinafter cited as Affeldt].

[3] *See* Note, *Title VII of the Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J. LAW & SOCIAL PROB. 1, 7 (1969).

[4] *See* Act §§ 706(a) and (b), 42 U.S.C. §§ 2000e–5(a) and (b) (1964).

[5] *See* Act §§ 706(e), 707(a), 42 U.S.C. §§ 2000e–5(e), 2000e–6(a) (1964).

[6] Act § 706(e), 42 U.S.C. § 2000e–5(e) (1964).

[7] As the enforcement scheme was originally conceived in the House, the EEOC was to be empowered to issue complaints, conduct hearings, and issue enforceable cease and desist orders much like the National Labor Relations Board. H.R. 405 §§ 9(c), 9(j), 10(a), 88th Cong., 1st Sess. (1963). For a discussion of the merits of such a proposal, see pp. 1270–75 *infra*.

[8] The House Committee on the Judiciary stripped the EEOC of its enforcement powers and substituted a power to institute a court action in its own name against the discriminator when attempts at settlement had failed. H.R. 7152, 88th Cong., 1st Sess. (1963). The reasons suggested for the change were: the belief that a de novo court action would facilitate more rapid and more frequent settlements, the belief that a court would be a fairer forum for the employer or union to establish innocence, and the fear that the EEOC would impose forced racial balance according to rigid mathematical formulae. *See Hearings on H.R. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 19 (1964).

In the Senate, the so-called "leadership compromise," which was made to secure enough Republican votes to achieve the two-thirds majority necessary to obtain

> basic change in the philosophy of the title . . . [which] implied an appraisal of discrimination in employment as a private rather than a public wrong, a wrong, to be sure, which entitles the damaged party to judicial relief, but not one so injurious to the community as to justify the intervention of the public law enforcement authorities.[9]

But the private action inherited a large measure of public interest. It is unlikely that the shift in enforcement responsibility, designed to make the bill more politically palatable, is indicative of a pervasive congressional purpose to deny a public interest in Title VII.[10] Indeed, the private action was specifically endowed with public interest characteristics. The provision for Justice Department intervention,[11] the provision for appointment of counsel in the discretion of the court [12] and for the discretionary award of attorney's fees to victorious litigants,[13] and the provision for discretionary relief in the form of affirmative action and back pay were all designed to protect the public interest.[14] The interplay of the public and private aspects of the Act has played a significant role in the courts' interpretations of the Act's procedural requirements.[15]

Moreover, the Attorney General is directly empowered to protect the public interest by bringing suit in the government's name when discrimination occurs in the form of a pattern or practice of resistance.[16] Finally, the EEOC has power to utilize "conference, conciliation, and persuasion" [17] in attempting to eliminate unlawful discrimination.[18] Although these powers are relatively weak, Congress apparently considered them so important that it subordinated to some degree the prompt vindica-

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cloture over the civil rights filibuster, resulted in the elimination of the power of the EEOC to enforce the Title by bringing civil actions in its own name. *See* Vass 452.

[9] Berg, *supra* note 1, at 67.

[10] Affeldt 675.

[11] Act § 706(e), 42 U.S.C. § 2000e–5(e) (1964).

[12] Act § 706(e), U.S.C. § 2000e–5(e) (1964); *see* p. 1253 *infra*.

[13] Act § 706(k), 42 U.S.C. § 2000e–5(k) (1964); *see* pp. 1253–56 *infra*.

[14] Act § 706(g), 42 U.S.C. § 2000e–5(g) (1964); *see* Affeldt 676; pp. 1242–43 *infra*.

[15] *See* Affeldt 677–78.

[16] Act § 707(a), 42 U.S.C. § 2000e–6(a) (1964). The power of the Attorney General to bring suit in cases of a pattern or practice of resistance intended to deny full exercise of Title VII rights originated in the Senate as a quid pro quo to satisfy the proponents of a strong EEOC when the EEOC's power to bring suits was eliminated. Vass 451–52.

[17] Act § 706(a), 42 U.S.C. § 2000e–5(a) (1964).

[18] After a court order is issued in favor of a complainant, however, the EEOC may sue to compel compliance with the decree. Act § 706(i), 42 U.S.C. § 2000e–5(i) (1964). *See* p. 1236 *infra*.

tion of Title VII rights to the informal conciliatory measures undertaken by the EEOC. Therein lies the second tension in herent in the Act, and the extent and importance of this subordination has been the subject of much of the procedural litigation occurring under Title VII.

B. The Procedural Scheme

"A person claiming to be aggrieved" [19] begins the enforcement process when he files a charge with the EEOC alleging a violation of Title VII. If the occurrence giving rise to the charge took place in a state "which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice," [20] the EEOC may not act on the charge until at least sixty days [21] have elapsed since the commencement of proceedings under state or local law, unless these proceedings terminated earlier.[22] If the alleged discrimination occurred in a state without state or local enforcement mechanisms, the charge must be filed with the EEOC within ninety days of the violation.[23] In a state with such enforcement, the aggrieved party must file his charge within thirty days after receiving notice that the state or local agency has terminated its proceedings, but in no event later than 210 days from the date of occurrence.[24]

When the aggrieved party files a charge, the EEOC investigates to determine whether there is "reasonable cause to believe that the charge is true," [25] and if it finds such reasonable cause, attempts to eliminate the unlawful practice through "informal methods of conference, conciliation, and persuasion." [26] If the EEOC is unable to obtain voluntary compliance with Title VII, it notifies the person aggrieved accordingly and informs him that he may at any time within the following thirty days bring a civil action in federal district court.[27] Upon finding a violation of the Act, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action

[19] Act § 706(a), 42 U.S.C. § 2000e-5(a) (1964).

[20] Act § 706(b), 42 U.S.C. § 2000e-5(b) (1964).

[21] During the first year after the effective date of the state fair employment practices law, the period is 120 days. *Id.*

[22] *Id.*

[23] Act § 706(d), 42 U.S.C. § 2000e-5(d) (1964).

[24] *Id.*

[25] Act § 706(a), 42 U.S.C. § 2000e-5(a) (1964).

[26] *Id.*

[27] Act § 706(e), 42 U.S.C. § 2000e-5(e) (1964). This section also provides for the appointment of an attorney and commencement of the action without payment of fees, costs, or security, in order to facilitate enforcement of the Title by indigent individuals. *See* p. 1253 *infra*.

as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." [28]

A Commissioner of the EEOC [29] may also file a charge with the Agency if he has reasonable cause to believe that a violation of Title VII has occurred.[30] This self-starting procedure has been utilized in cases in which the EEOC receives an anonymous complaint or where the aggrieved party is unwilling to sign a sworn charge for fear of reprisal.[31] It may also be invoked when other violations are observed during an investigation of charges filed by an individual or when any reliable source passes on information as to the existence of unfair employment practices.[32] Although the number of these "Commissioner charges" has been increasing, the EEOC has not emphasized this aspect of its activity because of its inability to handle adequately the number of individual charges which it receives and to which it gives priority.[33]

If the EEOC finds reasonable cause to believe that the violations alleged in the Commissioner's charge are true,[34] it will undertake conciliation efforts. If these efforts fail, two further courses remain open to the Agency, although neither guarantees enforcement in the courts.[35] The EEOC must notify the allegedly aggrieved person of his right to sue in federal court.[36] In addition, the EEOC may recommend to the Attorney General that he bring a pattern and practice suit.[37]

C. Prerequisites to Suit

The various jurisdictional prerequisites to suit are designed to allow the EEOC to perform its conciliatory function. Although conciliation inevitably delays prompt judicial vindication of Title

[28] Act § 706(g), 42 U.S.C. § 2000e-5(g)(1964).

[29] The EEOC is a bipartisan commission composed of five members appointed by the President. Act § 705(a), 42 U.S.C. § 2000e-4(a) (1964). It was vested with authority to establish regional or state offices in addition to its headquarters in Washington, D.C. Act § 705(f), 42 U.S.C. § 2000e-4(e) (1964). At present, the EEOC maintains 13 field offices and is in the process of establishing district office subdivisions within field office jurisdictions. U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 270 & n.518 (1970) [hereinafter cited as FEDERAL EFFORT].

[30] Act § 706(a), 42 U.S.C. § 2000e-5(a) (1964).

[31] R. NATHAN, JOBS AND CIVIL RIGHTS 26 (1969) [hereinafter cited as NATHAN].

[32] 1966 EEOC ANN. REP. 49.

[33] Note, *supra* note 3, at 16–17.

[34] 29 C.F.R. § 1601.19d(c) (1970) provides that when a Commission member has filed a charge, he may not participate in the determination of reasonable cause with respect to that charge. *See* pp. 1236–39 *infra*.

[35] *See* pp. 1236–39 *infra*.

[36] 29 C.F.R. § 1601.25 (1970); Act § 706(e), 42 U.S.C. § 2000e-5(e) (1964).

[37] 29 C.F.R. § 1601.26 (1970); Act § 705(a), 42 U.S.C. § 2000e-6(a) (1964).

VII rights, Congress apparently decided that the objectives of the Act could best be served by giving the informal measures of conciliation and persuasion a chance to work. But since at least some of the jurisdictional requirements formulated in deference to conciliation are not unambiguously declared in the Act, courts are often free to determine for themselves whether conciliation is really serving the ends intended for it, and thus to give the conciliation policy as much force as experience warrants.

The conciliation process has several features which recommend it:[38] it may solve problems without the animosities created by coercion; it gives the respondent a chance to explain and possibly justify his conduct before litigation receives widespread public attention; it is less expensive and time consuming than litigation; and broad relief is available. Despite the theoretical advantages of conciliation, however, EEOC conciliation has been less than a complete success. To date, the EEOC has been unable to achieve even partially successful conciliation in over half the cases in which it was attempted.[39]

Many explanations can be advanced for the comparative failure of the EEOC to accomplish successful settlements, but

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[38] *See* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 845–46 (1969).

[39] In fiscal year 1966, 82% of conciliation attempts were successful or partially so; in 1967, 51%; in 1968, 48%; and in 1969, 49%. The number of conciliations attempted during these years was 68, 174, 640, and 774 respectively. FEDERAL EFFORT 327. When a conciliation attempt results in an agreement signed by the respondent, the EEOC, and the charging party, it is considered successful. When the respondent agrees to discontinue the discrimination identified but refuses to sign an agreement, the conciliation is termed partially successful. An unsuccessful conciliation attempt is one which does not secure a promise of relief. FEDERAL EFFORT 327 n.715.

The EEOC's conciliation record may be contrasted with that of the NLRB, which has settled through voluntary withdrawal of the charge, settlement agreement, or dismissal approximately 90% of the charges it has retained. *See* A. COX & D. BOK, LABOR LAW: CASES AND MATERIALS 138 (7th ed. 1969).

The poor EEOC conciliation record also compares unfavorably with the 95% rate at which state fair employment practices commissions (FEPC's) with cease and desist powers achieve successful conciliation where probable cause is found. *See* Note, *Employment Discrimination: State FEP Laws and the Impact of Title VII of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 608, 622 (1965). However, the significance of this figure for purposes of comparison with the EEOC's settlement record should be tempered by the facts that state FEPC's (as well as the NLRB) find reasonable cause in far fewer cases than the EEOC and that state FEPC conciliation agreements are, as a general matter, probably "softer" than those of the EEOC. *See* Blumrosen, *The Individual Right to Eliminate Employment Discrimination by Litigation*, in PROCEEDINGS OF THE NINETEENTH ANNUAL WINTER MEETING, INDUSTRIAL RELATIONS RESEARCH ASS'N 88, 94 (1967); Note, *supra* note 3, at 32 (1969).

primary among them is the Commission's lack of enforcement power. There is little incentive for a respondent in a Title VII case to settle voluntarily when he knows the Agency has no power to bring meaningful pressure to bear on him.[40] At first blush, one might assume that the prospect of a direct suit in federal court for failure to settle voluntarily would be as much of an inducement to respondents to reach successful conciliation as would the threat of an administrative hearing resulting in a cease and desist order. But because it is usually the aggrieved party himself who must bring the Title VII suit, the time and expense of litigation make the prospect of being dragged into court less imminent for the uncooperative respondent.[41] Moreover, a respondent who believes he can convince a court of his compliance with Title VII may be less confident in his ability to finally prevail when he first must face adjudication before an expert administrative agency designed to protect the class of parties he is opposing, whose determination will not be upset by a reviewing court unless it is without "warrant in the record and a reasonable basis in law." [42]

Intrinsic defects in the conciliation process are aggravated by the fact that the EEOC is physically unable to perform its conciliatory function within the time limits afforded by Title VII. The EEOC has only sixty days from the date the charge is filed to investigate for reasonable cause and to seek conciliation before the charging party may commence his civil suit.[43] But the EEOC's present backlog is such that there is a four to five month delay before investigation begins,[44] and beyond that, the EEOC

[40] One former conciliator for the EEOC points out that conciliation is especially unsuccessful when attempted against large corporate respondents. Affeldt 674.

[41] Private suits have been initiated in less than 10% of those cases in which the EEOC has been unable to obtain voluntary settlement. *See Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess., at 40 (1969) (statement by EEOC Chairman William H. Brown, III).

[42] NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). It is not suggested that the standard of review for an enforcement-empowered EEOC would necessarily be the same as that for the NLRB.

[43] Act § 706(e), 42 U.S.C. § 2000e-5(e) (1964). This section provides for only 30 days which may be extended by the EEOC to 60 days if it finds further efforts to secure voluntary compliance are warranted. The EEOC has extended it to an automatic 60 days because of its huge backlog. 29 C.F.R. § 1601.25(a) (1970). Act § 706(a), 42 U.S.C. § 2000e-5(a) (1964) also provides that the court may stay its proceedings for an additional 60 days to give the EEOC more time to secure a settlement.

[44] *See* Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 DUQUESNE L. REV. 1, 14 (1970) [hereinafter cited as Coleman]. *See also Hearings on Appropriations for 1970 Before the Subcomm. on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies of the House Comm. on Appropriations*, 91st Cong., 1st Sess., pt. 4, at 384 (1969) (statement of EEOC Chairman Clifford L. Alexander).

takes an average of about twenty months to complete the conciliation process.[45] While this administrative incapacity suggests that the full potential of the EEOC-administered conciliation process for eliminating job discrimination has never been tested, it also militates against a court's enhancing the importance of conciliation in the present statutory scheme.

In efforts to impede Title VII actions, respondents have raised a myriad of jurisdictional objections ostensibly designed to protect the conciliation process. At one time or another, virtually every step in that process has been asserted as an essential element of the enforcement scheme, observance of which was necessary to the trial court's jurisdiction. The resulting litigation has largely settled what are the jurisdictional prerequisites to suit.

1. Filing Charge with EEOC. — It is clear that a complainant may not bypass the EEOC entirely by beginning court action without first filing a charge with the Commission.[46] A contrary

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[45] *Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. (1969).

[46] *See* Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1968). It has been argued that an aggrieved party could completely avoid the Title VII procedure by bringing suit under § 1 of the Civil Rights Act of 1866, now 42 U.S.C. § 1981 (1970). In Harrison v. American Can Co., 61 CCH Lab. Cas. ¶ 9353 (S.D. Ala. 1969), the district court refused to allow a plaintiff to proceed on this theory, but the Seventh Circuit in Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), and the Fifth Circuit in Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3273 (U.S. Dec. 10, 1970) (No. 1079), reached a contrary conclusion. The appellate courts relied on Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), which stated that Title VIII of the Civil Rights Act of 1968 does not preempt that section of the 1866 Civil Rights Act which is now 42 U.S.C. § 1982 (1964), and they concluded that the same result should be reached in the Title VII context.

The Court's conclusion in *Jones* was only dictum, since the petitioners there could not have brought the action under the new statute, their claims having accrued prior to the effective date of the Act's coverage. 392 U.S. at 417 n.21. Moreover, the conclusion was heavily influenced by legislative history indicating that Congress knew of the possible significance of § 1982 and passed Title VIII as a supplement for the existing legislation. *See id.* at 415, 416 n.20. Title VII, however, has no such legislative history, and it is unlikely that Congress intended to leave § 1981 as a means for plaintiffs to circumvent at will Title VII's elaborate procedural scheme.

Recognizing that its application of *Jones* would effectively nullify the procedural requirements of Title VII, the Seventh Circuit modified its *Waters* holding to the extent that a complainant may sue directly under § 1981 only "if he pleads a reasonable excuse for his failure to exhaust EEOC remedies." 427 F.2d at 487. Although this accommodation is, as a practical matter, more attractive, from

position would fly in the face of the statutory machinery clearly designed to afford the EEOC the opportunity to attempt to conciliate unlawful employment practices.[47] Although the filing requirement, like other jurisdictional prerequisites, may become mere formalism if the EEOC is so backlogged that it never looks at the charge within the sixty days, courts nonetheless are reluctant for that reason to read out of the statute the explicit procedural precondition of filing a charge.[48]

Besides forcing the complainant to wait sixty days before bringing an action against those he has named in the charge, the primary effect of this rule has been to bar the complainant from suing parties whom he has not previously charged before the EEOC.[49] Failure to name a party in the charge should ordinarily be fatal to the complainant's attempt to join him in the suit. It is clear that the framers intended every party to go through the conciliation process. This does not mean, however, that the rule should be mechanically applied in circumstances which would permit joinder consistent with statutory purpose and without prejudice to the additional party.

If the party whom the complainant attempts to join but whom he has not named in the charge is a party indispensible to the action under Rule 19 of the Federal Rules of Civil Procedure,[50] barring the joinder may result either in a stay of the proceedings if the limitation period has not run against the additional party,[51] or in a dismissal if it has run.[52] Sometimes the former may be a needless waste of time; the latter means that Title VII rights will not be enforced against the original party

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the standpoint of congressional intent, it too is a doubtful statutory construction. It is indeed difficult to assume that Congress saw § 1981 as an escape valve for complainants whose failure to comply with the comprehensive administrative requisites of Title VII was excusable.

[47] *See* Coleman 5. *But cf.* 110 CONG. REC. 14,188, 14,191 (1964) (remarks of Senators Humphrey and Javits); *Hearings on H.R. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 7 (1964) (remarks of Representative Celler).

[48] *See* Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

[49] *See* Mickel v. South Carolina State Employment Serv., 377 F.2d 239 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967). *See also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283, 285 (5th Cir. 1969).

[50] FED. R. CIV. P. 19(a).

[51] Longshoremen Local 329 v. Southern Atl. & Gulf Coast Dist., 295 F. Supp. 599 (S.D. TEX. 1968).

[52] Waters v. Wisconsin Steel Works, 301 F. Supp. 663 (N.D. Ill. 1969), *rev'd*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). For the possibility of construing an amendment adding parties after the statute has run as relating back, see 3 J. MOORE, FEDERAL PRACTICE ¶ 15.15, at 1049 (1968).

who has had a formal opportunity to conciliate and failed to do so. The harshness of this result becomes more apparent if the complainant was not at fault in failing to charge the additional party at the outset and if the prejudice to that party is more fanciful than real.[53] If the complainant is not negligent and the additional party knew that the original action was directed against his practices, it is hard to see what policy interest is served by not permitting joinder.[54]

2. EEOC Finding of Reasonable Cause. — The EEOC's determination of reasonable cause to believe a violation of Title VII has occurred is clearly a prerequisite to its initiation of conciliation efforts.[55] But it is less clear whether a finding of reasonable cause is a prerequisite to the aggrieved individual's suit. The courts had no trouble concluding that the EEOC's failure to make any finding whatsoever as to reasonable cause was not a bar to suit.[56] This conclusion is unassailable in view of the EEOC's inability to investigate within a reasonable time most of the charges it receives. The charging party's ability to bring suit certainly should not be put off because the EEOC is understaffed and underfinanced.[57]

But suppose the EEOC does investigate the complaint and finds no cause to believe a violation has occurred? [58] It has been argued that if the no-cause determination has no bearing on future judicial action, then the reasonable cause requirement

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[53] Of course, the problem disappears if the court holds for these very reasons that the additional party is not indispensible under FED. R. CIV. P. 19(b).

[54] For example, a complainant might complain of discriminatory practices of his employer without being aware that the union was also responsible for the discrimination and would be an indispensible party in any court action. If the union was aware of the charge against the company and did nothing to correct the alleged abuse or to intervene in the conciliation process, no policy is served by refusing to allow joinder in the subsequent suit. In Waters v. Wisconsin Steel Works, 427 F.2d 476, 487 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), the court seemed persuaded by these arguments. The problem was avoided, however, by allowing the complainant to sue directly under 42 U.S.C. § 1981 (1970), thus bypassing the conciliation process altogether. *See* note 46, *supra*. *But cf.* Longshoremen Local 327 v. Southern Atl. & Gulf Coast Dist., 295 F. Supp. 599 (S.D. Tex. 1968), where the court denied a motion to join local unions and an employer association not named in the EEOC charge and stayed the action by an all-Negro local against the union's district until the other "necessary parties" were charged before the EEOC.

[55] Act § 706(a), 42 U.S.C. § 2000e–5(a) (1964).

[56] *E.g.*, Miller v. International Paper Co., 408 F.2d 283, 288, 291 (5th Cir. 1969). For a discussion of the effect of failure to attempt conciliation, see pp. 1206–07 *infra*.

[57] *See* pp. 1206–07 & note 71 *infra*.

[58] *Compare* Coleman 13 *with* Berg, *Title VII: A Three Years' View*, 44 NOTRE DAME LAW. 311, 317 (1969).

serves no function other than delaying the aggrieved party's judicial hearing — hardly a legitimate legislative purpose.[59] Moreover, the reasonable cause requirement might logically serve as a device for sifting out frivolous complaints at the administrative level.[60]

In the face of these arguments, the courts which have considered the question have nevertheless decided not to give a preclusive effect to the EEOC's finding of no cause.[61] This conclusion was supported by reference to a broader principle that neither EEOC action nor inaction could deprive a complainant of his judicial remedy; since neither a finding of reasonable cause nor an actual conciliation effort is a prerequisite to suit,[62] a finding of no cause should not bar access to the courts. Although this reasoning is not inevitable, the nonadjudicatory nature of the Agency and the informality of its procedures militate against giving finality to an EEOC determination of no cause.[63]

If the EEOC's decision on reasonable cause is to have no bearing on the maintenance of a subsequent judicial action, the question arises whether the EEOC should make a judgment on the merits at all. It has been suggested that the EEOC should judge the merits only to the extent necessary to insure that the more meritorious claims are subject to whatever conciliatory action the Agency's budget will allow it to undertake within the statutory time limit.[64] But the Act speaks in terms of reasonable cause, and use of this term suggests that Congress intended an absolute rather than comparative evaluation of the merits. Moreover, the EEOC's budget is presently so meager in view of its workload that a comparative standard geared to budgetary constraints would mean that no cause would be found in the vast majority of cases. Even if there is no preclusive effect, informing a complainant with a possibly meritorious claim that there is no reasonable cause to believe his charge is true when all that is meant is that the budget will not permit conciliation could

[59] *See* Coleman 14. This argument seems to ignore the effect a no-cause determination has on the Commission's own functions. Without a finding of reasonable cause, the Commission will not attempt conciliation.

[60] *See id.*

[61] *E.g.*, Flowers v. Laborers Local 6, 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970); Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984 (N.D. Cal. 1969).

[62] Flowers v. Laborers Local 6, 431 F.2d 205, 207 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331, 333 (3d Cir. 1970); Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984, 989–90 (N.D. Cal. 1969).

[63] Flowers v. Laborers Local 6, 431 F.2d 205, 207 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331, 333 (3d Cir. 1970); Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984, 989–90 (N.D. Cal. 1969).

[64] *See* Note, *supra* note 3, at 22.

have a serious dampening effect on vindication of Title VII rights. Conversely, if the reasonable cause requirement is taken literally, a finding of reasonable cause gives the complainant and the Commission additional leverage at the bargaining table.[65]

Nevertheless, given the fact that the EEOC lacks the resources to conciliate all cases where reasonable cause is found, some rational way to further reduce the cases subject to conciliation should be developed. Although the statute provides that the EEOC "shall endeavor" [66] to conciliate cases wherein reasonable cause has been found, that language can hardly be construed to withhold from the Agency prosecutorial discretion to decide which cases it will endeavor to conciliate first.[67] Rather than get to no charges within a reasonable period, the EEOC would do well to direct its immediate conciliatory efforts toward those cases which present a fair likelihood of successful conciliation and which have a significant public impact. Cases meeting only the latter criterion should be immediately referred to the Justice Department as a candidate for a pattern and practice suit. The EEOC should send notice to a complainant whose case has been deferred that while the charge has merit, the Commission will be unable to attempt conciliation within the sixty days alloted. He should be informed that at the end of the period he may bring suit or wait in line for conciliation, but that those complainants waiting in line are not taken on a first-come, first-served basis. Of course, complainants whose charges have no merit would continue to receive no-cause letters.

3. EEOC Attempt at Conciliation. — Section 706(a) of Title VII [68] provides that when the EEOC has made a finding of reasonable cause, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." Section 706(e)[69] provides that the aggrieved party may commence a civil action "if . . . the Commission has been unable to obtain voluntary compliance with this title" within sixty days from the date of the charge. Initially, some courts construed the statutory language to require EEOC attempts at conciliation as a mandatory prerequisite to suit.[70] But all the appellate courts which have considered the

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[65] FEDERAL EFFORT 326.

[66] Act § 706(a), 42 U.S.C. § 2000e-5(a) (1964).

[67] To date the EEOC has not formulated a priority system for handling the complaints it receives. FEDERAL EFFORT 347.

[68] 42 U.S.C. § 2000e-5(a) (1964).

[69] *Id.* at § 2000e-5(e) (1964).

[70] Choate v. Caterpillar Tractor Co., 274 F. Supp. 776 (S.D. Ill. 1967), *rev'd*, 402 F.2d 357 (7th Cir. 1968); Dent v. St. Louis-S.F. Ry., 265 F. Supp. 56 (N.D. Ala. 1967), *rev'd*, 406 F.2d 399 (5th Cir. 1969).

question have decided the EEOC's failure to attempt conciliation will not bar the complainant if he has waited the statutory sixty days.[71] To hold otherwise would be to require a complainant who has done everything in his power to satisfy the requirements of the Act to pursue an administrative remedy which may be impossible to achieve [72] at the sacrifice of any effective judicial remedy. The EEOC now takes nearly two years to bring each charge through conciliation.[73] To require a destitute or unemployed plaintiff for whom speed is essential to wait out this period is tantamount to denying him an effective judicial remedy.

4. Receipt of Notice Letter. — If the EEOC has been unable to achieve a voluntary settlement through conciliation, it is required to "notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge." [74] The courts have insisted that the complainant receive this notice of the right to sue (the so-called "suit letter") from the EEOC before bringing suit.[75] Since the thirty day mandatory time limit for commencing the suit runs from the date of receipt of the suit letter,[76] requiring the written notice as a prerequisite to maintaining the action is seen as the surest way of enforcing the thirty day time limit.[77]

The statute requires that the EEOC send this suit letter to the charging party within sixty days after the charge is filed.[78] But recognizing the practical impossibility of any Commission action in that short period of time, the courts have held that the sixty day limit is "directory" rather than "mandatory." [79] Consistent with this holding, the current EEOC practice is to defer sending notice of failure to obtain voluntary settlement to the aggrieved party until attempted conciliation has actually failed, no matter how long that may take.[80] Either party, however,

[71] Dent v. St. Louis-S.F. Ry., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

[72] Quarles v. Philip Morris, Inc., 271 F. Supp. 842, 846–47 (E.D. Va. 1967).

[73] *See* pp. 1201–02 & note 45 *supra*.

[74] Act § 706(e), 42 U.S.C. § 2000e–5(e) (1964). Although it is not required by the Act, notice is also given to the respondent under 29 C.F.R. § 1601.25 (1970).

[75] *See* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969). 29 C.F.R. § 1601.25 (1970) requires that notice be given in writing.

[76] Cunningham v. Litton Indus., 413 F.2d 887, 891 (9th Cir. 1969).

[77] Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Miller v International Paper Co., 408 F.2d 283 (5th Cir. 1969); Pullen v. Otis Elevator Co., 292 F. Supp. 715 (N.D. Ga. 1968); *see* p. 1209 *infra*.

[78] Act § 706(e), 42 U.S.C. § 2000e–5(e) (1964).

[79] *See* Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969).

[80] 29 C.F.R. § 1601.25a (1970).

may demand such notice at any time after the expiration of the sixty day period, and upon demand, notice will be issued to all parties.[81]

If the EEOC has endeavored to conciliate and failed before sixty days have elapsed, the statutory language clearly permits a suit letter to be sent and an action commenced before the end of the waiting period.[82] Under present conditions this could only be expected to occur if the respondent affirmatively waives the opportunity to conciliate during the sixty day span. Of course, in the event the respondent chose to reject conciliation, there would be no point in denying the complainant the ability to bring suit immediately. However, such waivers are not likely because ordinarily it would be to the respondent's advantage to put off the possibility of suit for the sixty days.

When the complainant is anxious to obtain quick relief and it is clear from the outset that the EEOC will not be able to take action within the time limit, the purpose of compelling the complainant to wait sixty days before commencing suit becomes doubtful.[83] Yet if the complainant were allowed to sue immediately, the process of conciliation, which occupies a prominent place in the scheme of Title VII enforcement,[84] could be completely sidestepped. The courts cannot resolve this dilemma, since they cannot read out of the statute the express sixty day deference to conciliation. A solution might take either of two polar positions. On the one hand, the waiting period could be eliminated entirely, enabling the aggrieved party to file suit at once. On the other, the time limit could be extended so far that the EEOC could endeavor to conciliate each case. Both of these legislative solutions involve a significant alteration in the uneasy balance struck by Congress between the policy favoring informal persuasion as the means of combatting discrimination in employment and the policy favoring effective, coercive enforcement of the rights secured by the Act. The fact that Congress imposed a limited period of deference to conciliation indicates a legislative judgment that at the end of the period, the policy in favor of conciliation was to be subordinated to the desire for rapid, effective enforcement by private suit. Perhaps the balance struck by Congress was ill-considered and arbitrary. In any case, Congress undoubtedly did not foresee the breakdown in the conciliation process which has occured.[85] Although the effective-

[81] *Id.*

[82] Act § 706(e), 42 U.S.C. § 2000e–5(e) (1964).

[83] Of course, the 60 day period may serve some incidental purpose as a cooling-off period. Note, *supra* note 38, at 855.

[84] *See* Cunningham v. Litton Indus., 413 F.2d 887, 890 (9th Cir. 1969).

[85] *Cf.* note 43 *supra*. The initial budget and staff of the Agency were predicated

ness of conciliation under the present scheme is highly suspect,[86] it might nonetheless be argued that the scheme has not been given a chance to prove itself. And indeed, until the EEOC is given resources and staffing equal to the task envisioned for it in the statute, the effectiveness of the policy compromise will remain in doubt.[87]

5. Time Limits. — It is well settled that there are only two mandatory time deadlines in the Title VII enforcement process: a charge must be filed with the EEOC within ninety days of the occurrence of the alleged violation;[88] suit must be filed within thirty days after receipt of the notice of failure of conciliation from the EEOC.[89] The courts have uniformly rejected any other suggested limits, as, for example, a 180 day deadline from occurrence of violation to filing of suit (ninety days to file the charge, followed by sixty days of EEOC conciliation, and then thirty more days in which to file suit).[90] Likewise, there is apparently no time limit within which a copy of the charge must be served on the respondent.[91] Indeed, the practice of the EEOC has been to delay service of the charge until investigation begins, which is sometimes as long as five months after the charge was filed (and eight months after the alleged violation).[92]

The EEOC justifies this practice on the grounds that immediate service of the charge, followed by the long interval before investigation, creates the possibility of reprisal against the charging party.[93] However legitimate this concern may be, withholding service of the charge as a matter of course is open

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on a projected annual volume of 2,000 charges, while 9,000 charges were actually filed in the first year. FEDERAL EFFORT 317.

[86] *See* pp. 1200–01 *supra*.

[87] Through 1968 fewer than 400 positions were authorized for the EEOC, though in 1969 that number was increased to 570. FEDERAL EFFORT 269. Through 1969 the EEOC had received 52,085 complaints, of which 35,445 required investigation. *Id.* The backlog at the start of fiscal year 1971 was expected to reach 3,731 cases. *Id.* at 317. It presently takes the EEOC a minimum of 18 months to two years to process completely a charge of discrimination. *Id.* at 308.

[88] If the violation occurs in an area with state or local enforcement, the charge must be filed within 30 days after receiving notice that the state or local agency has terminated its proceedings, but in no event later than 210 days from the date of the alleged violation. Act § 706(d), 42 U.S.C. § 2000e-5(d) (1964).

[89] *See* Coleman 21.

[90] *See* Cunningham v. Litton Indus., 413 F.2d 887, 890 (9th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283, 287 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 361 (7th Cir. 1968).

[91] *See* Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

[92] Coleman 15.

[93] *Id.*

to criticism. It may delay a voluntary settlement in those cases in which the respondent would be willing to rectify the alleged abuses simply on being informed that he was charged with a violation of Title VII and under investigation.[94] The Commission could substantially mitigate the danger of reprisal by serving an informal charge on the respondent immediately upon its receipt of the complaint but at the same time deleting the name of the charging party, reminding the respondent that reprisals are illegal, and advising the charging party of his remedies should he be subjected to retaliation.[95] If, despite these protections, a particular complainant were to manifest an abiding fear of reprisal, perhaps service of the charge ought to be deferred until investigation begins. But if service is delayed, the courts should take this fact into account in deciding whether to award back pay for the period during which the respondent was unaware of the charge in cases where the respondent can prove prejudice.

The ninety day filing limitation has also been a source of frequent litigation. The Act does not make clear, for example, whether the running of the ninety day period should be suspended while other remedies are being invoked. In *Culpepper v. Reynolds Metals Co.*,[96] the Court of Appeals for the Fifth Circuit ruled that the deadline is suspended while the complainant invokes his contractual grievance and arbitration remedy. Statutes of limitation, said the court, are meant to penalize those who sleep on their rights, not those who actively pursue their remedies. Moreover, both federal labor law and Title VII are intended to encourage resort to grievance, arbitration, and other informal machinery to resolve industrial disputes, while forced waiver for those who use these methods would have the opposite effect.

The courts have also had some difficulty in determining when a violation is a single act which sets the ninety day period running and when it is a continuing violation. Most courts now take the position that if an act originating in the past operates to discriminate against the complainant at the present time, there is a continuous violation.[97] This might be taken to mean that practically any discrimination is continuing at least as long as the

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[94] Coleman claims the practice also presents serious questions of due process, but it is difficult to see precisely how the respondent is constitutionally prejudiced, and Coleman does not specify the nature of the infirmity he detects. *Id.*

[95] *See id.*

[96] 421 F.2d 888 (5th Cir. 1970).

[97] *See* Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970); Banks v. Lockheed-Georgia Co., 46 F.R.D. 442 (N.D. Ga. 1968).

employment relationship is maintained.[98] The EEOC has ruled,[99] however, that a transfer or layoff by itself is not a continuing violation, although discrimination with respect to recall is a new violation which starts the ninety day period running again.[100] Apparently the courts are willing to accept the EEOC's ruling, but are reluctant to conclude that the act complained of should be deemed a single violation simply because the *charge* alleged discriminatory layoff.[101] Noting the inability of many complainants to characterize their grievances in accord with the appropriate le-

[98] The restrictive interpretation given to continuing offense in Toussie v. United States, 397 U.S. 112 (1970), does not militate against a liberal interpretation of Title VII offenses as continuous. In *Toussie* the Supreme Court disregarded a Selective Service regulation and decided that failure to register for the draft within five days of the defendant's eighteenth birthday was not a continuing offense; after five years from the initial failure to register, a prosecution is therefore barred. *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 218 (1970). The policies of repose embodied in the limitation statute which the Court relied on hardly compel the conclusion that Title VII offenses are noncontinuous. In a Title VII case, the stigma of crime is not involved; employers and labor unions, the usual respondents, can generally obtain the necessary evidence to erect a defense more easily than an individual charged with a long-past violation, and the salutary effect in terms of prompt prosecution by law enforcement officials is not involved.

[99] The EEOC has authority to issue and publicize Guidelines embodying its interpretations of the meaning of statutory provisions. While these Guidelines are not binding on the courts, they are entitled to some weight as evidence. *See* Rosen v. Public Service Elec. & Gas Co., 409 F.2d 775, 781 n.21 (3d Cir. 1969); American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100, 1103 (D.D.C. 1968). *See* pp. 1239–41 *infra*.

[100] Opinion of General Counsel, EEOC, Jan. 11, 1966, in 1 CCH EMPL. PRAC. GUIDE ¶ 1255.75 (1969). An EEOC official has indicated, however, that the Commission no longer takes this position. Telephone interview with David Copus, Attorney, Office of the General Counsel, EEOC, Washington, D.C., Feb. 11, 1971.

[101] For instance, in Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970), the district court held that a charge brought by female employees complaining of sex discrimination, in that they were laid off from the bottom of a segregated seniority list while males with less seniority were retained, alleged discrimination of a continuous nature. Between their layoff and recall, the respondent had renegotiated the seniority provisions of the collective bargaining agreement in such a way as in effect to place all employees who had not worked during the previous 90 days (including the complainants) at the bottom of the seniority list. The court found that these facts presented "not the case of layoff with nothing more" but a "prior discrimination reaching effectively into the present." 316 F. Supp. at 296.

In Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969), the Seventh Circuit Court of Appeals found that a charge of discriminatory layoff modified by the word "continuing" was a sufficient foundation for an action despite failure to file charges within 90 days of the layoff. Since a layoff, as distinguished from a discharge or quit, suggests a possibility of re-employment, a layman's claim of "continuing" discriminatory layoff can be construed as alleging a discriminatory failure to re-employ. The court apparently approved the EEOC's regulation characterizing a layoff as a noncontinuing violation, but was disposed to attach considerable weight to the fact that the EEOC chose to accept the charge as timely.

gal terminology, they will look beneath the surface of the charge to determine the nature of the violation alleged.[102]

6. Utilization of State Remedies. — Title VII requires that if the discriminatory practice occurs in a state or a political subdivision of a state which has a "law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice," [103] then the person aggrieved must first bring his complaint to the state agency and wait a minimum of sixty days before bringing his charge to the EEOC.[104] Compliance with this provision has been uniformly held to be a jurisdictional prerequisite to the initiation of a suit in district court.[105] There is, however, no requirement that state remedies be *exhausted.* State proceedings need only be commenced; at any time after sixty days, the complainant may file charges with the EEOC, whether or not the state agency has completed its action on the case. The state and federal authorities then proceed side by side.[106] This procedure accommodates state and federal enforcement in a manner analogous to the way conciliation and judicial enforcement are accommodated on the federal level. While the state agencies are given a chance to act, effective federal relief is not postponed indefinitely.

The statute does not make clear, however, what powers the state enforcement agency must have before it qualifies for even this limited deference. The EEOC initially decided that it was required to defer to state agencies which had their own enforcement powers or were empowered to seek court relief, but not to agencies which could only conciliate.[107] The EEOC view was rejected, however, by the Court of Appeals for the Ninth Circuit in *Crosslin v. Mountain States Telephone and Telegraph Co.*[108]

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[102] *See* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970).

[103] Act § 706(b), 42 U.S.C. § 2000e–5(b) (1964).

[104] *Id.* Act § 706(d), 42 U.S.C. § 2000e–5(d) (1964) requires a charge to be filed with the EEOC within 30 days after the termination of state proceedings. Thus, the complainant may be required to file a charge with the EEOC before the expiration of 60 days from the commencement of state proceedings if those proceedings are terminated within 30 days.

[105] *E.g.*, EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1969); Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1969).

[106] *See* Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028, 1031 n.5 (9th Cir. 1970), *vacated*, 91 S. Ct. 562 (1971).

[107] EEOC Decision, Dec. 5, 1965, in 2 CCH EMPL. PRAC. GUIDE ¶ 17,252.304 (1966).

[108] 422 F.2d 1028 (9th Cir. 1970), *vacated*, 91 S. Ct. 562 (1971). The Supreme Court granted certiorari but vacated and remanded to the lower court for reconsideration in the light of the Solicitor General's brief.

The court interpreted "relief" to include voluntary compliance — precisely the kind of "relief" which the EEOC itself dispenses — since the short time period Congress allowed the state agencies to handle the complaint was more consistent with voluntary settlement than with litigation.

The *Crosslin* court's opinion seems to reflect accurately the congressional intent.[109] Yet that does not soothe the EEOC's real fear that the decision will encourage efforts in some states to inhibit enforcement of Title VII. Thus, states which at present have no fair employment practices legislation might set up puppet agencies with no real powers as procedural obstacles to securing meaningful relief.[110]

Occasionally, a layman unfamiliar with the procedural requirements of the Act will send a complaint to the EEOC before filing it with the state agency.[111] The EEOC procedure in such cases is to forward a copy of the charge to the state agency, while at the same time retaining a copy and notifying the complainant that the EEOC will automatically assume jurisdiction at the termination of the state proceedings, or after sixty days, whichever comes first, unless notified to the contrary.[112]

In *Love v. Pullman Co.*,[113] the Tenth Circuit found this procedure inconsistent with the statutory requirement of deferral to the state agency.[114] It is difficult to identify precisely the basis of the court's objection. Apparently, however, it was primarily disturbed by the EEOC's automatic assumption of jurisdiction.

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[109] For example, "The EEOC . . . could not consider taking any action for two months if there were any State machinery at all . . . . Only when the States have no colorable claim . . . to providing a remedy can the EEOC go ahead." 110 CONG. REC. 13,081 (1964) (remarks of Senator Case); ". . . the basic philosophy of the bill is that . . . whenever possible, the problems dealt with by the bill should be resolved locally and voluntarily." 110 CONG. REC. 12,707 (1964) (remarks of Senator Humphrey).

[110] Telephone interview with David Cashdan, Attorney, Office of the General Counsel, EEOC, Washington, D.C., Oct. 26, 1970.

Pursuant to Act § 706(b), 42 U.S.C. § 2000e-5(b) (1964) and C.F.R. § 1601.12 (1970), the EEOC presently defers to 37 states. Of the 13 to which it does not defer, 11 are the states of the civil war confederacy. EEOC Chart, "Deferral to State Agencies . . . ," 1 CCH EMPL. PRAC. GUIDE ¶ 1254 (1970).

[111] *See, e.g.*, Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

[112] 29 C.F.R. § 1601.12 (1970).

[113] 430 F.2d 49 (10th Cir. 1969), *aff'd on rehearing*, 430 F.2d 56 (1970), *petition for cert. filed sub nom.* United States v. Pullman Co., 39 U.S.L.W. 3215 (U.S. Nov. 10, 1970) (No. 957).

[114] The *Love* case arose before the EEOC procedure in question was formalized by regulation. The court on rehearing purported not to consider the validity of the regulation. 430 F.2d at 57. Yet, as the court also realized, the regulation could make little difference in the result of the case. *Id.*

The court argued that the EEOC procedure seeks to "channel complaints" [115] to the EEOC in violation of the statutory requirement that state commissions have an opportunity to consider complaints. But this reading of the statute serves no purpose other than creating further procedural barriers to the enforcement of Title VII rights. Requiring a second filing with the EEOC after sixty days have elapsed gives the "run around" to the aggrieved,[116] who may well have been pessimistic about getting government help in the first place. Nor does the *Love* rule advance the legislative intent of deference to state machinery.[117] Under the EEOC practice, the state agency was given sixty days to reach a resolution, just as it is under the *Love* procedure. The result reached in *Love* is particularly difficult to understand when one realizes that the *Love* court also sanctioned the procedure previously approved by the Third Circuit in *Electrical Workers Local 5 v. EEOC*.[118] There the EEOC had, at the expiration of sixty days from the commencement of state proceedings, sent a form to the complainant which he was to sign and return if he wanted the EEOC to assume jurisdiction. If the *Love* court was merely seeking some affirmative act of the charging party, it required an exaltation of form over substance. Ultimately the formal requirement of sending out such a request and awaiting its return simply means more paperwork for the EEOC, more delay for the individual com-

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[115] 430 F.2d at 53.

[116] *See* Note, *A Look at Love v. Pullman*, 37 U. CHI. L. REV. 181, 188 (1969).

[117] The *Love* court failed to notice the similarity between the EEOC procedure and the language of Act § 706(c), 42 U.S.C. § 2000e–5(c) which, in reference to charges filed by a Commissioner of the EEOC, states that "the Commission shall, before taking any action with respect to such charge, notify the appropriate state or local officials and, upon request, afford them a reasonable time, but not less than 60 days . . . to remedy the practice alleged." The language of Act § 706(b), 42 U.S.C. § 2000e–5(b) (1964), referring to private party charges — "no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under state or local law" — appears to support the position that until the aggrieved party himself has filed his charge at the end of the 60 day period, the EEOC cannot take jurisdiction. This cannot be said of § 706(c), which seems to indicate that deferral to state action is only a formality prior to resumption of action by the EEOC at its own initiative after 60 days. However, it is doubtful that Congress intended any substantive difference between the deferral procedure under § 706(b) and that under § 706(c) The different wording probably reflects only the different sources of the charge and the fact that it would be incongruous to expect an EEOC Commissioner to file a charge at the local level (and state law might not allow it). If § 706(c) expresses the congressional intent on what the Commission should do with charges that one way or another come to the EEOC first, it militates against the result in *Love*.

[118] 398 F.2d 248 (3d Cir. 1968).

plainant, and the possible forfeiture of his rights through neglect or loss of the EEOC form.

Insistence on formalistic requirements is particularly indefensible in light of the fact that the overall deferral scheme has little to recommend it. The mandatory sixty day deferral period does not encourage state agencies to enforce their anti-discrimination laws vigorously since the time period allowed is too short to reach a resolution of the problem. As a theoretical matter one might suppose that states would attempt to create strong remedies in order to keep the complainant in the state system after the sixty day period has elapsed. But as a practical matter, no trend in this direction seems to have developed; at the end of the mandatory sixty days, most complainants turn to the EEOC.[119] Respondents are disposed to be uncooperative in the state effort since a settlement at the state or local level will not preclude federal action.[120] Thus, deferral to a probably ineffective state agency only adds sixty days to the complainant's already lengthy wait for relief. Moreover, the system has the built in burden of needless duplication of efforts between the state agencies and the EEOC.[121] Of course, a system of complete deferral to state agencies would have definite advantages. If the state FEPC has been doing a satisfactory job, it will have accumulated experience and goodwill which it would be wasteful not to use.[122] Moreover, a complete deferral to effective state authorities would reduce the EEOC's caseload and conserve federal resources.[123]

The advantages of local enforcement cannot be secured unless the deferral is complete — *i.e.*, unless the EEOC refuses jurisdiction over the claim and treats the state resolution of it as dispositive. Any arrangement which provides for less than this will inevitably detract from the state agency's effectiveness. The parties will always feel free to ignore the state agency so long as

[119] M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 92–95 (1966) [hereinafter cited as SOVERN]. Two-thirds of deferred complaints are returned to the EEOC or closed without action by the state agency. *See* Note, *supra* note 3, at 19.

[120] The EEOC's Memorandum of Understanding relative to deferral arrangements provides that:

> Settlement of a case on terms satisfactory to the agency shall not be deemed by the Commission dispositive of the charging party's rights under Title VII unless the charging party has accepted the terms as equitable and has executed a written voluntary waiver . . . evidencing such acceptance.

2 CCH EMPL. PRAC. GUIDE ¶ 16,905 at 7324 (1970).

[121] FEDERAL EFFORT 314.

[122] *See* SOVERN 92; *cf.* Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1177 (1965) [hereinafter cited as Witherspoon].

[123] SOVERN 207.

they know that there is parallel federal machinery to which they can turn if they dislike the state result. Under section 709(b) of Title VII,[124] the EEOC is empowered to enter into cooperative agreements with state and local agencies whereby the Commission will refrain from taking jurisdiction on any case it designates in deference to state and local authorities whose disposition of the case then becomes conclusive on the complainant. Unfortunately the EEOC has not felt able to exercise this power because no state agency has satisfied the EEOC that it is effective enough to warrant a complete cession of jurisdiction.[125] State agencies are weak in part because the EEOC has refused to yield much real power to them — thus completing the vicious circle. Where complete cession was impossible, Congress evidently viewed partial deferral as a compromise allowing local authorities a chance to settle the dispute without abandoning the effective federal remedy. In fact, however, the partial deferral compromise has produced the worst of possible worlds. It has weakened state agencies, created administrative confusion, added to the time complainants must wait for relief — and, with all this, failed to increase the rate of settlement on a local level.[126] Clearly, this is one case where the tensions in the Act cannot be resolved by compromise. Either the EEOC should really defer to the states and give them a meaningful chance to resolve the dispute, or it should not defer at all.[127]

D. The Complaint

The Title VII enforcement process is often begun by a simple letter from the most unlettered layman.[128] The courts have been quite liberal in construing the language to make out an effective charge. "All that is required is that the [charge] give sufficient information to enable EEOC to see what the grievance is

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[124] 42 U.S.C. § 2000e-8(b) (1964).

[125] *See* Note, *supra* note 3, at 18.

[126] *Cf. id.*

[127] This principle was more or less embodied in the original Title VII bill, H.R. 405, 88th Cong., 1st Sess. (1963), where, as the Commission Report stated,

> [T]he Administrator is directed to seek agreements with state or local agencies to cede Federal jurisdiction where there is an effective power in the State or local agency to eliminate discrimination in employment in any cases covered by this Act and where such power is being effectively exercised . . . . He is expected to affirmatively and diligently seek such agreements wherever practicable. Such agreements shall not be prevented by anything but substantial deficiencies in the State power or exercise of such power.

H.R. REP. No. 570, 88th Cong., 1st Sess. 6 (1963).

[128] *See, e.g.*, Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).

about." [129] Technical requirements of the statute, such as the "under oath" requirement of section 706(a),[130] may be satisfied by later amendments.[131] Later amendments can also amplify the scope of the charge, with the amendments relating back to the date of the original filing.[132] The courts have also been quite liberal in construing the charge presented to the EEOC when deciding whether the complaint in subsequent litigation goes beyond the charge considered by the Agency. Courts taking this stance have argued that the complainant is frequently ignorant of "the full panoply of discrimination which he may have suffered" and may often be "ignorant of or unable to thoroughly describe the discriminatory practices to which [he is] subjected." [133] Additionally, a rigid standard restricting the plaintiff's complaint to the precise issues raised in his charge would discourage conciliation since the respondent would realize that an issue which became apparent only during investigation could not be included in court action.[134]

But the conciliation policy could be argued to cut the other way as well. A liberal construction of the charge might mean that an issue which had never been subjected to conciliation could be litigated.[135] Since this argument ignores the reality that the EEOC is usually unable to seek any conciliation at all

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[129] Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968). EEOC regulations provide that the charge must be "sufficiently precise to identify the parties and to describe generally the action or practices complained of." 29 C.F.R. § 1601.11(b) (1970); *cf.* FED. R. CIV. P. 8(a)(2).

[130] 42 U.S.C. § 2000e-5(a)(1964).

[131] *See* Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).

[132] 29 C.F.R. § 1601.11(b) (1970) provides:

> A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date. However, an amendment alleging additional acts . . . not directly related to or growing out of the . . . original charge will be permitted only where . . . the allegation could have been timely filed as a separate charge.

The Fifth Circuit in Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), allowed the charging party to add an allegation of discrimination on the basis of national origin to her original charge of sex discrimination, holding that the type of discrimination was only a legal conclusion to be drawn from the facts and that the crucial element of the charge is the facts alleged. Purporting to follow EEOC regulations, the court dubiously characterized the amendment as a mere technical defect or omission rather than one not directly related to the original charge. However, since the respondent could not complain that he was unaware of the true nature of the charge from the outset or that he would have been disposed to voluntarily settle had the charge originally alleged national origin discrimination, no practical purpose would have been served by denying the amendment. *But see* Fix v. Swinerton & Walberg Co., 3 FEP Cas. 9 (D. Colo. 1970).

[133] King v. Georgia Power Co., 295 F. Supp. 943, 947 (N.D. Ga. 1968).

[134] Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

[135] *Id.* at 467.

within the time limit allowed, it is not surprising that it has not tipped the scales in favor of a strict rule. It is now settled that the complaint may encompass any discrimination like or reasonably related to the allegations of the charge or growing out of such allegations during the pendency of the charge before the EEOC.[136]

Under the statute, the EEOC may discover any evidence "relevant to the charge under investigation." [137] There are reasons for construing this language to give considerable latitude to the EEOC's informational demands. Permitting vague charges forces the EEOC to rely heavily on extensive investigation. Moreover, since Title VII discrimination is necessarily directed against a class, investigation of the respondent's conduct toward the class in general is a reasonable means of ascertaining whether the particular complainant has suffered from the proscribed discrimination.[138]

There are, however, disadvantages to wide-ranging investigations. While a respondent might be cooperative in complying with the EEOC's narrowly focused informational demands, he might, if made the subject of a "wholesale fishing expedition," [139] become intractable. In addition, if the EEOC broadens its investigations to the limit of a liberal discovery standard in its zeal to vindicate the public interest in ferreting out all discrimination, the private interest of the complainant may suffer for it. The resolution of his specific complaint may be needlessly delayed.[140] Thus, although there are persuasive arguments for giving the EEOC sweeping investigatory power, there are countervailing considerations which should lead the Commission to be careful in exercising its discretion.

E. Class Actions

Although most Title VII actions are brought by private individuals, there is also a public interest in the outcome of the lawsuit. While this public interest should not unduly delay the complainant from getting his private remedy if that is all he

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[136] *Id.* at 466; King v. Georgia Power Co., 295 F. Supp. 943, 947 (N.D. Ga. 1968).

[137] Act § 709(a), 42 U.S.C. § 2000e-8(a)(1964); Act § 710(a), 42 U.S.C. § 2000e-9(a)(1964).

[138] *See* Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969):

> [T]he existence of patterns of racial discrimination in job classifications or hiring situations other than those of the complainants may well justify an inference that the practices complained of here were motivated by racial factors.

[139] Coleman 25.

[140] *Id.*

seeks, a qualified complainant who wishes to represent a broader class should be permitted to do so. Moreover, since a violation of the Act is by definition a class-wide discrimination,[141] even the purely private litigant almost always represents interests larger than his own. For these reasons class-wide relief is almost always an appropriate remedy.[142]

In *Oatis v. Crown Zellerbach Corp.*,[143] the leading case on class actions under Title VII, the Court of Appeals for the Fifth Circuit laid down two requirements for the maintenance of a class action: 1) the action must meet the requisites of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure;[144] and 2) the issues raised must previously have been raised before the EEOC.[145]

Although the first requirement is common to all class actions, it raises special problems in the Title VII context. In particular, it is unclear what a complainant must show to demonstrate that questions of law and fact are common to the class. If the complainant alleges that the discrimination consists of a particular practice or rule of the respondent which ostensibly affects all members of the class alike, the common questions of fact and law are evident. Such would be the case where the complainant alleged, for example, a discriminatory seniority system, the maintenance of segregated facilities, or a discriminatory testing

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[141] Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

[142] The prime illustration of the Rule 23(b)(2) class action is in "the civil-rights field where a party is charged with discriminating unlawfully against a class." Notes of Advisory Committee on Rules Relating to 1966 Amendments of Fed. R. Civ. P. 23(b)(2), 28 U.S.C. Appendix 1601 (Supp. III 1967). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 34 & n.15 (5th Cir. 1968); *cf.* Potts v. Flax, 313 F.2d 284 (5th Cir. 1963).

[143] 398 F.2d 496 (5th Cir. 1968).

[144] FED. R. CIV. P. Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

[145] 398 F.2d at 499. The *Oatis* court listed a third requirement as well: the plaintiff must have standing to raise the issues on behalf of the class. But since Rule 23(a)(4) requires that the plaintiff be able to fairly and adequately protect the interests of the class which he purports to represent, there is no reason to treat this requirement separately. *See* Hyatt v. United Aircraft Corp., 14 FED. RULES SERV. 2d 205, 207 (D. Conn. 1970); Berg, *supra* note 1, at 325 n.92.

program. If the complainant alleges merely sporadic instances of discrimination or discrimination practiced in many different contexts variously affecting members of a class, however, the required commonality is more difficult to find. Nonetheless, the courts of the Fifth Circuit have concluded that even in the latter case the requirement is met, since the existence of a racially discriminatory policy is a common thread running through the various outward manifestations of discrimination.[146] Title VII, the court has argued, is directed at the underlying discriminatory policy, not merely at its particular manifestations.[147]

A closely related question is whether the plaintiff is able to protect the interests of the class fairly and adequately. For example, in *Johnson v. Georgia Highway Express, Inc.*,[148] the issue was whether a black employee claiming to have been discharged because of his race had standing to sue for black employees victimized by discriminatory "hiring, firing, promotion, and maintenance of facilities."[149] If the thrust of the Title VII class action is seen as directed against the underlying policy of discrimination, the plaintiff should be able to raise any aspects of the discriminatory policy which might potentially affect him.[150] Using this rationale, the *Johnson* court found that the plaintiff had standing to sue on behalf of all present and future employees as well as discharged employees of the same class.[151]

The Fifth Circuit's "across the board" class action concept goes a long way toward effectuating the public interest. But it nonetheless should not be applied before a careful examination is made to be certain that the plaintiff really does fairly and adequately represent the interests of the class for which he purports to act. If a complainant alleges a policy of discrimination, he has in one sense alleged an issue common to all claimed instances of discrimination in the plant. Relief as against all the discriminatory practices, however, must be contingent upon proof that each is in fact prohibited conduct. When the complainant has proven that his discharge, for instance, was racially motivated, he has not thereby proven the claims of all those he purports to

[146] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); *see* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Wilson v. Monsanto Co., 315 F. Supp. 977 (E.D. La. 1970); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

[147] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

[148] *Id.*

[149] *Id.* at 1124.

[150] *See* Berg, *supra* note 58, at 323.

[151] *Accord*, Carr v. Conoco Plastics, Inc., 295 F. Supp. 1281, 1288–89 (N.D. Miss. 1969), *aff'd per curiam*, 423 F.2d 57 (5th Cir. 1970) (rejected job applicant allowed to challenge discrimination in internal operations of plant as well as in hiring practices).

represent — *i.e.*, members of his race who allege discriminatory hiring, firing, promotions, testing, seniority, etc. The complainant may not have enough interest in or knowledge about these other instances of allegedly unfair conduct to present the best case which could be made against them. If one is prepared to accept the Fifth Circuit's view as to commonality of interest,[152] then at least full and adequate representation should not be quickly presumed, since the consequences in terms of res judicata are serious.

The second requirement for a class action under Title VII is that the issues raised by the plaintiff must have previously been raised before the EEOC. Initially it had been held that the plaintiff class was limited to those members who had individually filed charges before the EEOC.[153] But that notion was put firmly to rest in *Oatis v. Crown Zellerbach Corp.*[154] The statutory policy giving the EEOC an opportunity to attempt voluntary settlement of the complaint is not frustrated simply because not all the members of the class avail themselves of the services of the Commission. If the EEOC finds it impossible to reach a settlement for one victim of an employer's discrimination, there is no reason to assume that it will be successful for another. As long as the respondent had an opportunity to conciliate on the issues raised in the class action, it is hard to see why he is prejudiced because not all members of the class have filed charges.

It does not necessarily follow, however, that a nonfiling member of the class is entitled to the same constellation of remedies that is available to a plaintiff who has gone through the conciliation process. One of the first Title VII class actions, *Hall v. Werthan Bag Corp.*,[155] held that class members were restricted to injunctive relief and could not obtain individual relief such as reinstatement and back pay unless they had previously filed a charge with the EEOC. The court proceeded on the theory that the EEOC had already investigated and unsuccessfully sought compliance with respect to the alleged class discrimination, but had had no opportunity to seek compliance with regard to the back pay claims of nonfiling parties. Initially *Hall* was followed by other courts.[156] More recent decisions, however,

[152] For cases which reject the Fifth Circuit's expansive view of class actions, see Burney v. North Am. Rockwell Corp., 302 F. Supp. 86 (C.D. Cal. 1969), decided before the appellate decision in *Johnson*, and Hyatt v. United Aircraft Corp., 14 FED. RULES SERV. 2d 205 (D. Conn. 1970), which was decided subsequent to *Johnson* but in which the court expressly declined to follow it.

[153] *See* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967), *rev'd sub nom.* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

[154] 398 F.2d 496 (5th Cir. 1968).

[155] 251 F. Supp. 184 (M.D. Tenn. 1966).

[156] *See, e.g.*, Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49 (S.D. Ga. 1968);

have begun to adopt the view that once a nonfiling party is acknowledged to be a class member, he is entitled to complete relief on the same basis as any other plaintiff.[157]

Of course, proof of the extent of damage must always be shown individually in a class action whereas no such proof is necessary for injunctive relief. But there is no reason why this rule should bar a party proven to have been damaged by the violation of the common right from recovering his just compensation. As one commentator points out, a nonfiling party who is made a class member for injunctive purposes only and fails to exclude himself from the class under Rule 23(c) suffers "the worst of two worlds [under the *Hall* rule] being collaterally estopped by an adverse judgment but not entitled to affirmative relief under a favorable one." [158]

F. Election of Procedures

One of the questions that has produced the most controversy in Title VII litigation is the extent to which utilization of contractual grievance and arbitration procedures affects a later Title VII action. Since Title VII itself is silent on the question, the courts have been forced to fashion a resolution for themselves.

The threshold issue is whether the complainant is required to exhaust his contractual remedies before bringing his charge to the EEOC. The response has been that exhaustion is not required.[159] It is impossible to find in Title VII any trace of congressional intent to accord different treatment to employees who may potentially be able to seek relief within the contractual grievance and arbitration framework. Absent an explicit showing of such intent, the courts are naturally unwilling to penalize employees by erecting still another barrier to suit. Moreover, if the resolution achieved through the contractual procedure were held to bind the aggrieved party in every case, a rule demanding prior resort to arbitration would mean that the elaborate machinery established by Title VII was applicable only to the narrow class of employees who worked without access to grievance and arbitration procedures. If on the other hand resort to grievance and arbitration were held to be a prerequisite to suit

Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 338 (S.D. Ind. 1967), *rev'd*, 416 F.2d 711 (7th Cir. 1969).

[157] *E.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Local 186, Paper Mill Workers v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969); Madlock v. Sardis Luggage Co., 302 F. Supp. 866 (N.D. Miss. 1969).

[158] 1968 DUKE L.J. 1000, 1004–05 n.33.

[159] *See* King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd on other grounds*, 416 F.2d 711 (7th Cir. 1969).

rather than an absolute bar, the rule would require an indefinite delay in sharp contrast with the precise deferral periods specified in the Act.

The next question to reach the courts was whether an aggrieved party had to make a binding election at the outset between pursuing his remedies under the grievance and arbitration procedure and pursuing his Title VII remedies. Only one district court put complainants to this choice.[160] The decision was reversed,[161] and the idea has never been seriously considered since.

The most persuasive reason against accepting an *ab initio* election of remedies rule is that an employee's initial choice may be uninformed. It is natural for an employee, especially a union member, to lodge a grievance when he feels he has been dealt an unfair blow by his employer. Indeed, the employee may not even know at this stage that an EEOC remedy exists. Given this ignorance, it is hard to say that the employee has intentionally bypassed his Title VII remedy. Moreover, even if the aggrieved is aware of the alternative recourses when he files his grievance claim, he should still be allowed to pursue parallel remedies, at least prior to final decision in either forum. Only after prosecution of the grievance through several stages of the grievance procedure may the employee be in a position to know that arbitration cannot offer the relief he seeks or that his claim would fare better in court.

The more difficult question is whether grievance and arbitration procedures, carried through to a final determination, constitute a binding election of remedies which precludes subsequent federal court action. The question has produced a split of authority, with the Seventh [162] and Fifth [163] Circuits holding that there is no binding election,[164] and the Sixth Circuit [165] reaching the opposite conclusion.[166]

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[160] Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967).

[161] Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

[162] *Id.* The narrow holding of this court is that no binding election of remedies has to be made before a decision on the merits in either of the available forums. However, the court stated that the only restriction upon the maintenance of a Title VII suit after the arbitrator's decision is that the court action must not result in "duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs." *Id.* at 715.

[163] Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970).

[164] The Third Circuit has obliquely indicated its support for this position in Fekete v. United States Steel Corp., 424 F.2d 331, 333 n.3 (3d Cir. 1970), where the court stated that the case was not mooted by an arbitration award or reinstatement, because the complainant also sought injunctive relief against an allegedly continuing course of discrimination not affected by the arbitration.

[165] Dewey v. Reynolds Metals Co., 429 F.2d 324, *petition for rehearing denied*, 429 F.2d 334 (6th Cir. 1970), *cert. granted*, 91 S. Ct. 566 (1971) (No. 835).

[166] *Accord*, Newman v. Avco Corp., 313 F. Supp. 1069 (M.D. Tenn. 1970);

The mainstay of the Fifth and Seventh Circuits' argument is that "determinations under a contract grievance-arbitration process will involve rights and remedies separate and distinct from those involved in judicial proceedings under Title VII." [167] Many, although by no means all,[168] arbitrators see themselves as creatures of the contract with the sole function of interpreting and applying its provisions regardless of the requirements of surrounding statutory law.[169] If an irreconcilable conflict between the requirements of Title VII and the terms of a collective bargaining agreement were to arise, a binding election of remedies rule as applied to the award of an arbitrator who espouses this position would be intolerable.[170]

Of course, when it is possible to harmonize the contractual provisions with surrounding law, most arbitrators would not ignore the law.[171] Thus, for example, if a grievant claims his discharge was racially discriminatory, an arbitrator might well look to the statutory law in determining whether the discharge was for "just cause." Even if he does not explicitly refer to the law in his opinion, his determination is likely to be consistent with the statute. Almost all racial discrimination grievances have turned on one, straightforward factual issue — whether the

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Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968); Washington v. Aerojet Gen. Corp., 282 F. Supp. 517 (C.D. Cal. 1968).

[167] Hutchings v. United States Indus., Inc., 428 F.2d 303, 311 (5th Cir. 1970).

[168] *See, e.g.*, Howlett, *The Arbitrator, the NLRB, and the Courts*, in THE ARBITRATOR, THE NLRB, AND THE COURTS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 67 (1967).

[169] *See, e.g.*, Seitz, *The Limits of Arbitration*, 88 MONTHLY LAB. REV. 763, 764 (1965).

[170] *See* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in THE ARBITRATOR, THE NLRB, AND THE COURTS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 16 (1967); M. Sovern, When Should Arbitrators Follow Federal Law (1970) (paper delivered to twenty-third annual meeting of national academy of arbitrators). While Dean Sovern's approach is certainly different from Professor Meltzer's, it also would require an arbitrator to ignore the statutory mandate in a case of irreducible conflict between Title VII and the terms of a collective bargaining agreement. *See also* Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42 (1968), which takes the position that the arbitrator may follow the contract to permit conduct forbidden by law but should never require such conduct even if sanctioned by the contract.

[171] "No one argues that arbitrators should ignore federal law when it is helpful in resolving a question of contract interpretation." Sovern, *supra* note 170, at 2. *See* Meltzer, *supra* note 170, at 17; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597–98 (1960); Stanley Works, 39 Lab. Arb. 374, 378 (1962) (Summers, Arbitrator).

grievant was discriminated against on account of race or color.[172] And, as Arbitrator Harry H. Platt has observed, "No published arbitration cases have been found where the alleged racial discrimination was solely in violation of Title VII and not also violative of a contract provision." [173] Finally, many collective bargaining agreements contain antidiscrimination clauses framed in accord with Title VII or state fair employment practice legislation.[174] In these cases arbitrators would apply the statutory law under the contractual command.

If the arbitrator can be confidently said to have decided the exact question involved in the statutory claim, a court should not permit it to be relitigated, unless it finds unfairness so serious as to approach a due process violation.[175] In the usual case, however, the award does not indicate whether the statute was specifically contemplated. Where any doubt exists as to whether the statutory claim has been decided, the court should not apply an absolute rule, but rather exercise its discretion in deciding whether to hear the claim. Some courts, however, have gone farther than this and argued for an automatic hearing on the merits in all circumstances. Thus in *Bowe v. Colgate-Palmolive Co.*,[176] the court argued: [177]

> When, as frequently happens, the alleged discrimination has been practiced on the plaintiff because he or she is a member of a class which is allegedly discriminated against, the trial court bears a special responsibility in the public interest to resolve the dispute by determining the facts regardless of the position of the individual plaintiff.

Evidently the court did not mean to say that it should relitigate factual issues already determined by the arbitrator simply because a strong public interest was involved. Rather, the court seems to be saying that even though the plaintiff has failed before the arbitrator, his suit will be entertained if he brings it in the name of a class because there are wider interests to be vindicated. But if the arbitrator's findings as to the individual plaintiff are to be accepted, it is not clear why the plaintiff should have standing to represent aggrieved employees in court when it has already

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[172] *See* Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398, 408 (1969).

[173] *Id.*

[174] *Id.* at 400.

[175] *Cf.* Hutchings v. United States Indus., Inc., 428 F.2d 303, 314 (5th Cir. 1970).

[176] 416 F.2d 711 (7th Cir. 1969).

[177] *Id.* at 715. The Fifth Circuit incorporated this statement into its *Hutchings* decision. 428 F.2d at 310.

been conclusively established that he himself is not aggrieved.[178]

A stronger argument for not treating the arbitrator's decision as dispositive (indeed even when the arbitrator explicitly decides the statutory issue) is that the arbitration procedure itself may be unfair. The grievant's union may have countervailing interests which prevent it from representing the grievant as effectively as it might.[179] Moreover, the level of procedural protection in arbitration, while varying widely, is often minimal.[180]

The Sixth Circuit has countered these arguments by pointing to the importance of arbitration in national labor policy. The court's reasoning is straightforward. The Supreme Court has made it clear that if the arbitration award had been in favor of the grievant, it would have been final, binding, and conclusive on the respondent.[181] If a court can consider on the merits the claim of an employee whose grievance was denied by the arbitrator, the result would be that the employer, but not the employee, is bound by the arbitration.

> This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, *i.e.*, that the awards are binding on them but not on their employees.[182]

But even if the Sixth Circuit is correct when it argues that a relitigation rule would work to undermine the national policy in favor of arbitration, the conclusion does not follow that relitigation should never be allowed. There is also a national policy against employment discrimination — "a policy that Congress considered of the highest priority" [183] — and, as indicated above, this policy could be substantially undermined if a strict election

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[178] *See* Newman v. Avco Corp., 313 F. Supp. 1069 (M.D. Tenn. 1970). It is to be noted that Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), did not go so far as to confer standing on a person to represent a class if he himself was not at all a victim of the discrimination he claims was practiced against the class. *See* p. 1220 *supra*.

[179] If the union unfairly represents the grievant, it is of course subject to suit on that ground. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

[180] *See* Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment*, 24 ARB. J. 88, 96 (1969); 44 N.Y.U.L. REV. 404, 408–09 (1969).

[181] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The arbitrator's award will be upset only if it did not "[draw] its essence from the collective bargaining agreement." *Id.* at 597.

[182] Dewey v. Reynolds Metals Co., 429 F.2d 324, 332 (6th Cir. 1970). On petition for rehearing, the court used even stronger language: "It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result." *Id.* at 337.

[183] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401–02 (1968).

of remedies rule were always applied. Nothing the Supreme Court has done in the labor field should be read as holding that federal labor policy requires precise mutuality of obligations in arbitration schemes whatever the price.

Thus, a strict election of remedies doctrine applied to all cases where the statutory issue is not specifically decided is unacceptable because it may operate to cut off the vindication of Title VII rights where the arbitral award contravenes the statutory mandates or where the arbitration procedure is basically unfair. Yet, the reasons for rejecting a rigid election of remedies rule do not justify rejection of federal abstention in all cases.

Faced with a similar problem of overlapping jurisdiction, the NLRB has adopted a policy of selective deferral to arbitration. In *Spielberg Manufacturing Co.*,[184] the NLRB stated that it would refuse to exercise its preemptory jurisdiction to set aside arbitration awards dealing with contractual claims which would also give rise to unfair labor practice charges provided the arbitration proceedings "have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." [185] A rule analogous to this so-called "Spielberg doctrine" might constitute the best solution to the Title VII problem.[186]

By analogy, the likely body to formulate a Spielberg-type doctrine is the EEOC. But, since the EEOC has neither enforcement power nor the power to prevent a charging party from bringing suit, the federal courts must be persuaded to adopt a selective abstention rule if it is to be effective.

The conditions for treating an arbitration award as conclusive should be responsive to the dangers which the Fifth and Seventh Circuits have pointed out. It should be clear that the grievant has made a knowledgeable, voluntary decision to bypass his federal remedy. A court should require that at some point the grievant be fully apprised of the alternatives open to him and that he then freely consent to continue down the path of arbitration. Moreover, the grievant must have the opportunity to make an effective case before the arbitrator. Consequently, some minimum standard of procedural fairness is necessary.

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[184] 112 N.L.R.B. 1080 (1955).

[185] *Id.* at 1082.

[186] *But cf.* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 57 (1969). The possibility of such a solution has already been acknowledged by one court. In Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970), the court said: "We leave for the future the question whether a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases." *Id.* at 314 n.10.

If the grievant voluntarily makes an informed choice to proceed to arbitration and he is accorded the minimum of procedural due process, there is no compelling reason to overrule the arbitrator's decision for his benefit even if the court considers it erroneous. But there are also public interests involved in Title VII litigation.[187] A clearly erroneous arbitral decision left judicially undisturbed could have a substantial chilling effect on the assertion of similar Title VII claims by other members of the plant. For these reasons, at least some scrutiny of the merits beyond that given normal arbitration decisions is necessary on review. The courts should be careful to fulfill the responsibility Congress entrusted to them for effectuating the public policy against discrimination, while at the same time avoiding the potential for thwarting federal labor policy by rehearing every case on the merits.

G. Government Enforcement of Title VII

1. The Pattern or Practice Power. — The compromise that facilitated the passage of the Civil Rights Act stripped the EEOC of virtually all its enforcement powers,[188] leaving it essentially with only its responsibility for attempting to effect a voluntary settlement between the parties.[189] The great bulk of governmental power to enforce Title VII was given to the Attorney General by the authorization of suits against a "pattern or practice" of discrimination.[190]

Effective use of the pattern or practice suit is an essential element in the fight against discrimination. Experience has shown that the individual complaint mechanism is an inadequate vehicle for eliminating job discrimination.[191] Too often, victims of job discrimination fail to file charges: they may be reluctant to be branded as troublemakers;[192] they may, with some justification, fear retaliation; [193] or they may lack firm evidence to support their suspicions.[194] In addition, many victims of discrimination will fail to file charges because they are ignorant of their legal rights.[195] Black workers may be "cynical about the prospect of

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[187] *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401–02 (1968).

[188] *See* pp. 1196–97 & note 8 *supra*.

[189] *See* pp. 1236–41 *infra*.

[190] Act § 707(a), 42 U.S.C. § 2000e-6(a) (1964).

[191] FEDERAL EFFORT 297.

[192] *Id.* at 297 n.604.

[193] NATHAN 47–48; SOVERN 33. Retaliatory action by an employer or union might be one basis for an award of punitive damages. *See* pp. 1261–64 *infra*.

[194] FEDERAL EFFORT 297.

[195] NATHAN 48.

their rights being enforced against whites by white authority." [196] In fact, it is likely that complaints are not filed against many of the worst offenders of Title VII: in some cases, workers, realizing that there is little hope of obtaining employment, will not make the futile effort of applying for work required before a charge alleging hiring discrimination can be filed; in others, workers who do apply for work are not even aware that they have been the subject of unlawful discrimination.[197] To attack the many cases of discrimination that the complaint process does not reach, an enforcement mechanism which allows the government to initiate its own action is required.[198] The pattern or practice suit provides this mechanism.[199]

The pattern or practice action has functional virtues other than the reaching of those employers against whom a complaint might otherwise not be filed. It enables the Government to mount a coordinated attack on the largest or most flagrant violators of Title VII. Such systematic attack would be almost impossible if private actions were the only mode of enforcement;[200] the necessarily random selection of defendants in private actions would allow many offenders to escape prosecution. And, whereas the private suit challenges the employment practices of only a single employer or a single union, the pattern or practice suit can be used to attack industrywide discriminatory practices.[201]

In addition, the pattern or practice suit avoids many of the procedural obstacles to the private suit: there is no requirement that either state FEPC's or the EEOC have an opportunity to consider the case or attempt conciliation prior to suit.[202] Rather, Congress has directed that the pattern or practice suit be assigned for hearing at the earliest practicable date and that the case "be

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[196] SOVERN 33.

[197] Additionally, walkin hiring practices may prevent minority workers from learning of job opportunities. *See* pp. 1152–53 *supra*.

These possibilities may explain the fact that seventy-five percent of the Commission's charges allege discrimination against persons already employed. Note, *supra* note 3, at 15; *see* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 531 (1961) ("It is generally agreed that neither the type nor the number of complaints initiated by private parties is an accurate barometer of actual discrimination."). *See* pp. 1119–20 *supra*.

[198] *See* SOVERN 31, 83; Witherspoon 1191–92.

[199] The Commissioner charge, another government initiatory mechanism, but one that is not nearly as potentially effective as the pattern or practice suit, is discussed at pp. 1236–39 *infra*.

[200] *Cf.* Witherspoon 1192.

[201] *See, e.g.*, 110 CONG. REC. 14,270 (1964) (remarks of Senator Humphrey).

[202] *See* United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 126 n.5 (8th Cir. 1969); 110 CONG. REC. 12,724 (1964) (remarks of Senator Humphrey).

in every way expedited."[203] To that end, it has also provided for the convening of a three-judge district court, with its concomitant right of direct appeal to the Supreme Court,[204] in cases certified by the Attorney General to be of "general public importance."[205]

Despite the potential value of this enforcement mechanism, however, the Justice Department has made only limited use of it.[206] To be sure, each Title VII litigation is exceedingly long and complex, and consumes a tremendous amount of Department resources.[207] And the Civil Rights Division has been hampered by its small size and inadequate funding,[208] and by its inability to train and retain attorneys sufficiently experienced to handle complex Title VII litigation.[209] Yet even within these constraints, the Justice Department has failed to assume an effective role in Title VII enforcement.

During the first two and one-half years of Title VII's existence (through the end of 1967), a total of only ten pattern or practice suits was brought by the Attorney General.[210] In part, this slow beginning can be attributed to the relatively low priority accorded by the Department to employment cases. For several years following passage of the Civil Rights Act, the Attorney

[203] Act § 707(b), 42 U.S.C. § 2000e-6(b)(1964).

[204] The utility of the three-judge court procedure has often been criticized, as an egregious waste of judicial resources, as an undue burden on the Supreme Court, and, since the interest in protecting state regulatory laws from the federal injunctive powers which led to its creation is no longer pressing, as an anachronism. *See* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 1-7 (1964). On the other hand, some commentators have pointed out that the relative burden on the courts is not great and that there is a continuing need for avoiding "even the appearance of bias and inadequate deliberation" in sensitive areas, particularly in the field of racial discrimination. Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299, 302-03 (1963).

In the Title VII area, the debate is purely academic, for the Attorney General has never seen fit to make use of this provision.

[205] Act § 707(b), 42 U.S.C. § 2000e-6(b) (1964).

[206] A total of 57 pattern or practice suits had been brought from the effective date of Title VII, July 2, 1965, through Jan. 8, 1971. Department of Justice Memorandum, Title VII of the Civil Rights Act of 1964: Status of Cases as of 1/8/71 [hereinafter cited as Status of Cases].

[207] FEDERAL EFFORT 371-72; *Hearings on Appropriations for 1971 Before the Subcomm. on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies of the House Comm. on Appropriations*, 91st Cong., 2d Sess., pt. 1, at 493 (1970) [hereinafter cited as *1971 Civil Rights Division Appropriations Hearings*].

[208] FEDERAL EFFORT 372; *1971 Civil Rights Division Appropriations Hearings* 472-511.

[209] Telephone Interview with Robert T. Moore, Deputy Chief, Employment Section, Civil Rights Division, Justice Department, Washington, D.C., Dec. 2, 1970.

[210] Status of Cases 1-2.

General concentrated on the enforcement of school desegregation and voting rights laws, granting lowest priority to Title VII cases.[211] This failure to devote substantial attention to employment discrimination cases was apparently corrected by a change in Department policy in late 1967.[212] Yet the backlog caused by the delay remains a serious problem: the Justice Department has been unable to file many pattern or practice actions in 1969 or 1970 because its resources have been almost totally committed to litigating the belated rush of cases filed in late 1968 and early 1969.[213]

More importantly, the Justice Department has taken a restrictive view of its role in Title VII enforcement. It has seen a significant part of its role to be securing favorable court interpretations of the statute,[214] while deferring in large part to the EEOC and the Office of Federal Contract Compliance[215] for actual enforcement of the Act.[216] Within the limited role it has defined for itself, the Justice Department has done an excellent job; it claims not to have lost a case, obtaining reversal on appeal of its few losses in the district courts.[217] Yet it makes little sense

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[211] NATHAN 80.

[212] *Id.* at 80–81. Nathan attributes this shift toward giving "the highest priority" to Title VII cases to the effective implementation of the 1965 Voting Rights Act which made voting rights a less pressing problem. Department officials claimed that the change in priorities was due to the realization that equal employment opportunity was the key to helping minority groups break out of the poverty cycle and solving other discrimination problems, such as housing. *Hearings on Appropriations for 1970 before the Subcomm. on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies of the House Comm. on Appropriations*, 91st Cong., 1st Sess., pt. 1, at 718 (1969).

[213] FEDERAL EFFORT 376. Thirty-six pattern or practice suits were filed between Jan. 1, 1968 and Apr. 30, 1969; from the latter date through Jan. 8, 1971 only eleven new cases were initiated. Status of Cases 2–9; *see* note 234 *infra*.

[214] Moore Interview, *supra* note 209; *1971 Civil Rights Division Appropriations Hearings* 483; *see* FEDERAL EFFORT 372–73. There appear to be two justifications for this choice of roles. One is that because of resource limitations, the Justice Department is unable to be an effective enforcement agency and that the precedent-making role is more compatible with its resources. Moore Interview, *supra* note 209. But this is no reason not to attempt to accomplish as much as possible within those limited resources, instead of abdicating enforcement to other agencies with similar financial problems and lesser powers. The second justification is the Department's hope that once precedent is sufficiently established and the requirements of Title VII clear, employers will voluntarily reform their employment practices. FEDERAL EFFORT 377. Reliance on voluntary compliance seems unwarranted, however, considering the lack of success of EEOC conciliation, *see* pp. 1200–02 *supra*, and the history of poor compliance with state fair employment practice laws. *See also* FEDERAL EFFORT 377 & n.873.

[215] *See* p. 1283 *infra*.

[216] Moore Interview, *supra* note 209.

[217] *Id.* Of course, such a record may also indicate an unwillingness to expand the scope of practices condemned by Title VII very far. EEOC authorities charge

for the Justice Department to leave to the EEOC a primary enforcement role under the Act, for that agency has almost no enforcement powers.

Moreover, precedent-making seems far from the most significant function which the Justice Department can perform, even with its limited resources. As one Department attorney admitted, much of the Title VII precedent is evolving in private actions anyway.[218] And in light of the low percentage of private suits brought following the failure of conciliation,[219] the establishment of precedent in order to ease the prosecution of private actions should not be an important consideration in the filing of pattern or practice suits. Instead, the most beneficial use of the pattern or practice action would be to employ it where it can have the greatest practical effect on eliminating discriminatory practices: to attack the most widespread patterns of discrimination (*e.g.*, discrimination industrywide or throughout the operations of a large corporation);[220] or to attack discrimination in areas with substantial minority concentrations.[221] If the suit should involve a previously established point of Title VII law, that would only simplify the litigation and make settlement more likely, increasing the number of enforcement actions that could be undertaken. Significantly, there are indications that the suit recently filed against the Fairfield Works of United States Steel Corporation may represent a shift in policy toward these goals.[222]

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that the Justice Department requires near certainty that there has been a violation before it will take action. FEDERAL EFFORT 399.

[218] *See, e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term) (testing requirements); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (bona fide occupational qualifications for women).

[219] *See* p. 1252 *infra*.

[220] Of course, such defendants will also be the most powerful politically. EEOC officials have expressed doubts that the Attorney General will institute such suits. NATHAN 79. *See also* Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846, 883 (1966). The recent suit against United States Steel Corp., *see* N.Y. Times, Dec. 12, 1970, at 1, col. 2, does not completely dispel such doubts, for there is some evidence that the management of the corporation was not adverse to being sued in order to change employment practices which it felt it could not correct unilaterally due to union resistance. These doubts about the willingness of the Justice Department to attack powerful defendants are a good reason to give pattern or practice power to the perhaps more politically independent EEOC. *See* pp. 1235–36 *infra*.

[221] The Civil Rights Division has claimed that this type of geographic consideration is one of its priorities, but, as the Civil Rights Commission noted, it is not one that has been followed. FEDERAL EFFORT 372–73.

[222] The U.S. Steel plant is the largest employer in the Birmingham, Alabama area, an area which has a significant population of minority group workers. The suit is not likely to establish new Title VII law, for precedents in the steel industry are being set by United States v. Bethlehem Steel Corp., 312 F. Supp. 977

Additional criticism has been directed at the Civil Rights Division for failing to coordinate its litigation with the efforts of the EEOC, helping to rob the conciliation technique of whatever potential effectiveness it may have.[223] Nor has the Justice Department made it a policy to follow up the EEOC's hearings with the threat of litigation.[224] Finally, the Justice Department has concentrated almost exclusively on discrimination against blacks, and until recently seemed unaware that discrimination against Mexican-Americans, Puerto Ricans, Indians, and women was equally condemned by the statute.[225]

In an effort to remedy many of these deficiencies, there has been an unsuccessful attempt to transfer the power to bring pattern or practice actions to the EEOC.[226] This effort surely reflects,

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(W.D.N.Y. 1970), *appeal docketed*, No. 35,183, 2d Cir., June 12, 1970, and United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969. In general, the Civil Rights Division has indicated that it is now putting emphasis on the "impact" of each suit and is also seeking to make use of the special advantages of the pattern or practice action. For example, one recent Justice Department suit, United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970), was brought against five of the major unions in the Seattle area; further uses of an areawide or industrywide approach are being prepared. Moore Interview, *supra* note 209.

[223] FEDERAL EFFORT 421–22; *see* pp. 1200–01 *supra*. The Justice Department has taken pattern or practice action on less than seven percent of EEOC referrals. FEDERAL EFFORT 398. As a result, "[r]espondents appear to be less concerned than before about the prospect of a lawsuit by the Department of Justice, particularly since Justice has concentrated on actions that establish law rather than suits to secure individual rights . . . ." *Id.* at 350.

The United States Commission on Civil Rights places partial responsibility for this failure on the EEOC because many of its referrals were several years old by the time the EEOC completed its procedures, necessitating wasteful re-investigation. FEDERAL EFFORT 340–41.

[224] FEDERAL EFFORT 365. The exception is the compliance agreement secured by the Justice Department with significant elements of the West Coast entertainment industry following the March 1969 hearings in Los Angeles at which they had been the object of EEOC investigation. *Id.* at 363–65.

[225] The first governmental suit attacking discrimination against Mexican-Americans and Indians was filed on June 24, 1970, against Inspiration Consolidated Copper Co.; the first such suit involving sex discrimination against women was brought on July 20, 1970, against Libbey-Owens-Ford Co. and the United Glass and Ceramic Workers. *Id.* at 374 n.860.

The filing of one suit, however, has not ended criticism of the Justice Department's failure to fight harder for women's job equality. Moreover, the Libbey-Owens-Ford action was settled in December by consent decree, Status of Cases 9, despite protests by women due to the dropping of a demand for back pay. *See* N.Y. Times, Jan. 31, 1971, at 50, col. 1; pp. 1243–44 *infra*.

[226] S. 2453, 91st Cong., 2d Sess. (1970), which provided for the transfer of the pattern or practice authority to the EEOC in three years upon the approval of the Attorney General and three Commissioners, passed the Senate. 116 CONG. REC. 16,913 (daily ed. Oct. 1, 1970). However, its companion bill, H.R. 17,555, died a slow death in the House Rules Committee. 29 CONG. Q. 39 (Jan. 8, 1971). The proposed transfer was to be postponed three years to allow the EEOC to first

at least in part, the growing recognition that the Justice Department's many other responsibilities under the civil rights laws have detracted from its enforcement of Title VII. In contrast, the EEOC clearly can devote all of its attention to the single goal of equal employment opportunities. In this regard, many commentators have noted how effective such a dedicated, single-minded agency, armed with sufficient enforcement powers, could be.[227] Further, the EEOC could coordinate the use of such enforcement power with its other activities, thereby increasing the effectiveness of its Commissioner charges[228] and the conciliation process for private complaints.[229]

Providing enforcement powers for the EEOC should not, however, necessitate stripping the Justice Department of its present powers under Title VII. To the contrary, it seems likely that the more independent bodies there are attacking employment discrimination, the more effective enforcement will be. Certainly, the pervasiveness of discriminatory employment practices is such that there is enough work for both the EEOC and the Justice Department. In addition, Title VII, unlike, for example, the Interstate Commerce Act, is not a law which requires the development of a coherent system of regulation by a single agency. Instead, it is more in the nature of a remedial provision directed at the eradication of particular unlawful employment practices. To the extent that the agencies' philosophies differ on what problems are critical, the net result may be a more diverse and broader scale attack on discrimination in employment.[230]

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establish its proposed cease and desist machinery. SENATE COMM. ON LABOR AND PUBLIC WELFARE, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT, S. REP. NO. 91-1137, 91st Cong., 2d Sess. 15 (1970) [hereinafter cited as S. REP. NO. 91-1137].

[227] As a single purpose agency, it is also more likely to develop as a self generating, dedicated force, willing to enforce vigorously the fair employment practices laws. Since the agency has no other responsibilities that might divert its energies from its task . . . and since the only way it can justify its existence is by successful implementation of these laws, a built-in incentive to vigorous enforcement is created.

Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws*, 42 N.Y.U.L. REV. 823, 830 (1967). *See also* Berg, *supra* note 1, at 88.

As Professors Jaffe and Nathanson have pointed out, the creation of a new administrative jurisdiction, with sufficient powers, can lead to a period of particularly effective law enforcement. L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 153-55 (3d ed. 1968) (discussing the NLRB's early years, but adding that "[r]ecent civil rights acts provide a contemporary parallel").

[228] *See* pp. 1236-39 *infra*.

[229] *See* pp. 1245-46 *infra*.

[230] Of course, it is possible that the EEOC and the Justice Department might decide to attack the same target from differing approaches, with the result of confusion for the respondent and a waste of federal resources. One example is

Perhaps the most substantial danger of coordinate enforcement jurisdiction is that each agency will assume that the other will carry the brunt of the enforcement duties. But this result seems unlikely considering the EEOC's enthusiasm for its mission. In addition, conceding that such a danger is real, it nonetheless appears to be more than outweighed by the possibility that a single enforcement agency could be immobilized by political pressures. One major reason at times advanced for transferring the Justice Department's enforcement responsibility to the EEOC is the view that by doing so governmental enforcement of Title VII would then be insulated from the political process. The possibility of the neutralization of Title VII by political forces should indeed be a weighty consideration in an area such as the elimination of employment discrimination where it is apparent that some of the most powerful interests in the nation may have to be challenged.[231] The staggered five-year terms of the Commissioners,[232] who most likely cannot be removed at the will of the President,[233] undoubtedly make them more independent from the Executive will than is the Attorney General.[234] Still, it is ultimately impossible to isolate the EEOC from significant political pressures. For while largely independent of the Executive, the agency remains continually at the mercy of Congress through its power of the purse.[235] Each enforcement authority,

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the famous Crown Zellerbach case, Papermakers Local 189 v. United States, 416 F.2d 980, 984–85 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), where the EEOC agreed to accept one seniority plan in 1965, only to have the Justice Department successfully sue in 1968, asking the court to reject that plan, and the proposed plan of the OFCC, in order to implement its own. *See* FEDERAL EFFORT 387–90; Farmer, *Equal Employment Opportunity — Case Study of Chaotic Administration*, 44 FLA. B.J. 400 (1970).

But under a system of coordinate jurisdiction, such cases of interagency conflict should be rare, certainly no more frequent than the few times this has occurred under the present enforcement scheme. Indeed, in the Crown Zellerbach case the EEOC filed an amicus brief supporting the Justice Department's action. Furthermore, since the proposed coordinate plan envisions litigation by either agency, action by one would necessarily foreclose later action by the other through the doctrine of res judicata.

[231] *See* N.Y. Times, Dec. 11, 1970, at 1, col. 2; *id.*, Dec. 12, 1970, at 1, col. 2, detailing EEOC and Justice Department actions against A.T.&T. and U.S. Steel.

[232] Act § 705(a), 42 U.S.C. § 2000e–4(a) (1964).

[233] *Cf.* Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).

[234] For instance, under the previous Administration, thirty-two new pattern or practice suits were filed from Jan. 1, 1968 through Jan. 20, 1969; in the rest of 1969 under the current Administration, only seven additional suits were commenced; in 1970 only eight new suits were filed. Status of Cases 2–9. While the Justice Department explanation, that most of their manpower has been devoted to litigating the earlier cases, *see* p. 1231 *supra*, seems reasonable, the coincidence of the change of national administrations and the drastic drop in new actions suggest another explanation.

[235] Indeed, as a consequence of this power, it might often be easier to influence

then, is to some degree susceptible to political pressures. But the duplication of power inherent in a coordinate enforcement scheme should substantially decrease the possibility that the entire governmental Title VII enforcement mechanism can be immobilized by outside pressure.

2. EEOC Enforcement. — (*a*) *Compliance Power Under Section 706(i).* — General responsibility for the enforcement of Title VII having been lodged in the Attorney General, only section 706(i) [236] of the version of the Act finally passed provides for any form of direct enforcement by the EEOC: it allows the Commission to commence contempt proceedings in the district courts to compel compliance with a court order issued in a prior private action. This provision has been rarely used,[237] primarily because the Commission lacks the manpower to effectively monitor compliance in all private actions,[238] but it is potentially significant as a means of policing compliance with conciliation agreements through the device of consent decrees.[239]

(*b*) *Commissioner Charge.* — The Commissioner charge provision of section 706(a) of the Act [240] does provide one device that the EEOC could use to initiate action. However,

> [l]ittle has been done to implement the potential effectiveness of the Commissioner charge as an enforcement mechanism. No . . . policy [has] been developed to utilize the Commissioner charge to attack pattern or industry-wide discrimination. Rather, most Comissioner charges have resulted from routine individual complaints, such as . . . complaints from charging parties who wished to remain anonymous.[241]

The EEOC has come under extensive criticism for this emphasis on a primarily reactive approach, to the exclusion of self-starting activities like the Commissioner charge.[242]

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the actions of the EEOC through a single, key Congressman, than to alter a decision within the Justice Department, where the Executive hierarchy may largely shelter the operating personnel from political pressure brought to bear by any but the most influential of persons.

[236] 42 U.S.C. § 2000e–5(i) (1964).

[237] In fact, the EEOC has used this provision in only one test case. *See* note 300 *infra*.

[238] Telephone Interview with David Copus, Attorney, Office of the General Counsel, EEOC, Washington, D.C., Dec. 18, 1970.

[239] *See* pp. 1248–49 *infra*.

[240] 42 U.S.C. § 2000e–5(a) (1964); *see* p. 1199 *supra*.

[241] FEDERAL EFFORT 333–34 (footnotes omitted).

[242] *Id.* at 295–98, 1078–79. Recent favorable decisions, such as Bowaters Southern Paper Corp. v. EEOC, 428 F.2d 799 (6th Cir.), *cert. denied*, 400 U.S. 942 (1970) (charge containing the barest allegation of discrimination satisfied the statutory requirement that the charge "set forth the facts upon which it is based"), have induced the EEOC to reconsider its Commissioner charge policy. Apparently,

The Commission's approach, however, seems quite understandable. First, the present function of the Commissioner charge is probably more in line with congressional intent. The EEOC's formal investigatory powers being limited to the "charge under investigation," [243] it seems doubtful that Congress intended that the EEOC engage in investigatory activities independent of charges brought before the Commission. Indeed, the apparent lack of independent investigatory powers raises some question as to how the EEOC could obtain facts on which to base sweeping Commissioner charges.[244] Thus, the intent of Congress was

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the Commission is presently establishing procedures to handle more widespread use of the Commissioner charge. Telephone Interview with David Copus, Attorney, Office of the General Counsel, EEOC, Washington, D.C., Feb. 10, 1971.

[243] Act § 710(a), 42 U.S.C. § 2000e-9(a) (1964). *See also* Act § 709(a), 42 U.S.C. § 2000e-8(a) (1964).

[244] Section 706(a) requires the Commissioner charge to "set forth the facts upon which it is based." 42 U.S.C. § 2000e-5(a) (1964).

One possibility for obtaining such facts might be to rely on an analysis of information provided by the record-keeping requirements of section 709(c), 42 U.S.C. § 2000e-8(c) (1964). *See* NATHAN 26; SOVERN 85–89. This section provides that employers and unions covered by Title VII must keep records of their employment practices, and must make such reports to the Commission as the EEOC requires. Unfortunately, section 709(d), 42 U.S.C. § 2000e-8(d) (1964), creates a substantial loophole in these record-keeping requirements by exempting any employer or union in a state with a local FEP law. *See* note 110 *supra*. Nonetheless, a Commission attorney has indicated that, in practice, employers and unions have not sought to take advantage of this loophole, but have continued to file reports with the EEOC without consideration of whether they are legally obligated to do so. Copus Interview, *supra* note 242.

Also, the Commission need not depend on compelled evidence and is free to gather evidence informally wherever it can. SOVERN 88. In this vein, the EEOC has held six such informal hearings in four different locations around the country. Unfortunately, the Commission has been unable to follow up these hearings with enforcement actions. The EEOC has been able to persuade the Justice Department to take action following only one hearing, the Los Angeles hearings of March 1969. The only Commissioner charges filed as a result of these hearings followed the most recent hearing in Houston in June 1970, FEDERAL EFFORT 334, 363–65, and the first private action brought on these Commissioner charges has recently been filed, Baldwin v. Houston Lighting & Power Co., Civil No. 71-H-175 (S.D. Tex., filed Feb. 16, 1971). Copus Interview, *supra* note 242. This form of public hearing was considered by former EEOC Chairman Clifford H. Alexander, Jr., to be a potentially important means of uncovering patterns of discrimination, FEDERAL EFFORT 298, but failure to follow them up or to conduct them jointly with other enforcement agencies has greatly diluted their effectiveness, *id.* at 420. Alexander's successor, William H. Brown, III, has deemphasized this form of Commission activity. *Id.* at 300.

In addition, the statutory requirement of stating the facts on which the charge is based has been interpreted very liberally by the courts to include the barest allegations of discrimination. Bowaters Southern Paper Corp. v. EEOC, 428 F.2d 799 (6th Cir.), *cert. denied*, 400 U.S. 942 (1970). Thus the EEOC might well avoid the whole problem by filing a charge on mere suspicion and then beginning investigation.

apparently to restrict the Commissioners to filing charges on behalf of persons who had already come to the Commission but who, for fear of reprisals, were unwilling to sign a sworn charge.

Secondly, the Commissioner charge, unlike the Attorney General's pattern or practice suit, is required to go through the Commission's investigation and conciliation processes. These processes are already overburdened by private charges, with a two-year backlog of charges under consideration.[245] With insufficient funding to increase significantly the number of complaints it can handle,[246] the EEOC has been forced to deemphasize this form of Commission activity to avoid increasing the delay currently facing private complainants.[247]

Most importantly, even if the Commission decided to utilize the Commissioner charge more extensively, a major stumbling block to its effectiveness would remain: the absence of EEOC authority to initiate court suits, even on a Commissioner charge. Thus, after failure of conciliation, the EEOC must rely on a private individual to bring suit,[248] or persuade the Attorney General to take action.[249] Generally, reliance on private parties to bring suit on their own complaints has proved ineffective;[250] there is little reason to think that private action will be any more likely when it is a Commissioner who initiated the charge, particularly if the individual had originally hesitated to file a charge for fear of reprisals.[251] Nor has the alternative to the private suit proved effective, for the Justice Department has been unwilling to coordinate its litigation efforts with the EEOC's

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[245] FEDERAL EFFORT 283, 308; see pp. 1201–02 *supra*.

[246] *See* notes 85 & 87 *supra* & note 408 *infra*.

[247] Note, *supra* note 3, at 16–17.

[248] Section 706(e) provides that suit may be brought on a Commissioner charge "by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice." 42 U.S.C. § 2000e–5(e) (1964). Persons may be designated by name, or the Commission may notify a class of the right of any of its members to sue. 29 C.F.R. § 1601.25(b) (1970).

[249] If the employer is a government contractor, the Commission could also attempt to persuade the OFCC to take action. *See* p. 1285 *infra*. Pursuant to their recently signed Memorandum of Understanding, *see* FEDERAL EFFORT 406–07, the EEOC is now preparing to refer its first case to the OFCC. Copus Interview, *supra* note 242.

[250] Private actions have been brought in less than ten percent of the cases in which reasonable cause was found but conciliation failed. FEDERAL EFFORT 336; *see* note 41 *supra*.

[251] Baldwin v. Houston Lighting & Power Co., Civil No. 71–H–175 (S.D. Tex., filed Feb. 16, 1971), is the first and only private suit to be brought as a result of the unsuccessful conciliation of a Commissioner charge. Copus Interview, *supra* note 242. Substantial responsibility for this record of failure must, however, be put on the EEOC for only rarely notifying members of the aggrieved class of their right to sue. FEDERAL EFFORT 334.

Commissioner charges,[252] leaving the EEOC powerless to follow the charges it initiates through to ultimate enforcement.

(c) Other Commission Enforcement Efforts. — Ironically, the one enforcement mechanism that the EEOC has utilized to a significant degree, appearing as amicus curiae in private actions,[253] was not specifically authorized by Title VII. The courts have adopted the attitude that the Commission's brief would be a useful aid to decision and to framing relief and, despite the lack of statutory authorization, have seen no reason to refuse the EEOC such an appearance.[254] The Commission has had some success through these appearances in persuading the courts to adopt its view, particularly in the area of remedies and procedural technicalities.[255] Still, appearances as amicus curiae are not an adequate substitute for more enforcement powers; the EEOC must rely on an individual to bring the action, and the Commission has no control over the course of the litigation or the right to appeal.

Central to such EEOC activity is the question of what weight the courts will give to EEOC opinion, not only in its amicus briefs, but also as embodied in its interpretative rulings and Guidelines.[256] The courts have generally acknowledged the Supreme Court's command to "show great deference to the interpretation given the statute by the officers or agency charged with its administration." [257] But at the same time, the courts have

[252] *See* p. 1233 & note 223 *supra*.

[253] During fiscal year 1969 the Commission appeared as amicus curiae in ninety cases, fifty percent of all private suits under section 706. *Hearings on Appropriations for 1971 Before the Subcomm. on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies of the House Comm. on Appropriations*, 91st Cong., 2d Sess., pt. 4, at 606 (1970) [hereinafter cited as *1971 EEOC Appropriations Hearings*]. The Commission has announced that it will seek an appearance whenever significant legal questions are raised involving the interpretation of Title VII, when the practices of the Commission are challenged, or when questions of more than routine interest are raised concerning the framing of appropriate relief. EEOC Opinion Letter, Dec. 3, 1965. *See also* FEDERAL EFFORT 337.

Recently, the Commission has also successfully sought to appear in a private suit by means of permissive intervention under FED. R. CIV. P. 24(b). Childress v. Plumbers Local 27, Civil No. 69-1428 (W.D. Pa., filed Dec. 23, 1969).

[254] *See, e.g.*, Vigil v. American Tel. & Tel. Co., 61 CCH Lab. Cas. ¶ 9321 (D. Colo. 1969).

[255] FEDERAL EFFORT 337.

[256] The authority of the EEOC to issue such Guidelines and interpretations has been upheld. American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968), *aff'd*, 59 CCH Lab. Cas. ¶ 9203 (D.C. Cir. 1969). The court implied this authority from: section 713(a), 42 U.S.C. § 2000e-12(a) (1964), which allows the EEOC to issue procedural regulations; section 713(b), 42 U.S.C. § 2000e-12(b) (1964), which talks of the effect to be given "any written interpretation or opinion of the Commission;" and the general practice of administrative agencies.

[257] Udall v. Tallman, 380 U.S. 1, 16 (1965) (referring to an order of the Sec-

also remained cognizant of the fact that the EEOC's opinion cannot be binding on them, and have felt free to disregard it when they disagree.[258] Perhaps the most revealing statement of the weight courts will give to the EEOC's interpretations and Guidelines is the Supreme Court's discussion of the effect of an "interpretative bulletin" of the Wage and Hour Administrator under the Fair Labor Standards Act: [259]

> The rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[260]

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retary of the Interior interpreting the Mineral Leasing Act of 1920, 30 U.S.C. § 226 (1964)). For such judicial acknowledgments, *see, e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term); Cox v. United States Gypsum Co., 284 F. Supp. 74, 78 (N.D. Ind. 1968), *aff'd*, 409 F.2d 289 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

Recently, Justice Douglas, dissenting from the Court's summary disposition of Crosslin v. Mountain St. Tel. & Tel. Co., 91 S. Ct. 562 (1971), reemphasized "the importance of deference to an administrative interpretation by the agency charged with the initial interpretation of a new law," citing *Udall*. 91 S. Ct. at 563.

[258] *See, e.g.*, Crosslin v. Mountain St. Tel. & Tel. Co., 422 F.2d 1028, 1030 (9th Cir. 1970) (EEOC decision "inconsistent" with the statute), *vacated and remanded in light of the Solicitor General's brief*, 91 S. Ct. 562 (1971); Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir.) ("clearly contrary" to the legislative history), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term); Diaz v. Pan American World Airways, 311 F. Supp. 559, 568 (S.D. Fla. 1970), *appeal docketed*, No. 30,098, 5th Cir., July 7, 1970 ("inconsistent").

[259] 29 U.S.C. §§ 201–19 (1964). Like the EEOC, the Wage and Hour Administration is an administrative agency with no adjudicatory powers.

[260] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

In one respect, however, the courts are required by statute to give a conclusive effect to EEOC opinion: section 713(b) provides that "good faith reliance on any written interpretation or opinion of the Commission" will bar "any liability or punishment" under Title VII. 42 U.S.C. § 2000e–12(b) (1964). Commission regulations have restricted the application of this provision to "(a) a letter entitled 'opinion letter' and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the Federal Register . . . ." 29 C.F.R. § 1601.30 (1970). These restrictions have been upheld. Papermakers Local 189 v. United States, 416 F.2d 980, 997 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See also* 35 Fed. Reg. 18692 (1970).

It is clear that section 713(b) does not, however, provide a defense to an action for violation of Title VII; while it bars any liability for back pay, it "is inapplicable to the action insofar as . . . [it] is an action for declaratory and other pro-

Finally, the EEOC has recently added another enforcement role to its arsenal of non-powers: petitioning other administrative agencies for permission to intervene in their proceedings in an effort to persuade these agencies to consider the employment practices of the firms which they are regulating.[261] The Commission finds the statutory authority to take such action by virtue of section 705(g), which empowers the EEOC "to cooperate with . . . other agencies." [262] While EEOC officials are enthusiastic about the potential of this enforcement mechanism, the extent of Commission activity of this sort will depend in large part upon what the Federal Communications Commission does with the first effort, an EEOC challenge of the employment practices of the American Telephone and Telegraph Company.[263]

spective relief." Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219, 1224 (C.D. Cal. 1968).

While section 713(b) is simply the protection of a reliance interest which, since the award of back pay is in the court's discretion, would in all probability be protected even without the statutory command, one court considered it to give an EEOC opinion "the force of law" and therefore enjoined the release of the opinion because of a lack of due process before the Commission. Air Transport Ass'n v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967), *modified*, 55 CCH Lab Cas. ¶ 9062 (D.D.C. 1968) (Commissioner Hernandez had ruled on a case involving sex discrimination after she had accepted a job with the National Organization of Women). The decision makes little sense. Not only did the court misconstrue the effect of section 713(b), but it awarded injunctive relief to the party charged with an unlawful practice, whose interests could in no way be prejudiced by an EEOC opinion. A favorable opinion would protect it from any retrospective liability, while an adverse decision would be of no legal effect. Whatever deference the courts might ordinarily give to the EEOC opinion would certainly be nullified later at trial by showing the same abuse of discretion in the EEOC decisionmaking process.

[261] N.Y. Times, Dec. 11, 1970, at 1, col. 2.

[262] 42 U.S.C. § 2000e-4(g) (1964).

[263] Copus Interview, *supra* note 238.

The EEOC first attempted to block an A.T.&T. rate increase by petitioning the FCC to hold hearings on the company's employment policies before allowing the increase. *See* N.Y. Times, Dec. 11, 1970, at 1, col. 2. The FCC, however, has decided to separate the questions of the reasonableness of the rate increase from an economic point of view and the utility's employment practices. While the rate increase has been partially granted, 36 Fed. Reg. 1282 (1971), the FCC has decided to treat the EEOC petition as a formal complaint under the Communication Commission's new anti-discrimination rules, 47 C.F.R. § 21.307 (1970), and has granted the request for hearings. 36 Fed. Reg. 1285, 1287 (1971). Hearings on A.T.&T.'s employment practices are presently scheduled for March 29, 1971. Telephone Interview with David Copus, Attorney, Office of the General Counsel, EEOC, Washington, D.C., Feb. 5, 1971. In addition, the EEOC has intervened as a plaintiff in NAACP v. FCC, No. 71-1065 (D.C. Cir., filed Jan. 25, 1971), a suit challenging the grant of the rate increase to A.T.&T. as unlawful in view of their allegedly discriminatory practices.

Of course, the publicity for EEOC enforcement efforts generated by such actions is itself valuable; but the Commission is hopeful that more tangible results will be obtained. Copus Interview, *supra* note 238.

H. Remedies

1. Remedies in Pattern or Practice Suits Under Section 707. — (*a*) *Affirmative Relief.* — Section 707(a) gives the Attorney General in a pattern or practice action the authority to request "such relief, including an application for a permanent or temporary injunction, restraining order, or other order . . . as he deems necessary to insure the full enjoyment of the rights herein described."[264] The courts have gone to great lengths in ordering affirmative relief to fulfill the promise of the statute.[265] Court decrees have ordered the merger of unions,[266] the establishment of new seniority systems,[267] the development of new objective criteria for union membership,[268] and the publicizing of new nondiscriminatory union practices.[269] Pattern or practice actions have obtained relief for specifically named individuals who were not parties to the action: for example, such individuals have been ordered admitted to unions or referred for work.[270]

The only statutory limitation on the availability of such affirmative relief is the anti-preferential treatment provision of section 703(j).[271] The courts, however, have interpreted this provision as not precluding affirmative action against apparently neutral practices which continue the effects of past discrimination.[272]

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[264] 42 U.S.C. § 2000e-6(a) (1964).

[265] *See* pp. 1146–50 *supra*. *See also* United States v. Louisiana, 380 U.S. 145, 154 (1965), in which the Court, in a voting rights case, held that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

[266] United States v. Papermakers Local 189, 301 F. Supp. 906 (E.D. La.), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[267] *Id.*; *see* p. 1164 *supra*.

[268] Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[269] United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

[270] Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D. Ind. 1969). Note that in the *Asbestos Workers* case several black workers, who had brought private actions seeking union membership but whose suits had been dismissed for failure to file a charge with the EEOC, were among those ordered to be admitted to the union. *Compare* Vogler v. McCarty, Inc., 294 F. Supp. 368, 372–75 (E.D. La. 1968), *with* Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047, 1053 (5th Cir. 1969). Others ordered admitted had never applied for membership and might well have lacked standing to sue. *Id.* at 1053.

[271] 42 U.S.C. § 2000e-2(j) (1964).

[272] United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). For example, the court in Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), found an otherwise lawful seniority system illegal because it had the effect of keeping black employees in the lower job categories in which they had originally

(*b*) *Back Pay.* — While sometimes seeking affirmative relief for specific individuals, the Justice Department has not, as a general rule, sought back pay in its pattern or practice suits for the class of individuals affected by the defendant's discriminatory practices.[273] There may be valid reasons for this policy if one shares the Justice Department's view that pattern or practice suits serve in large part a precedent-making function.[274] To be sure, the award of back pay would be inappropriate where the class is ill-defined; back pay recoveries based on mere statistical evidence would quickly become unmanageable. In such cases, it is appropriate to limit relief to prospective remedies, such as injunctions or affirmative relief. In addition, even in appropriate cases, determination of the amounts of back pay would add significant delay and complexity to the already difficult pattern or practice litigation.[275] Moreover, judges may be more reluctant to find questionable, but long-established, practices a violation of the statute when large sums of back pay are involved.[276]

But if the Justice Department's role is seen as extending beyond the establishment of favorable precedent, seeking back pay may often be essential. Where the Attorney General brings suit on behalf of those persons too poor, ignorant, or afraid of retaliation to bring their own action, the award of back pay is necessary to give the parties full relief. A case initiated on the basis of a Commissioner charge which was in turn the result of an anonymous private complaint to the EEOC would seem to present such a situation. In other cases, a back pay award would have a significant deterrent effect on firms with similar practices in addition to compensating more fully the individual victims of discrimination.[277]

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been discriminatorily hired. *See* FEDERAL EFFORT 377–79. Section 703(j) is discussed at pp. 1147–50 *supra*.

[273] Moore Interview, *supra* note 209. *But see* note 277 *infra*.

[274] *See* p. 1231 *supra*.

[275] *See* Dobbins v. Electrical Workers Local 212, 61 CCH Lab. Cas. ¶ 9327 (S.D. Ohio 1969). Often hundreds of employees may have been affected by such a discriminatory practice as an unlawful seniority system. To award back pay would require a separate determination for each individual of when he should have been promoted and what pay rate he should have been getting.

[276] Moore Interview, *supra* note 209.

[277] Perhaps the Justice Department has begun to realize the importance of back pay awards. *See 1971 Civil Rights Division Appropriations Hearings* 478:

> [One] . . . pending and future legal problem . . . [is] the development of the [principle] of compensation for past opportunities lost to discrimination. Not only is such compensation appropriate relief from the effects of illegal conduct, but knowledge of the principle will itself operate to deter future violations.

Hence, the Justice Department has recently begun to request back pay as a matter of course in its pattern or practice suits. Telephone Interview with Robert T. Moore, Deputy Chief, Employment Section, Civil Rights Division, Justice De-

Should the Justice Department obtain only affirmative or injunctive relief in a successful pattern or practice suit, private parties ought to be allowed to bring an action for back pay, with the judgment of the government suit binding on the defendant through the operation of collateral estoppel. The traditional collateral estoppel doctrine of mutuality would seem to prevent the prior judgment from having a binding effect on the employer in a subsequent suit by discriminatees for back pay.[278] Recently, however, courts have begun to retreat from the strict doctrine of mutuality and have allowed even the "offensive" use of a prior judgment as long as the defendant has had a full and fair opportunity to litigate the issue of liability in a prior adjudication.[279]

(*c*) *Preliminary Injunctions.* — Courts have regarded favorably petitions for preliminary relief in pattern or practice suits.[280] The Fifth Circuit recently held that the threat of irreparable harm (ordinarily required if preliminary relief is to be granted) could be presumed from the violation of Title VII in pattern or practice litigation.[281] The legislative judgment that discriminatory employment practices are a serious threat to the public welfare should be sufficient to justify a preliminary injunction if a violation of the statute has been shown;[282] this is particularly

partment, Washington, D.C., Feb. 16, 1971. Still, the back pay demand is considered negotiable and may be the first demand dropped; the Department claims that this is only because there is often a private party willing to sue for back pay, Moore Interview, *supra*, as in the Libbey-Owens-Ford case; *see* note 225 *supra*.

[278] Of course, a prior judgment cannot be asserted against a nonparty because it would be a violation of due process, depriving him of his day in court. Hansberry v. Lee, 311 U.S. 32, 40–41 (1940). The traditional doctrine of mutuality goes even further, not allowing a party to be bound in a judicial action as to the resolution of a question litigated fully in a previous judicial proceeding unless all parties in the second action were the same as those in the first. *See* F. JAMES, CIVIL PROCEDURE § 11.31 (1965).

[279] Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 934 (1964); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); *see* Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942) (Traynor, J.); Currie, *Mutuality of Collateral Estoppel*, 9 STAN. L. REV. 281 (1957). *But see* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967) (disapproving of such "offensive" use of prior judgment).

[280] *See, e.g.*, United States v. Sheet Metal Workers Local 10, 3 CCH Empl. Prac. Dec. ¶ 8068 (D.N.J. 1970); United States v. Central Motor Lines, Inc., 3 CCH Empl. Prac. Dec. ¶ 8095 (W.D.N.C. 1970); Vogler v. McCarty, Inc., 294 F. Supp. 368, 369 (E.D. La. 1968), *aff'd sub nom.* Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969). *But see* United States v. National Lead Co., 315 F. Supp. 912 (E.D. Mo. 1970).

[281] United States v. Hayes International Corp., 415 F.2d 1038, 1045 (5th Cir. 1969).

[282] Note, *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994, 1059

true when Congress has considered and explicitly authorized the award of preliminary relief,[283] as in Title VII.[284] As the clarity of the violation decreases, however, courts must be careful to take the course likely to produce the least injury. While public injury from a violation of Title VII can still be presumed, the possible injury to the defendant or to unrepresented third parties from an unwarranted injunction must still be considered in a weighing of the equities before a grant of preliminary relief.[285]

2. Conciliation. — (*a*) *Strengthening the Conciliation Process.* — It is generally conceded that conciliation, the first step in the remedial process for private complaints, has not worked, primarily because there is insufficient pressure on the respondent to reach an agreement. Respondents have found that only infrequently do private parties take their charges into the courts after conciliation has failed.[286] Delay and recalcitrance in conciliation, therefore, frequently work to the benefit of the respondent. The solution, then, is to find some means of increasing the incentive for the respondent to attempt to reach agreement before suit.[287]

(1965); *accord*, United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 544 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963):

> The enactment [section 7 of the Clayton Act] . . . was an expression of the public policy of the nation and the threatened violation of the law here is sufficient public injury to justify the requested relief. . . . No further showing need be made by those directed to enforce that section than that it is being violated or threatened with violation. Nor is it necessary to demonstrate the precise manner in which violation of the law will result in injury to the public interest. It is sufficient to show only that an act or threatened act is within the declared prohibition of Congress.

[283] *See* Note, *supra* note 282, at 1059.

[284] The Attorney General may request "such relief, including an application for a permanent or temporary injunction, restraining order or other order . . . as he deems necessary . . . ." Act § 707(a), 42 U.S.C. § 2000e-6(a) (1964).

[285] Note, *supra* note 282, at 1059. *See also* Note, *Temporary Injunctive Relief Under Section 10(i) of the Taft-Hartley Act*, 111 U. PA. L. REV. 460, 481 (1963).

[286] *See* pp. 1200–02 *supra*.

[287] *See* SOVERN 80: "The experience of state and local agencies shows that impotence will frequently be met with intransigence and conciliation works best when compulsion is waiting in the wings."

One additional possibility might be to provide some sanction for failure of respondents to make a good faith effort to resolve the dispute; present Commission regulations allow the EEOC only to terminate its conciliation efforts in this event. 29 C.F.R. § 1601.23 (1970). But because respondents are ultimately entitled to obtain a judicial determination of their obligations under Title VII, the EEOC can do little more than require them to come to the bargaining table and present their positions. The EEOC, however, has not had a serious problem in obtaining this minimal amount of cooperation, Copus Interview, *supra* note 238, making such a "good faith" requirement unnecessary. Nevertheless, the EEOC and OFCC recently signed an agreement to employ OFCC enforcement powers against any contractor who refuses to conciliate with the EEOC. FEDERAL EFFORT 406–07. Also, evidence of such a refusal to cooperate, or of the intransigence of a respondent when his responsibilities under Title VII were perfectly clear, might well be a

This can best be done by giving the EEOC greater enforcement powers,[288] such as cease and desist authority or the power to bring suits in the district courts on behalf of a charging party.[289] If this is done, respondents will no longer be able to rely on the likelihood that a suit will not follow the failure of conciliation efforts. The consequence, then, should be that the normal considerations which go into a decision whether to settle before trial — that is, the probability of being held liable and the cost of litigation — will control.

The lack of incentive to reach agreement has undoubtedly contributed, in part, to the delay which the conciliation process has entailed for private complainants. The individual charging party is usually complaining about a particular discriminatory act, which he is relying on the EEOC and Title VII to prevent or reverse. But the need for employment and income generally cannot wait for years — the span of time which it normally takes the EEOC to process a private complaint.[290] Granting the EEOC substantial enforcement powers would certainly help cut down the present delay by creating some substantial threat of litigation if agreement is not reached. Still, other means of eliminating delay from the present conciliation process should be sought as well.

One possibility would be the introduction of a notice procedure as a first step in the conciliation process; after a finding of reasonable cause, the Commission would notify the respondent of the charge and inform him that unless he wishes to discuss settlement, the EEOC will notify the individual of his right to sue and/or refer his case to the Justice Department or the OFCC to institute proceedings.[291] In other words, the initiative should,

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factor for the court to consider when determining whether punitive damages are appropriate. *See* pp. 1261–64 *infra*.

[288] FEDERAL EFFORT 343, 350; Note, *supra* note 38, at 847.

[289] *See* pp. 1270–74 *infra*. If the complaint in fact involved more than an isolated case of discrimination, the threat of EEOC pattern or practice power would serve the same function, should the agency be granted that power. Under the present statutory scheme, of course, the Attorney General's suit could serve the same purpose, but the Justice Department has not coordinated its efforts with the EEOC's conciliation attempts. *See* p. 1233 *supra*.

[290] Although theoretically a complainant may demand his notice of his right to bring suit sixty days after he files a charge, in practice the majority of complainants will not pull out of the conciliation process, but will let the EEOC procedures run their course. The same factors that result in so few court actions being brought after failure of conciliation, *see* pp. 1252–53 *infra*, are at work here: many individuals, unfamiliar with the legal process and unaware of how to go about contacting an attorney or bringing suit, are forced to put their full faith in the Commission to redress their complaints.

[291] A similar notification procedure has been used with some success by the Justice Department before filing pattern or practice actions. *See Hearings on*

in the first instance, be placed on the respondent; if he wished to conciliate, he would have to so notify the Commission within a short period — for example, ten days. Should the respondent reply negatively or fail to reply at all, the EEOC would then notify the complainant of his right to sue, unless he wishes to pursue conciliation — a doubtful possibility considering that the employer has already indicated that he will not settle voluntarily.[292] If, however, the respondent replies favorably, the Commission would move as rapidly as possible to effect a settlement, ready to issue the complainant a notice of his right to sue at the first indication that negotiations have stalled.[293]

Such a procedure would not necessitate any statutory change. While Title VII requires that the EEOC attempt conciliation, the extent of its efforts in any given case are left to the discretion of the Commission. Certainly, it could take the position that when the employer has expressly evidenced a disinclination at the outset to settle voluntarily, the Commission is justified in

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Appropriations for 1969 Before the Subcomm. on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies of the House Comm. on Appropriations, 90th Cong., 2d Sess., pt. 1, at 296 (1968). Likewise, the Federal Trade Commission has an established settlement procedure used in the context of antitrust suits. *See* 16 C.F.R. §§ 2.31–.35 (1970). When the FTC notifies a respondent of his noncompliance, it includes the text of a proposed settlement agreement which the Commission believes adequate to correct the violation and which then forms the basis of settlement negotiations. *See* Note, *The Federal Trade Commission and Reform of the Administrative Process*, 62 COLUM. L. REV. 671, 689–91 (1962).

Sixteen of the fifty-seven pattern or practice suits brought through Jan. 8, 1971 were settled before trial. Status of Cases. Most of these agreements, however, were reached just before trial, and not before filing of the suit. Moore Interview, *supra* note 209. Such a settlement procedure should not be applied to cases where the lawmaking function of the pattern or practice suit is important. *Cf.* ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 27 (Comm. Print 1959) (critical of Justice Department's tendency to settle too many actions rather than creating new law in the antitrust field). Of course, it is in just these precedent-setting cases that the chance of reaching agreement is smallest.

[292] Individuals who rely on the Commission as their only hope of obtaining relief, *see* note 290 *supra*, might be reluctant to abandon conciliation without giving it a chance, no matter how small the likelihood of success.

[293] Dean Sovern also observed that commissions have a tendency to try for conciliation agreements long after they should have moved on to court or administrative action. SOVERN 47. He therefore suggested holding the Commission to a thirty day time limit on conciliation. *Id.* at 58. *See also* P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT 270 (1964).

Of course, the Commission will still be hampered by its lack of funds and its huge backlog, perhaps making such short deadlines unrealistic. Yet the suggested procedure should reduce the number of conciliations as well as the length and difficulty of each, hopefully allowing the EEOC to get out from under its case backlog.

foregoing further informal efforts.[294] Furthermore, such an approach would not violate the statutory policy favoring voluntary settlements of Title VII complaints. That policy is tempered by the additional legislative judgment that, after sixty days have passed, the private complainant's interest in relief becomes predominant over the concern with voluntary settlement and he is to be allowed to sue. A notification procedure would merely tend to narrow conciliation efforts to those cases in which the employer would in fact be amenable to settlement within the statutory sixty-day period — essentially those cases in which the violation of Title VII would be corrected as soon as it had been pointed out. Although the likelihood of settlement would remain largely the same, the delay of cases in the EEOC might then be substantially reduced because cases without hope of voluntary resolution would frequently be channeled at once to the courts.[295]

(*b*) *Enforcement of Conciliation Agreements.* — Once a conciliation agreement has been reached, it is desirable that the agreement should be legally enforceable if the respondent fails to abide by his bargain. Otherwise, the complainant would be forced to sue on the underlying Title VII violation and attempt to establish liability, perhaps after having waited for the completion of a lengthy conciliation effort. Commentators have puzzled over the legal basis for such enforceability.[296] To be sure, the charging party can enforce the conciliation agreement against the respondent on ordinary contract principles: he has waived his right to sue in exchange for the promises in the agreement.[297]

The possibility of enforcement of the agreement by the EEOC has raised more difficult questions.[298] The best approach would

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[294] *Cf.* 29 C.F.R. § 1601.23 (1970) (allowing the EEOC to terminate conciliation efforts for failure of respondent to cooperate).

[295] Such a preliminary notification procedure would leave the conciliation process itself unaffected. The charge would still be kept confidential until suit is brought, enabling the respondent to explain and possibly justify his practices without public exposure. In addition, the form of any settlement agreement would be the same as in the present conciliation agreements; hence the type of relief available would remain unlimited.

[296] *See, e.g.*, Blumrosen, *supra* note 180, at 102–05; Rosen, *supra* note 220, at 869; Note, *supra* note 3, at 33.

[297] *See* 1 A. CORBIN, CONTRACTS § 139 (1963). The complainant, as a part of a conciliation agreement, executes a formal waiver of his right to sue. See paragraph three of the sample conciliation agreement set out in Blumrosen, *supra* note 180, at 102.

Arguably, a third party (for example, another employee) who was to be benefited under the agreement might sue as a third-party beneficiary. He would have to convince the court that, through the EEOC's participation in the conciliation process, the agreement was intended to benefit him as well. *See* 4 A. CORBIN, CONTRACTS § 776 (1963).

[298] Various means of finding authority for such Commission action have been

be to make use of section 706(i) of Title VII which explicitly gives the Commission the power to police compliance by bringing suit to enforce a court order.[299] By making a practice of entering conciliation agreements as consent decrees, the EEOC can insure that it, as well as charging parties, can directly enforce such agreements in the district courts.[300]

A different problem is presented if the complainant, after formally waiving his right to sue by signing a conciliation agreement, seeks to bring an action on the underlying violation of Title VII.[301] Of course, the presumption must be that the agreement is binding and can be enforced against him to bar suit. To protect the integrity of the conciliation process and to encourage settlement, the conclusiveness of the conciliation agreement must be the general rule.

Yet the tendency of state FEPC's to accept "soft settlements" binding on the complainant has often reduced the effectiveness of state fair employment practice laws.[302] It is quite possible

suggested, including contract theories and a general supervisory power over conciliation. *See, e.g.*, Blumrosen, *supra* note 180, at 103; Rosen, *supra* note 220, at 869. Both suggestions ignore the fact that the powers of the Commission have been strictly limited by Congress and that to imply new powers would do clear violence to the legislative intent.

[299] 42 U.S.C. § 2000e-6(i) (1964).

[300] The Supreme Court has upheld the validity of consent decrees as judicial orders, and not mere contracts, even if complaint, answer, and decree are filed on the same day (as would be the case here with plaintiff filing a complaint under section 706 following the agreement on a settlement). Swift & Co. v. United States, 276 U.S. 311, 320, 327 (1928); United States v. Swift & Co., 286 U.S. 106, 115 (1932).

One court has already sanctioned the Commission's right to enforce a conciliation agreement in this manner. EEOC v. Plumbers Local 189, 3 CCH Empl. Prac. Dec. ¶ 8110 (6th Cir. 1971) (enforcement sought of consent decree entered in Locke v. Plumbers Local 189, Civil No. 68-148 (S.D. Ohio 1968); case remanded for further findings of fact).

One commentator dismissed this procedure by saying that respondents would be unlikely to agree to it. Note, *supra* note 3, at 33. But if the respondent is signing the agreement in good faith, there would seem to be little reason for him to object to the consent decree procedure.

There is no apparent reason why the EEOC has not entered its conciliation agreements as consent decrees. The Justice Department regularly uses the consent decree procedure. *See* Status of Cases (the sixteen pattern or practice actions settled have been ended by consent decrees).

[301] It is well settled that when a complainant refuses to sign a proposed conciliation agreement reached by the EEOC and the respondent, he has an absolute right to bring suit, regardless of how favorable the proposal might be. Austin v. Reynolds Metals Co., 62 CCH Lab. Cas. ¶ 9408 (E.D. Va. 1970); Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968), *aff'd*, 409 F.2d 289 (7th Cir. 1969). To hold otherwise would be to make the Commission's opinion of what was compliance the final unreviewable determination of the plaintiff's claim. 284 F. Supp. at 84.

[302] SOVERN 48; *see* Blumrosen, *supra* note 39, at 94; Note, *supra* note 3, at 32.

that a similar problem could arise in the context of Title VII enforcement as well.[303] In addition, since private complaints are essentially the only means by which the EEOC can participate in the enforcement of Title VII, there is a great temptation to see any complaint as an opportunity for a broad attack on discriminatory practices; the result may often be a settlement which, although it may achieve some class relief, does not satisfy the complaint of the individual. Or the Commission, because of its severe backlog of cases, may accept significant compromises not wholly consistent with the interests of the individual in order to achieve speedy conciliation.

Certainly, if the complainant had been represented by his own attorney before signing the agreement, courts ought not engage in an examination of the fairness of the agreement. The involvement of complainant's own counsel should justify the assumption that his interests were adequately protected in the conciliation agreement, even if it were shown that the EEOC's concerns and efforts in the case were somewhat inconsistent with his own. In addition, considering the traditional presumption as to the competence of counsel, there would undoubtedly be a strong reluctance to review counsel's performance.[304]

But more often, the only legal advice the complainant would have received was that provided by the EEOC. In such cases, there would seem to be an obligation on the part of the EEOC not only to act as mediator between the employer and complainant, but also to seek to insure that the complainant's interests are adequately protected. Absent such a duty of fair representation, the complainant — often unlettered and ignorant of the law — may well bind himself against his best interests to an agreement which he does not understand and which waives any right to further recourse in the courts.

In the somewhat analogous context of a union's duty of fair representation,[305] the Supreme Court held in *Vaca v. Sipes*[306] that if an employee could establish that the union had violated this duty, he would be allowed to prosecute his grievance in the

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[303] One EEOC source suggested that it was just as well that the Commission's conciliation agreements were not entered as consent decrees since many of them are so weak.

[304] *Cf.* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence, and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1268, 1276–77 (1966) (presumption of competence of counsel in criminal law). *But cf.* Tigar, *The Supreme Court, 1969 Term, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 16–19 (1970).

[305] The union duty of fair representation was first announced in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[306] 386 U.S. 171 (1967).

courts, despite his failure to have exhausted the grievance machinery provided for in the contract. Similarly, it should be recognized that if the EEOC does not adequately safeguard the interests of an unrepresented complainant, he should not necessarily be bound by any conciliation agreement which he accepts at the instigation of the agency.

Of course, the question remains: when should the EEOC be held to have failed in its duty, thus allowing the complainant to repudiate the conciliation agreement? In *Vaca v. Sipes*, the Court held that a union violates its duty of fair representation in failing to prosecute a grievance only if it acts arbitrarily or in bad faith.[307] Such a narrow test undoubtedly reflects a fear of destroying the ability of unions to be the collective voice of their members in their continuing relationship with management.[308] But the EEOC does not have a continuing relationship with employers which requires substantial protection. It is true that employers might be somewhat reluctant to enter into conciliation agreements if they see complainants frequently escaping them and bringing suit. Yet such fears may well provide an incentive for the employer — as well as the EEOC — to be certain that a complainant understands the agreement into which he is entering. Moreover, it seems likely that the instances in which repudiation occurs will, in fact, be rare.

Given the real dangers to the unrepresented complainant, it would seem appropriate to ensure that in the negotiation of the conciliation agreement there was in fact no conflict of interests between the EEOC and the complainant. To do so, the court would presumably have to look not only at the conduct of the agency in the negotiation process, but also at the substance of the final agreement to ascertain its reasonableness.[309] To be sure, if a court found that the agency had adequately safeguarded the complainant's interests, then any waiver provided in an agreement should be binding. If, however, plaintiff could establish

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[307] *Id.* at 190.

[308] *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 253 (1967).

[309] *Cf.* Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81, 107–09, in which the author argues for limited judicial consideration of the merits of the grievance and the fairness of union action in the *Vaca v. Sipes* situation.

The courts would not be barred from re-examining the merits of the agreement even if it were entered as a consent decree. In Hughes v. United States, 342 U.S. 353 (1952), "'it appears that the Supreme Court recognized, as it would seem it must, that . . . a consent decree could not constitute a license to a defendant to continue in violation of the law . . .'" ANTITRUST SUBCOMM., *supra* note 291, at 6 (discussing consent decrees in government antitrust suits). In Liquid Carbonic Corp. v. United States, 350 U.S. 869 (1955), the Court, per curiam, remanded the case "for a hearing on modification of the consent decree."

that in negotiating the agreement the agency acted according to interests contrary to his own, it would be appropriate for a court to refuse to hold a plaintiff to a waiver of his rights. Still, in this latter case, it should be open to the defendant to contend that, regardless of the EEOC's actions, the plaintiff voluntarily waived his right to sue and that the waiver must be given effect. Yet the law will not invariably enforce a waiver. Considering the fundamental importance of freedom from discrimination, it would seem appropriate to draw upon the stringent requirements established to protect constitutional rights in criminal law: a waiver of such rights must be performed "understandingly and knowingly."[310] Even basic contract law requires "informed consent" to make an agreement binding.[311]

3. Remedies in Private Actions Under Section 706. — After failure of conciliation, the present statutory enforcement scheme for private complaints under Title VII relies on the individual complainant to institute court action to bring the respondent to justice.[312] As noted previously, such reliance on individual complainants to enforce the statute has been misplaced. The vast majority of Title VII violations continue uncorrected. Only a small percentage of such violations are brought to EEOC attention; of these, private actions have been brought in less than ten percent of the cases in which the EEOC found reasonable cause but was unable to conciliate successfully.[313]

One important reason for this failure is the lack of familiarity of many minority workers with the institutions of our legal system.[314] But another important factor is that the rewards for the individual who successfully brings suit normally provide insufficient incentive to overcome the delay and expense necessarily entailed in litigation.[315] The courts have provided extensive

[310] Fay v. Noia, 372 U.S. 391, 439 (1963); *cf.* Tigar, *supra* note 304, at 7–25.

[311] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[312] Act § 706(e), 42 U.S.C. § 2000e-5(e) (1964).

[313] FEDERAL EFFORT 336; *see* note 41 *supra*.

[314] When notified of his right to sue, the complainant may often not know of an attorney to whom he can turn. Even if he is informed that the court will appoint an attorney for him, as is authorized by section 706(e), 42 U.S.C. § 2000e-5(e) (1964), the complainant may have no idea where to go. For this reason, the EEOC has compiled a list of attorneys in the Los Angeles area who are willing to handle Title VII cases. FEDERAL EFFORT 338. An effort should be made to extend this practice to other areas, and to try to give each individual complainant the name and telephone number of an attorney along with the notice of his right to sue.

[315] FEDERAL EFFORT 336; Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 492 (1968); *cf.* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 557 (1961) (state FEP laws).

affirmative relief,[316] but not the immediate relief needed by many plaintiffs. Because of the delay of deferral and conciliation procedures, by the time he is given the right to sue, the complainant may have long since obtained other employment and may no longer see the need to bring an action. The possible financial rewards, back pay less interim earnings, are inadequate to overcome this delay as well as the trouble and expense of litigation.[317]

(*a*) *The Appointment of Counsel and the Award of Attorney's Fees.* — To some extent Congress recognized these problems. Title VII provides for the appointment of counsel and authorizes the commencement of an action without payment of fees, costs, or security "in such circumstances as the court may deem just." [318]

Another statutory remedy for these problems would seem to be the authorization of the award of a reasonable attorney's fee to the prevailing party.[319] Several recent Supreme Court de-

[316] The affirmative remedies provided in private actions are very similar to those allowed in pattern or practice suits. *Compare* Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969) (requiring transfer opportunities for all presently employed black workers), *and* Johnson v. Continental Can Co., 1 CCH EMPL. PRAC. GUIDE ¶ 9481 (E.D. La. 1969) (requiring consolidation within plant departments), *and* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (requiring transfer opportunities without loss of seniority, in modification of collective bargaining agreement), *with* cases cited in notes 266, 268, & 269 *supra*. *See also* pp. 1146–50 *supra*.

[317] "[V]ictory [for the complainant] may bring him no personal gain." SOVERN 75.

[318] Act § 706(e), 42 U.S.C. § 2000e–5(e) (1964).

Several factors may legitimately enter into the court's decision whether to appoint counsel. Foremost, of course, are financial considerations. The court must distinguish the Title VII provision from the general statutory provision for proceedings in forma pauperis, 28 U.S.C. § 1915 (1964); the Title VII plaintiff need not be a pauper but must simply be unable to afford to retain private counsel. Edmonds v. E.I. duPont deNemours & Co., 315 F. Supp. 523 (D. Kan. 1970); Petete v. Consolidated Freightways, 313 F. Supp. 1271 (N.D. Tex. 1970). *But see* Green v. Cotton Concentration Co., 294 F. Supp. 34 (S.D. Tex. 1968).

The court may also consider the merit of the plaintiff's claim; the EEOC finding on reasonable cause might be a useful guide in this respect. *See* Aiken v. New York Times Co., 60 CCH Lab. Cas. ¶ 9305 (S.D.N.Y. 1969). Moreover, the public benefit likely to accrue from the action enforcing Title VII can be considered. Edmonds v. E.I. duPont deNemours & Co., 315 F. Supp. 523, 526 (D. Kan. 1970).

Finally, the court may require some effort on the part of the plaintiff to secure counsel, perhaps on a contingent fee basis; however, the court must keep in mind the extremely short thirty day time limit in which the plaintiff may commence an action, and the fact that few attorneys are qualified or willing to handle the complex Title VII litigation. Edmonds v. E.I. duPont deNemours & Co., 315 F. Supp. 523 (D. Kan. 1970); Petete v. Consolidated Freightways, 313 F. Supp. 1271 (N.D. Tex. 1970). It is simply not true, as one court said, that if the claim is meritorious, the plaintiff will be able to find counsel. Johnson v. Hertz Corp., 316 F. Supp. 961 (S.D. Tex. 1970).

[319] Act § 706(k), 42 U.S.C. § 2000e–5(k) (1964).

cisions have clarified the considerations relevant to determining when fees should be awarded. Thus, the Court has said that although "attorney's fees are not ordinarily recoverable in the absence of a statute," [320] an exception will be made if attorney's fees are a necessary incentive to private enforcement of a statute, and if the suit benefits others in addition to the individual prosecuting the action.[321] And when the statute explicitly authorizes the award, and the additional considerations indicated above are met as well — as they are in a Title VII case — the law is clear. In a case arising under Title II of the Civil Rights Act of 1964, the Supreme Court held that in order to encourage private litigants to enforce the statute, "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." [322] While the successful Title VII plaintiff, unlike his Title II counterpart who is limited to injunctive relief, can receive a monetary award in the form of back pay, the same rationale should apply. As long as he obtains relief for interests greater than his own — as is invariably the case when injunctive or affirmative relief is granted — an award of attorney's fees is appropriate to encourage suits advancing the national policy embodied in Title VII.[323]

At the same time, since the purpose of the provision was to encourage plaintiffs of limited means to enforce Title VII,[324] the regular award of attorney's fees to successful defendants would

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[320] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

[321] Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); *see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 215–17 (1970).

[322] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam). More fully, the Court reasoned:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive power of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief. . . .

Id. at 401–02 (footnote omitted).

[323] *See* Lea v. Cone Mills Corp., 3 CCH Empl. Prac. Dec. ¶ 8102 (4th Cir. 1971); Clark v. American Marine Co., 1 CCH EMPL. PRAC. GUIDE ¶ 9449 (E.D. La. 1970), *aff'd*, 3 CCH Empl. Prac. Dec. ¶ 8113 (5th Cir. 1971). The *Clark* court also ruled that it was immaterial that one of the attorneys was employed by the NAACP Legal Defense and Education Fund, since technically the award went to the prevailing party, not to his attorney. 1 CCH EMPL. PRAC. GUIDE ¶ 9449, at 6774. *But see* Dobbins v. Electrical Workers Local 212, 61 CCH Lab. Cas. ¶ 9327 (S.D. Ohio 1969) (dictum questioning the right of an organization — the NAACP — to receive the attorney's fee).

[324] *See* 110 CONG. REC. 12,724 (1964) (remarks of Senator Humphrey); *cf.* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

frustrate that policy.[325] Hence, attorney's fees should not be granted to the prevailing respondent unless there is some evidence that the suit was brought with a malicious or vexatious intent.[326]

These principles have generally been followed in practice by the courts. Although an occasional court has refused to award a successful plaintiff his attorney's fees,[327] most have granted a "reasonable" fee to the prevailing complainant.[328] And no case has been found in which the court awarded counsel fees to the defendant.[329]

Yet these awards of attorney's fees have not had the effect of substantially increasing the frequency of private actions. One reason might be that the award depends on the outcome of the suit. Even when granted, awards generally have not been sufficiently generous to induce attorneys to undertake the associated risk, to cover the extensive trial preparation costs, and to compensate for the long and arduous Title VII litigation.[330] More likely, however, the award of attorney's fees is ineffective be-

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[325] *See* Miller v. International Paper Co., 408 F.2d 283, 293 (5th Cir. 1969).

[326] *See* Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 506 (1966); Note, *supra* note 3, at 50.

[327] *See, e.g.*, Robinson v. Lorillard Corp., 319 F. Supp. 835, 843 (M.D.N.C. 1970), where the court refused to grant the plaintiff any attorney's fee because the respondent's defenses were not "extreme." The Supreme Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), rejected any test based on a subjective characterization of the respondent's defenses. *Compare id. with* Newman v. Piggie Park Enterprises, Inc., 377 F.2d 433, 437 (4th Cir. 1967).

[328] The awards range from $20,000 in Clark v. American Marine Corp., 1 CCH EMPL. PRAC. GUIDE ¶ 9449 (E.D. La. 1970), *aff'd*, 3 CCH Empl. Prac. Dec. ¶ 8113 (5th Cir. 1971), to $250 in Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969). *See also* Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) ($12,000), *aff'd in pertinent part*, 416 F.2d 711 (7th Cir. 1969); Garner v. E.I. duPont deNemours & Co., 60 CCH Lab. Cas. ¶ 9300 (W.D. Ky. 1969) ($6,000); Long v. Georgia Kraft Co., 62 CCH Lab. Cas. ¶ 9437 (N.D. Ga. 1970) ($5,000); Gunn v. Layne & Bowler, Inc., 56 CCH Lab. Cas. ¶ 9088 (W.D. Tenn. 1967) ($1,000).

[329] The court in Miller v. International Paper Co., 290 F. Supp. 401 (S.D. Miss. 1967), awarded attorney's fees to the defendant in a Title VII action for failure of plaintiff to appear at a deposition, but the award was apparently based on the provisions of FED. R. CIV. P. 37. At any rate, the award was reversed on appeal as an abuse of discretion. Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).

[330] To remedy these problems, a recent proposed amendment of Title VII, S. 2453, 91st Cong., 2d Sess. (1970), provided for payment of attorney's fees by the Commission to litigants who, after a Commission finding of reasonable cause, brought suit but were unsuccessful, Proposed § 706(w), S. REP. No. 91-1137 at 49, and allowed the award of up to $1000 in trial preparation costs. Proposed § 706(g)(2). Even these proposals, however, might not be sufficient to overcome the natural reluctance to undertake the strain of a difficult litigation. Nor is an award of $1000 likely to be sufficient to allow the individual plaintiff to litigate on equal terms with the large corporate defendant.

cause, while it does make suit easier for the complainant, it provides no individual benefit and therefore no positive incentive to bring suit;[331] generally, it is only the attorney who will benefit from the award. What are needed, then, are remedies which will reward the individual for undertaking suit, either monetarily or in the form of more immediate relief.

(*b*) *Preliminary Injunctive Relief.* — One step in this direction would be for the courts to provide more meaningful preliminary injunctive relief. Section 706 specifically authorizes the courts to award injunctions, but makes no mention of temporary relief. Nevertheless, the courts have assumed by implication the power to grant a preliminary injunction and preliminary affirmative relief,[332] indicating that they will apply the same presumption of irreparable injury that is applied in pattern or practice suits.[333] In the past, however, this relief has not been made available until after the plaintiff has fulfilled the procedural prerequisites of the statute, including filing a charge with a state agency if necessary and giving the EEOC an opportunity to attempt conciliation.[334] This necessarily entails a delay of sixty days, and often much longer.[335] By this time, though, the value of the preliminary injunction — freezing the status quo at the time of the alleged violation — will frequently be lost.

Yet there is no reason why a court in an appropriate case could not grant a preliminary injunction before the deferral and conciliation processes have begun.[336] Such a remedy would pro-

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[331] *See* note 317 *supra*.

[332] Culpepper v. Reynolds Metals Co., 421 F.2d 888, 893–94 (5th Cir. 1970); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 200 (E.D. La. 1968); *see* S. REP. NO. 91–1137 at 12.

[333] Culpepper v. Reynolds Metals Co., 421 F.2d 888, 894–95 (5th Cir. 1970); *see* S. REP. NO. 91–1137 at 12; p. 1244 *supra*.

[334] *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184 (E.D. La. 1968). The courts have not expressly stated that these or any other prerequisites are applicable; rather they were in fact present in the only cases in which preliminary relief has been granted.

[335] The plaintiff can avoid this delay if he can establish an independent basis of jurisdiction apart from Title VII. For example, in Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967), the plaintiff, alleging discriminatory employment practices on the part of the unions involved, successfully restrained the award of state contracts for new construction projects in a suit under 42 U.S.C. § 1983 (1964), despite the defendant's claim that the availability of Title VII precluded such relief.

[336] The language of one court did indicate that such preliminary relief could be immediately granted, saying "it would be unrealistic to require an employee whose rights are threatened with irreparable harm to exhaust his remedies before the EEOC prior to seeking injunctive relief from the Court." Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 338 (S.D. Ind. 1967) (dictum), *aff'd in pertinent part*, 416 F.2d 711 (7th Cir. 1969). However, the court's holding was merely that

vide plaintiffs complaining of specific action the immediate relief often necessary to make suit worthwhile for the individual. There is strong precedent for the authority of the courts to assume jurisdiction of a cause of action, without explicit statutory authority, in order to grant a temporary injunction and preserve the status quo pending an administrative determination of the merits.[337] As Professor Jaffe has pointed out, "cases in this category [where a private party asks the court to stay private action pending an administrative decision] . . . approach unanimity in recognizing the power of the court to preserve the status quo." [338] Consistent with this view, the Supreme Court recently derived from the All Writs Act [339] the inherent authority of the federal courts to enjoin temporarily a merger pending a decision of the Federal Trade Commission despite the lack of more explicit statutory authorization.[340] It would seem that if the court has power to grant a preliminary injunction when the final decisionmaking authority is in an administrative body, a fortiori it should have the power to award such relief when it must only defer to the agency for a period of attempted conciliation and the final decisional authority rests with the court. Indeed, such an injunction might be essential to preserve the court's ability to later order meaningful relief.

Of course, if the congressional failure to provide for such a remedy was intended to negative this power of the courts, that

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persons not filing a charge with the EEOC could join a class action for the purpose of injunctive relief only. *See* pp. 1221–22 *supra*.

[337] *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 677–86 (1965) [hereinafter cited as JAFFE] and cases cited therein.

[338] *Id.* at 677. For example, in Montana State Fed'n of Labor v. School Dist. No. 1, 7 F. Supp. 82 (D. Mont. 1934),

> [t]he district court after holding that the plaintiff must 'resort first to the Board [of Labor Review of the Department of Labor in accordance with regulations issued under the NIRA] . . . and second, if necessary, to the court,' stated: 'There is a qualification to this, however . . . and it is that pending litigation in or before some other tribunal . . . a court of equity may and should almost of course issue any injunction or exact an equivalent reasonably necessary to preserve the status quo, to protect property or rights, and to ensure the fruits of the probable decision or judgment.' The court thus issued the injunction conditioned on the plaintiff's instituting 'due proceedings before the Board . . . within ten days.'

JAFFE 677 (footnotes omitted).

The only significant authority contrary to this proposition is the Supreme Court's decision in Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963). But that decision was premised on (1) explicit statutory language allowing the ICC to suspend a rate pending decision, but limiting the order to seven months, and (2) the doctrine of primary jurisdiction whereby the statutory scheme demanded that the question first be decided by the agency. Clearly these considerations do not apply to the Title VII case.

[339] 28 U.S.C. § 1651(a) (1964).

[340] FTC v. Dean Foods Co., 384 U.S. 597 (1966).

intent would preclude preliminary relief. But the legislative history is silent on the question and there is no reason to infer such an intent from the legislative silence.[341]

> If the party seeking relief will suffer irreparable injury of a sort which it is the purpose of the statute to avoid, there is a prima facie case for relief pendente lite. It should require fairly clear statutory language to find a purpose to exclude the judicial power traditionally available for such protection.[342]

At the same time, the granting of such relief would not do violence to the expressed statutory preference for voluntary conciliation over court action. The court can simply withhold its injunctive award until the plaintiff has filed a charge with the Commission, and thereby insure that the EEOC would have an opportunity to conciliate the dispute. Ultimately, the granting of preliminary relief might enhance, rather than destroy, the effectiveness of conciliation by increasing the pressure on the respondent to agree to settlement. While the award of temporary relief will obviously strengthen the complainant's bargaining position, he will still be aware that he is not assured permanent relief, and so cannot afford to be intransigent in the conciliation attempts.

The relief available through preliminary injunctions in similar situations is generally characterized as the preservation of the status quo. Yet ascertaining the status quo is often difficult and relief pendente lite can be more accurately characterized as "*a temporary settlement based on a free evaluation of all the equities.*" [343] Still, a hearing for such a "quickie" preliminary injunction is not the place for the court to order broad affirmative relief; the court should refrain from ordering any relief that would be difficult to reverse, either through a later conciliation agreement or after a more complete trial on the merits.

Having thus limited the range of preliminary relief which would be appropriate, there still remain numerous situations in which such a remedy could be invaluable. An employee alleging that his discharge was discriminatory might obtain reinstatement — or, at the option of the employer, the right to have his salary continue — through preliminary relief.[344] The hardship on the employer would not be too severe since the court may re-assert jurisdiction for a fuller trial in sixty days. Or, if a plaintiff alleges

[341] *Cf.* H.M. HART & A. SACKS, THE LEGAL PROCESS 1393–97 (tentative ed. 1958).

[342] JAFFE 685.

[343] *Id.* at 655 (emphasis in the original).

[344] *Cf.* Brown v. National Union of Marine Cooks, 104 F. Supp. 685 (N.D. Cal. 1951) (court ordered reinstatement for employees pending NLRB decision on motion of NLRB under section 10(j) of the NLRA).

discriminatory hiring practices for a new plant or construction project, the court might enjoin its start pending conciliation attempts.[345] In contrast, it would seem unlikely that a court could properly order the hiring of a rejected job applicant. There is a clear difference between requiring an employer to hire a complainant for the first time, pending the outcome of a Title VII complaint, and requiring an employer to continue the employment of a complainant whom the employer originally selected himself. Still, in an egregious case, where the employer is a repeated violator of Title VII and the plaintiff's case is clear, even an order to hire a complainant might be appropriate.[346]

(*c*) *Damage Remedies.* — Traditionally, the only monetary relief the courts have awarded under Title VII has been back pay, and this must be reduced by interim earnings. Since the plaintiff has had to support himself in the interim, the resulting award may be insignificant. Recognizing that this problem diminishes the incentive to prosecute claims, several commentators have suggested that a general compensatory damage remedy would provide a solution, as well as providing more adequate compensation.[347]

Such a suggestion, however, presents several problems. Arguably, the statutory authority to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay" [348] is broad enough to permit the award of general compensatory damages. Yet this would strain the language of the Act, and the legislative history does not lend support to a tort damage remedy.[349]

More importantly, upon close analysis, the need to imply a compensatory remedy seems doubtful. It is indeed difficult to identify the elements of damage which would be covered by the new remedy. Compensation for virtually any monetary injury that is work-related may be awarded under the rubric of "back

[345] *Cf.* Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) (court granted preliminary injunction restraining grant of state contracts for new construction projects; jurisdiction under 42 U.S.C. § 1983).

[346] *Cf.* United States v. Central Motor Lines, Inc., 3 CCH Empl. Prac. Dec. ¶ 8095 (W.D.N.C. 1970) (court ordered defendant to hire immediately six black truck drivers on a preliminary injunction in a pattern or practice suit).

[347] *See, e.g.*, Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 467 (1965); Note, *Tort Remedies for Employment Discrimination under Title VII*, 54 VA. L. REV. 491 (1968).

[348] Act § 706(g), 42 U.S.C. § 2000e-5(g) (1964).

[349] The relief provision was modeled after section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1964). The NLRB has traditionally restricted its monetary awards to those which can be classified as back pay, and the understanding of Congress seems to have been that relief under Title VII would be similar. *See* 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey); H.R. REP. No. 914, 88th Cong., 1st Sess. 112 (1963).

pay." [350] Most other financial injury would not be compensable because it would be too remotely related to the discriminatory practice.[351] Essentially the only uncompensated elements of damage, therefore, are the psychological injuries — for instance, humiliation and mental suffering. To go so far as to imply a compensatory damage remedy solely for this type of injury would be of doubtful propriety, particularly since the extent of congressional concern for the intangible losses of the aggrieved individual is suspect; recovery for mental suffering would be a significant departure from the NLRB practice on which the remedial provisions of Title VII were modeled.[352]

In addition, proof of mental suffering damages is speculative at best. An award of such damages often includes elements of punishment as well as compensation [353] and, since the measure of recovery is based on the magnitude of the plaintiff's injury rather than the degree of wrong of the defendant, might well be unjust, particularly since an intention to discriminate has not been required to find a violation of Title VII.[354]

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[350] *See, e.g.*, Dewey v. Reynolds Metals Co., 61 CCH Lab. Cas. ¶ 9357 (W.D. Mich. 1969), *rev'd on other grounds*, 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 91 S. Ct. 566 (1971) (No. 835) (award of reinstatement, plus all back pay, back seniority benefits that would have accrued); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (differential back pay for discriminatory refusal to promote); Rosen v. Public Serv. Elec. & Gas Co., 3 CCH Empl. Prac. Dec. ¶ 8073 (D.N.J. 1970) (pension benefits); Papermill Workers Local 186 v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969) (back pay for job transfer applicant discriminatorily rejected); *cf.* Oman Constr. Co., 144 NLRB 1534, 1538, *enforced*, 316 F.2d 230 (6th Cir. 1963) (awarding Christmas bonus); Brown & Root, Inc., 132 NLRB 486, 504, 558–59 (1961), *enforced*, 311 F.2d 447 (8th Cir. 1963) (Labor Board, per usual practice, deducts from interim earnings the employee's travel expenses, room and board, and cost of moving family for other employment); Home Restaurant Drive-In, 127 NLRB 635 (1960) (tips); Isis Plumbing & Heating Co., 138 NLRB 716 (1962), *rev'd on other grounds*, 322 F.2d 913 (9th Cir. 1963) (interest on all of the above at six percent).

[351] Remoteness would bar recovery whether under a contract theory of consequential damage or a tort theory of foreseeability. *See* 5 A. CORBIN, CONTRACTS, § 1007 (1964); W. PROSSER, LAW OF TORTS § 50 (3d ed. 1964). *See also* St. Clair v. Teamsters Local 515, 422 F.2d 128 (6th Cir. 1969), where the court held that the plaintiff's loss of his home to a mortgagee was not compensable in an unfair representation case under the NLRA The court added that the rule that consequential damage would not be awarded was the reason that remedies under the NLRA and under Title VII were limited to back pay. *Id.* at 132.

[352] *See* note 349 *supra*.

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> In many cases where compensatory damages include an amount for emotional distress . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.

RESTATEMENT OF TORTS § 908, Comment (c) (1939).

[354] The present requirement of section 706(g) that discrimination must be "in-

In truth, it seems that those who propose such a damage remedy are not really concerned so much with compensation, but rather with increasing the penalties for violations of Title VII, both to provide an increased incentive for aggrieved individuals to bring suit and to increase the deterrent effect on respondents. A more effective and more appropriate way to advance these interests would be to recognize explicitly a punitive damage remedy.

The possibility of an award of exemplary damages has often explicitly served to provide additional incentive for private parties to bring suit.[355] This is particularly true when a statute is primarily intended to correct a serious public problem, and is only secondarily concerned with the compensation of private grievances, as is Title VII;[356] in such cases, the award of punitive damages is a form of compensation for playing a public enforcement role.[357]

The punitive damage remedy would also perform a significant deterrent function, further discouraging those abuses which the statute was attempting to eliminate. The effectiveness of this deterrent is particularly great when, as in the Title VII case, the defendant is engaging in a calculated course of conduct — rather than an isolated act of anger, as in many of the tort situations in which punitive damages have been awarded.[358]

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tentional" has been interpreted to require "only that the defendant meant to do what he did, that is, his employment practice was not accidental." Papermakers Local 189 v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[355] [T]he possibility of an award of such damages may not infrequently induce the victim, otherwise unwilling to proceed because of the attendant trouble and expense, to take action against the wrongdoer. Indeed, such self interest of the plaintiff has been characterized as '[p]erhaps the principal advantage' of sanctioning punitive damages because it 'leads to the actual prosecution of the claim . . . .'

Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 490 (1961) (footnote omitted). *See also* C. McCormick, Law of Damages § 77, at 276–77 (1935).

[356] *See, e.g.*, the discussion of Title VII in S. Rep. No. 91-1137 at 3–6; *see* p. 1196 *supra*.

[357] This public enforcement role of the individual plaintiff in Title VII suits is a recurring theme in the cases. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 32–33 (5th Cir. 1968).

A similar role is effectively performed by the treble damage remedy in private antitrust actions. P. Areeda, Antitrust Analysis 35–36 (1967).

[358] *See* Walker v. Sheldon, 10 N.Y.2d 401, 404–06, 179 N.E.2d 497, 499–500, 223 N.Y.S.2d 488, 490–92 (1961).

The great effectiveness of the deterrent force of the treble damage remedy has often been observed. *See* Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 Yale L.J. 1010 (1952).

Moreover, an exemplary damage award would also provide additional relief to cover in part those intangible injuries which are otherwise uncompensated by the Act. In doing so, however, the exemplary award would be fairer to the defendant than the compensatory damage remedy,[359] since the former would be measured by the extent of the defendant's wrongful conduct. In addition, a punitive damage remedy would be more easily administerable, for it would not involve the court in difficult determinations of the amount of loss or mental suffering.

Unfortunately, however, the Act is silent on the question of punitive damages. Nor is the legislative history helpful, for it appears that the question was never considered.[360] Could a punitive remedy, then, be implied from the statutory scheme? This question has been considered in actions under the "Bill of Rights" section of the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act),[361] another statute in the labor law field which authorizes the courts to grant "such relief . . . as may be appropriate."[362] There, too, the legislative history is silent on the question of punitive damages. Nonetheless, Judge Wisdom, writing for a panel of the Fifth Circuit in *International Brotherhood of Boilermakers v. Braswell*,[363] stated that the determining factor was whether the granting of punitive damages would serve to effectuate the purposes of the statute and concluded that the power to award punitive damages could properly

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[359] *See* p. 1260 *supra*.

[360] It could be argued that since the remedies under Title VII were intended to be modeled after those of the NLRB, and since the Labor Board is not empowered to order punitive remedies, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938), it can be implied that the legislative intent was that punitive damages were not to be available. This argument can be answered in two ways. First, the patterning of the remedies under Title VII occurred before the fundamental shift from a Labor Board type of procedure to an emphasis on the private right of action. Though the words of the statute did not change, the intent behind them may well have changed, leaving the legislative history ambiguous at best. *See* Comment, *supra* note 347, at 432, 466–67.

Secondly, even if the model of the Labor Board is to be considered, its power to award punitive remedies has been denied for reasons wholly inapplicable to the Title VII situation. *See* UAW v. Russell, 356 U.S. 634, 650 (1958) (Warren, C.J., dissenting), where the Chief Justice objected to the award of punitive damages by a state court in a labor dispute because: (1) the deterrent effect of a punitive award might be a threat to activities protected by the Wagner Act; and (2) the Taft-Hartley Act and the Wagner Act are intended to work for industrial peace, seeking to get the parties to settle their disputes by collective bargaining; a punitive award would only increase bitterness and strife between the parties. In contrast, punitive damages would only aid, and not hinder, the purposes of Title VII.

[361] 29 U.S.C. §§ 401–12 (1964).

[362] Landrum-Griffin Act § 102, 29 U.S.C. § 412 (1964).

[363] 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968).

be implied.[364] Invoking similar reasoning, other courts have also been willing to award exemplary damages without specific authorization in actions based on other federal statutes.[365]

In addition, courts and commentators have recently become aware of the special appropriateness of punitive damages in actions under the civil rights laws. Discrimination is so obnoxious to our ideals and so injurious to the nation as a whole that this form of punishment and deterrence is justified.[366] Congress belatedly recognized this in providing for the award of punitive damages in actions under Title VIII of the Civil Rights Act of 1968,[367] which bars discrimination in the selling and leasing of housing. And, although the Supreme Court has left the question undecided,[368] several lower courts have implied the availability of punitive damages under a section of the older Civil Rights Act of 1866.[369]

Like these statutes, the thrust of Title VII is the elimination of discrimination. Recognizing that a punitive damage remedy would very likely speed the realization of this goal by increasing the incentive for private enforcement, it is entirely appropriate for courts to award exemplary damages under Title VII of the Civil Rights Act of 1964 as well.[370]

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[364] *Id.* at 200. This decision has been followed in Sands v. Abelli, 290 F. Supp. 677 (S.D.N.Y. 1968). Prior to the Fifth Circuit decision, the district courts had split over the question. *Compare* Farowitz v. Musicians Local 802, 241 F. Supp. 895 (S.D.N.Y. 1965) (awarding punitive damages), *with* Cole v. Hall, 35 F.R.D. 4 (E.D.N.Y. 1964), *aff'd on other grounds*, 339 F.2d 881 (2d Cir. 1965) (denying power to award punitive damages), *and* Burris v. International Bhd. of Teamsters, 224 F. Supp. 227 (W.D.N.C. 1963) (same).

[365] *See, e.g.*, Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) (action under 42 U.S.C. § 1983); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961) (action based on § 404(b) of the Civil Aeronautics Act of 1938, 49 U.S.C. § 1374(b) (1964)). "[P]unitive damages have traditionally been allowed where circumstances warrant, irrespective of enabling legislation." 200 F. Supp. at 367.

[366] *See, e.g.*, Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1039 (1969), in which the author suggested that any refusal to rent or sell property on the basis of race might justify an award of punitive damages.

[367] 42 U.S.C. § 3612 (Supp. V, 1970).

[368] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); *see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 88 n.35 (1970).

[369] 42 U.S.C. § 1982 (1964); *see* Newbern v. Lake Lorelei, Inc., 1 RACE REL. L. SURVEY 185 (No. 6871) (S.D. Ohio 1969); Vaughn v. Ting Su, 1 RACE REL. L. SURVEY 45 (No. 49,643) (N.D. Cal. 1968). Commentators have urged the utility of exemplary damage awards in section 1982 actions. Note, *supra* note 366, at 1040; 23 VAND. L. REV. 827, 834 (1970).

[370] Apparently only one court has considered this question of punitive damages under Title VII. *See* Tidwell v. American Oil Co., 3 CCH Empl. Prac. Dec. ¶ 8022 (C.D. Utah 1970). In that case, the court denied defendant's motion to strike plaintiff's claim for punitive damages, ruling that "the availability of such damages should not be determined until after the Court has heard all the facts. At that

The further question remains, what type of discriminatory conduct would justify an award of punitive damages? Certainly, exemplary damages could be awarded if the defendant actually had an intent to discriminate: for example, if a union had a policy or practice of refusing to admit blacks. It is less clear that punitive damages would be appropriate for any knowing violation of the statute: that is, if the defendant were aware of his Title VII violation but felt unable to correct it because of external pressures — for example, if an employer were unable to change his unlawful seniority system because of union opposition. Certainly, punitive damages would not be appropriate if the defendant were unaware that his employment practices were unlawful and could not reasonably be expected to be so aware. Yet, as time passes and the standards of employer and union conduct under Title VII emerge, violations of the statute should more often be found to contain elements of malice or specific intent to discriminate, or at least such an extreme indifference to the rights of the plaintiff as would justify an award of punitive damages.

Finally, before awarding either compensatory or punitive damages, an important factor to consider may be whether a jury trial would be required in either case. In many Title VII cases jury trial would seem undesirable. Title VII is a new law and many questions are as yet unresolved; as Title VII cases are adjudicated, a coherent body of judical interpretation will hopefully be appended to the statute, providing employers and unions with clear standards under the law. But jury trials in Title VII cases cannot insure the uniformity of decision that is needed to establish such standards of conduct. Indeed, in precedent-setting cases in particular, the question of discrimination is an inappropriate one for the jury: the facts of the case may be relatively clear and the only question may be whether a particular practice constitutes discrimination. This question will often be complex and technical, involving evidence not suitable for presentation in open court and on which a jury would lack competence to make a judgment. And to the extent that juries reach inconsistent conclusions on the same issue, the effectiveness of Title VII will be diminished. Furthermore, a significant problem in the context of all Title VII litigation would be the danger of jury prejudice.[371]

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time, the Court will have the proper perspective to rule on any motion to strike." *Id.* at 6056.

[371] Defendants in the South apparently agree that there may be prejudice on a jury, and have sought to take advantage of it. The great majority of jury demands in Title VII cases have come from southern defendants in cases in which racial discrimination was alleged. Comment, ***The Right to Jury Trial Under Title VII***

Lastly, as a general rule, jury trials in the federal courts face substantially longer delays in coming to trial than do nonjury trials[372]—a crucial consideration in the context of Title VII where timely relief is essential.

At present, in limiting monetary awards to back pay, courts have been unanimous in holding that there is no right to jury trial in Title VII actions.[373] Since there is no evidence of congressional intent to provide for trial by jury,[374] the only question is whether the seventh amendment requires such a trial. Recent Supreme Court decisions have indicated that jury trial will be required if any legal claims are presented,[375] even if characterized as only incidental to the equitable relief sought.[376] The question thus turns on whether back pay is considered a legal claim in the nature of a prayer for damages; it has been held that it is not a legal claim, but is instead considered an integral part of the equitable remedy of reinstatement, a form of restitution.[377] This characterization seems justified since even if a violation of Title VII is shown, back pay is to be awarded under the statute in the sound discretion of the court.[378] So long as this discretion

of the Civil Rights Act of 1964, 37 U. CHI. L. REV. 167 (1969); *see* Note, *supra* note 366, at 1051.

[372] In fiscal year 1969, the median time interval from joinder of issue to trial in civil cases was 11 months in nonjury trials, but 15 months for jury trials, an increase of 36.4%. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 248 (1969).

[373] *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1239–43 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970); Brown v. Gaston County Dyeing Machine Co., 3 CCH Empl. Prac. Dec. ¶ 8044 (W.D.N.C. 1970); Gillin v. Federal Paper Board Co., 1 CCH EMPL. PRAC. GUIDE ¶ 9486 (D. Conn. 1970).

[374] Comment, *supra* note 371, at 169; *see* 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey); H.R. REP. No. 914, 88th Cong., 1st Sess. 110 (1963).

[375] The Court's decisions in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), have held that if legal and equitable claims are contained within the same suit, the constitutional right to jury trial on all legal issues, including those common to both claims, must be preserved.

[376] Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 (1962).

[377] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); *cf.* Harkless v. Sweeny Indep. School Dist., 427 F.2d 319, 323–24 (5th Cir. 1970), *cert. denied*, 91 S. Ct. 451 (1971) (denying jury trial in action for back pay under 42 U.S.C. § 1983).

[378] The award of back pay is, in fact, not automatic; this discretion has been exercised to refuse to award back pay despite a finding of violation of Title VII. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969) (upholding lower court's deduction from back pay award of unemployment compensation received, normally not considered in an award of damages, as a proper exercise of discretion); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969), *aff'd in pertinent part*, 3 CCH Empl. Prac. Dec. ¶ 8102 (4th Cir. 1971)

continues, the award is equitable and jury trial is not required by the seventh amendment.[379]

The addition of a compensatory damage remedy, however, would present legal issues constitutionally requiring a jury trial.[380] In determining the presence of a legal claim, analogy to pre-existing common law actions has long been an accepted test;[381] a compensatory damage action would closely resemble several ordinary tort actions.[382]

Still, it has been argued that there can be no jury trial right in a cause of action created by statute, since the action was unknown to the common law and hence outside the reach of the seventh amendment.[383] But no such categorical exclusion of statutory causes of action from the requirements of the seventh amendment is warranted.[384] Instead the courts have held that the jury trial right attaches if the action is one for damages, regardless of the origin of the cause of action.[385]

(where court declined to award back pay in part because plaintiff applied for job only to test the employer's practice and was not really seeking employment); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969) (where court refused to award back pay because employer had relied in good faith on state law).

[379] Comment, *supra* note 371, at 179–80. *Contra*, Walker, *supra* note 326, at 507–10.

[380] Comment, *supra* note 347, at 467–68; Comment, *supra* note 371, at 173 n.42.

[381] *See generally* the discussion of the historical test in F. JAMES, CIVIL PROCEDURE §§ 8.1–8.3 (1965).

[382] The tort of interference with prospective advantage has often been cited as a parallel. *See, e.g.*, Comment, *supra* note 347, at 467; Note, *supra* note 347, at 497 n.32. *See generally* W. PROSSER, LAW OF TORTS § 124 (3d ed. 1964). Insofar as the injury compensated would be mental suffering, the tort of intentional infliction of mental distress is a close analogy. *Cf.* Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

[383] McGraw v. United Ass'n of Journeymen, 341 F.2d 705 (6th Cir. 1965); *cf.* Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).

[384] International Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir.) (Wisdom, J.), *cert. denied*, 391 U.S. 935 (1968); Simmons v. Avisco Textile Workers, Local 713, 350 F.2d 1012 (4th Cir. 1965) (alternative holding) (Sobeloff, J.). Both cases reject McGraw v. United Ass'n of Journeymen, 341 F.2d 705 (6th Cir. 1965), and uphold the right of jury trial in actions for violation of the Bill of Rights of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(5) (1964). *See* Walker, *supra* note 326, at 509–510.

[385] "There is no such cleavage between rights existing under common law and rights established by enacted law, when the relief sought is an award of damages." Simmons v. Avisco Textile Workers, Local 713, 350 F.2d 1012, 1018 (4th Cir. 1965) (Sobeloff, J.).

The Supreme Court has recently given support to this position in Ross v. Bernhard, 396 U.S. 531 (1970). There the Court held that a jury trial was required when the legal remedy of money damages was sought even though the procedural origin of the action, a stockholder's derivative suit, was purely equitable. *See*

Nor does *NLRB v. Jones & Laughlin Steel Corporation*,[386] in which the Supreme Court upheld an NLRB award against a claim that jury trial was constitutionally required,[387] support such a distinction between statutory and common law causes of action. The Court there held that a jury trial was not required in a "statutory *proceeding*"; [388] its concern was to protect the comprehensive administrative scheme of the NLRB,[389] which would have been substantially destroyed if jury trials were required.[390] The relevant distinction thus appears to be between those statutory actions which invoke an administrative process and those which do not. If the Congress makes a judgment that a comprehensive scheme of administrative adjudication is required, the Court will be willing to find that it is a "statutory proceeding" to which the seventh amendment has no application.[391] If, however, a statutory claim is entrusted to court de-

The Supreme Court, 1969 Term, 84 HARV. L. REV. 1, 172–76 (1970). The Supreme Court is apparently moving toward a test more easily administered than the historical test for determining whether jury trial is required. The jury trial test is becoming whether the claim is for legal or equitable *relief*. *Id.* at 175–76. In a number of areas the Court has indicated that jury trial will be required for a monetary claim despite the historically equitable nature of the proceeding: Ross v. Bernhard, 396 U.S. 531 (1970) (legal claim in stockholder's derivative suit); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (accounting of profits); Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948) (legal issues in class actions; cited with approval in *Ross*, 396 U.S. at 541); Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960) (legal claim raised on interpleader; cited with approval in *Ross*, 396 U.S. at 541–42 n.15). *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 175 n.18 (1970). Perhaps claims of breach of fiduciary obligations will be included as well. *Id.* at 176 n.26.

This trend would seem to indicate that any claim for monetary relief may require a jury trial. Actions under Title VII as presently construed would seem to be an exception only because the claim for monetary relief — back pay — is part of an equitable restitution remedy whose award is in the discretion of the courts.

[386] 301 U.S. 1 (1937).

[387] *Id.* at 48.

[388] *Id.* (emphasis added). Actually, the Court in *Jones & Laughlin* upheld an award of back pay by the NLRB without jury trial on two grounds: (1) back pay was only incidental to equitable relief; (2) the proceeding was a "statutory proceeding," "unknown to the common law." *Id.*; *see* JAFFE 91. The first argument, however, is now unavailing, apparently overruled by later decisions. *E.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471 (1962). But the award of back pay without jury trial would still be upheld today, even if not a "statutory proceeding," since it is a discretionary equitable award.

[389] Walker, *supra* note 326, at 508.

[390] "[T]he concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." JAFFE 90.

[391] *Id.* at 98–99; 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.16 (1958). Of course, the ability of Congress to commit common law claims to administrative decision and thereby destroy the right of jury trial does have its limits; certainly it could not simply transplant the adjudication of a common law action into an administrative agency without justification. *Cf.* Note, *Application of Constitu-*

cision, where there is no functional justification for not granting a jury trial, and the claim is for the type of relief normally awarded by a court of law, as would be the case in an action for compensatory damages under Title VII, the similarity to common law forms of action will require a jury trial.[392]

In contrast, it seems arguable that punitive damages could be claimed and awarded without any requirement of jury trial. Historically, only a court of law would award punitive damages because of the notion that courts of equity should attempt to do justice between the parties without imposing a penalty.[393] The only exception to this rule is where a statute expressly authorized the equity court to grant punitive damages together with equitable relief.[394] But while originally available only in an action at law, punitive damages did not necessarily have to be awarded by a jury; rather punitive damages were considered to be a discretionary remedy which could be granted at the determination of the trial judge.[395] At least three circuit courts of appeal have recently indicated that a trial judge's discretionary award of punitive damages is not violative of the seventh amendment right to jury trial.[396] To be sure, these were all actions for legal relief.[397] But the merger of law and equity presumably removed

tional Guarantees of Jury Trial to the Administrative Process, 56 HARV. L. REV. 282, 282–83, 289 (1942).

[392] Simmons v. Avisco Textile Workers, Local 713, 350 F.2d 1012 (4th Cir. 1965) (alternative holding) (Landrum-Griffin Act); Olearchick v. American Steel Foundries, 73 F. Supp. 273 (W.D. Pa. 1947) (Fair Labor Standards Act); *cf.* JAFFE 99 (Court would be "reluctant" to deny jury trial in this situation)

[393] Livingston v. Woodworth, 56 U.S. (15 How.) 546, 559–60 (1853); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir. 1928).

[394] *See* Swofford v. B & W, Inc., 336 F.2d 406, 412 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 427–28 (2d Cir. 1928).

[395] Seymour v. McCormick, 57 U.S. (16 How.) 480 (1853). Ordinarily in an action at law, all the issues in the action would be resolved by the jury, including a claim for punitive damages; the only way the question of punitive damages would be isolated from the rest of the case and committed to the discretion of the trial judge would be if the separation were ordained by statute. Thus, *Seymour* was based on an earlier version of 35 U.S.C. § 284 (1964), which provides that the jury will assess actual damages in patent infringement cases, but that the court in its discretion may treble the damages or award any amount between actual and treble damages. Still, the Supreme Court in *Seymour* upheld the validity of a scheme whereby "the power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court . . . ." *Id.* at 488.

[396] Swofford v. B & W, Inc., 336 F.2d 406, 411–14 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); Kennedy v. Lasko Co., 414 F.2d 1249, 1254 (3d Cir. 1969); Pan American World Airways, Inc. v. Ramos, 357 F.2d 341, 342 (1st Cir. 1966).

[397] Both *Swofford* and *Kennedy* were patent infringement actions based on 35 U.S.C. § 284 (1964); *Ramos* was based on a local rule allowing the court to make an award if a party had been "obstinate." The court in *Swofford* analogized the award

whatever barrier the availability of punitive relief in an action at law created to the granting of such relief in equity. Indeed, merger would seem to have erased such anachronistic doctrines as that a court of equity does not punish, but only does justice; such partitioning of judicial action seems inconsistent with the very principles of merger. Once it is recognized, then, that there is no justification for perpetuating the rule that a court will not grant a punitive damage remedy in a wholly equitable proceeding, the fact that such relief is sought in the context of an equitable action would not seem to alter the established discretion of the trial judge to make punitive awards. Thus, in awarding equitable relief in a Title VII action, the court should be able to grant exemplary damages in the exercise of its discretion without infringing upon seventh amendment rights.

I. Proposals for Administrative Reform

It has already been observed that some form of government initiated action is essential to the enforcement of Title VII in order to reach the many violations of the Title that will not be remedied through the complaint process, and that this function can best be filled by allowing the EEOC, as well as the Justice Department, the power to bring pattern or practice suits.[398]

Nonetheless, the pattern or practice authority can only be effective as a supplement to the private complaint process. The consideration of individual grievances is essential for two reasons. First, no one is in a better position to detect and report violations of the Act than the persons affected; reliance on these complaints thus provides the most effective means of bringing Title VII violations to public attention. Secondly, there are important private interests which Title VII was enacted to protect. While

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of exemplary damages to the award of attorney's fees; although both may be awarded in an action at law, neither is a money claim triable by jury.

In all of the above cases, the award of punitive damages was authorized by statute. While this should have no constitutional significance, for some it may prove too much to allow a judge to both imply a new remedy and make his own punitive award. *But see* Farowitz v. Musicians Local 802, 241 F. Supp. 895 (S.D.N.Y. 1965) (court implied a punitive damage remedy under the Landrum-Griffin Act and then granted a $1000 punitive award sitting without a jury). This is particularly true since standards for the amount of punitive damages to be awarded are very unclear, *see, e.g.*, W. PROSSER, LAW OF TORTS § 2 (3d ed. 1964), and the statute usually provides a maximum penalty, as did the statutes in the cases cited above. For this reason, an amendment of Title VII to provide for treble damages or for some limits on the amount of a punitive award would be appropriate. Nevertheless, standards for the size of a punitive award can be judicially developed — more readily, in fact, than if a jury trial were allowed.

[398] *See* pp. 1233–36 *supra*.

some commentators have disagreed with this view,[399] and while it is certainly true that most of the congressional discussion of Title VII focused on discrimination as a social and economic problem on a national scale,[400] it seems implicit in the creation of a private right of action that the Act was intended to recognize and give protection to the civil rights of the individual worker who is the victim of discrimination.[401]

Once the need for a private enforcement mechanism is recognized, the question becomes how best to protect private rights. Two possibilities may be summarily dismissed. The present enforcement scheme must be rejected because experience has shown that aggrieved individuals are too often unfamiliar with the institutions of our legal system and that private litigation is too expensive, in terms of time and money,[402] to redress effectively the majority of grievances.[403] A system which relied exclusively on private litigation, with no Commission involvement at all, would not only have these same disadvantages, but would lose the advantages that the present method of first filing a charge with the Commission does provide: overcoming ignorance of the law by publicizing the work of the Commission; providing a single authority to which one can turn with a complaint rather than trying to seek legal advice; allowing informality in the filing of charges; and aiding the aggrieved party in preparing his complaint and framing his case.

The most effective enforcement system for individual complaints, then, requires that once the original charge is filed, the Commission have the power to take the initiative in insuring that it is settled satisfactorily or prosecuted to decision. This power could take two forms: Commission power to bring suits in the district courts on behalf of individual complainants, or an administrative cease and desist machinery, whereby the Commission both files the formal complaint on behalf of the indi-

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[399] The theory of some commentators is that

> Title VII was enacted to vindicate the public interest in fully productive employment with the most efficient utilization of human resources, and that the individual is only a beneficiary of the greater public interest.

Note, *supra* note 3, at 7.

[400] *See, e.g.*, S. Rep. No. 91-1137 at 3-6.

[401] *See* Affeldt, *Title VII in the Federal Courts — Private or Public Law*, 14 VILL. L. REV. 664 (1969). Indeed, in the context of the Labor-Management Relations Act, the Supreme Court has rejected the notion that the statutory pattern dichotomized public and private interests; "[r]ather the two interblend in the intricate statutory scheme." UAW Local 283 v. Scofield, 382 U.S. 205, 220 (1965).

[402] It is true that the award of attorney's fees is provided for the prevailing party; but such awards have generally not been generous and, of course, do not aid the unsuccessful litigant. *See* pp. 1253-56 & note 330 *supra*.

[403] SOVERN 56; *see* pp. 1252-53 *supra*.

vidual and conducts the adjudication of the merits. The choice between these two proposals has often been debated by Congress.[404]

One argument of those who favor the cease and desist power is that administrative adjudication can provide relief more quickly.[405] Clearly, speed is an essential element of effective Title VII enforcement. And it may be true that, despite the acknowledged delay in many administrative proceedings, court dockets are so overcrowded that the delay is even longer.[406] Yet, court delays are smallest where the most substantial number of Title VII suits are brought.[407] More importantly, it must be recognized that the speed of the EEOC process would be proportional to the amount of appropriations. While in theory this means that additional funding could eliminate delay in the administrative process more easily than in the courts, in reality, the EEOC has been chronically short of funds.[408] This has resulted in a two-year backlog of cases presently before the Commission; it seems likely that the same delays would persist in an administrative adjudicatory scheme.

Another argument advanced in favor of the cease and desist proposal is that greater uniformity of decision would result by concentrating decision in a single forum, where the Commission could give effect to its Guidelines and interpretations, rather than in the many district courts.[409] Rapid development of the standards of employer and union conduct under Title VII is

[404] When it incorporated the original FEPC bill, H.R. 405, 88th Cong., 1st Sess. (1963) into Title VII of the Civil Rights Act of 1963, the House Judiciary Committee voted to replace the cease and desist machinery of the earlier bill with a provision for court actions. *Compare* H.R. REP. No. 570, 88th Cong., 1st Sess. (1963), *with* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963).

More recently, the Senate, considering S. 2453, elected the cease and desist enforcement power over court action. *Compare* S. REP. No. 91-1137 at 10 *with id.* at 71-72.

[405] S. REP. No. 91-1137 at 10; *see* note 8 *supra*.

[406] Median time from filing of complaint to decision is just under one year for NLRB adjudications and nineteen months for district court cases. *Id.* These figures may be somewhat misleading, however, since the filing of the complaint by the NLRB's General Counsel follows a substantial period of investigation and informal settlement procedures after the filing of the charge by the individual. *See* A. COX & D. BOK, LABOR LAW: CASES AND MATERIALS 136-42 (7th ed. 1969). Perhaps a more comparable figure is the thirteen month median delay, eleven months in non-jury trials, in the district courts from the time issue is joined to trial. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 248 (1969).

[407] Median time from filing of complaint to trial is fourteen months, the lowest in the country, for district courts in the Fifth Circuit, in which a large proportion of Title VII cases have been brought. *Id.* at 228-29.

[408] *See* FEDERAL EFFORT 269-70, 291.

[409] S. REP. No. 91-1137 at 10.

indeed an important consideration. Yet the cease and desist proposal would be no more effective in achieving that goal than enforcement through the courts. The cease and desist order would not establish a binding rule until upheld by the appellate courts. And since the order could be appealed to any of the circuit courts,[410] a diversity of opinion which could only be resolved by the Supreme Court is just as likely as under an EEOC court action plan.

The better solution would be to give the EEOC power to bring suit in the district courts on charges filed by individual complainants.[411] First, the assumption of a prosecutorial role by the Commission would be more consistent with the advocate's role that the EEOC has assumed under the present statutory scheme than would be cease and desist jurisdiction. A change to an adjudicatory role would cause difficult transitional problems,[412] and raise serious doubts about the fairness of the EEOC adjudicatory process.[413]

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[410] S. 2453 provided that the cease and desist order would be conclusive on issues of law and automatically enforceable if not appealed within sixty days. Proposed § 706(m), *id.* at 46. However, before that period expired, the order could be reviewed by the court of appeals for the circuit in which the alleged unlawful employment practice occurred, or in which the party seeking review resided or transacted business, or in the District of Columbia Circuit Court of Appeals. Proposed § 706(k), *id.* at 45.

[411] *Accord*, Address of William H. Brown, III, Chairman, EEOC, delivered by Stanley P. Hebert, EEOC General Counsel, May 14, 1970, reprinted in 1 CCH EMPL. PRAC. GUIDE ¶ 5068 (1970); Presentation of Jerris Leonard, Assistant Attorney General, Civil Rights Division, Department of Justice, before the Labor Law Section of the American Bar Ass'n 1–2 (Aug. 10, 1970). *Contra*, FEDERAL EFFORT 1078.

The Senate passed S. 2453, which included Commission cease and desist powers, by a vote of 47 to 24, 116 CONG. REC. S16,913 (daily ed. Oct. 1, 1970), after rejecting Senator Dominick's amendment which would have substituted the power to bring court actions. 116 CONG. REC. S16,816 (daily ed. Sept. 30, 1970). The Nixon Administration supported the Dominick amendment. S. REP. NO. 91–1137 at 3. Most civil rights organizations felt that cease and desist power would be more effective than court enforcement. *Id.* at 2.

[412] *See* Testimony of William H. Brown, III, Chairman, EEOC, *Hearings on the Equal Employment Opportunities Enforcement Act before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. 41–50 (1969).

[413] *See* Presentation of Jerris Leonard, *supra* note 411, at 2; note 8 *supra*. For an over-dramatization of this problem, see the remarks of Senator Dominick comparing the EEOC with adjudicatory powers to a "star chamber." 116 CONG. REC. S16814 (daily ed. Sept. 30, 1970).

S. 2453 reflected concern for the fairness problems caused by the transition. Its solution was to provide that court actions should be brought by the Commission for any case then pending before it. Proposed § 706(q)(3), S. REP. NO. 91–1137 at 48; *see id.* at 10. This solution assumes, however, that the same individuals who played an advocate's role in prior cases can fairly shift to

Moreover, the private action by individual complainants can be more easily integrated with an EEOC court action than with an administrative adjudicatory scheme. The private action could not co-exist with agency cease and desist powers without destroying the claimed advantage of uniformity and raising serious problems of forum shopping between court and agency. Yet the private action would be essential to provide at least some guard against administrative delay and to insure that the individual can adequately present his grievance.

The interchangeability of the private action and the EEOC action should be a significant benefit. The individual complainant should have a choice of either bringing suit immediately in the district courts or invoking the aid of the administrative process. For the individual to whom time is of the essence, this option would eliminate the delay of a mandatory period of conciliation. Simultaneously, however, he should be required to notify the EEOC, so that the Commision will be kept aware of all activity in Title VII enforcement. This will also enable the Commission to accommodate the national interest in settling discrimination problems peaceably; the EEOC, if it feels it worth the effort, may then attempt to conciliate the dispute much as it would now. The fact that the suit has been formally filed or preliminary relief granted should make little practical difference, except perhaps to increase the defendant's incentive to settle.

Arguably, however, the majority of Title VII complainants would still seek the Commission's aid in investigating the charge, preparing the complaint, and conducting the litigation. By doing so, they would avoid shouldering the substantial burden of prosecuting their charge. In addition, many workers will undoubtedly know of no place to turn other than the EEOC when faced with unlawful discrimination. And if in fact the aid of the Commission is sought initially by large numbers of complainants, the private action will serve several important functions. If the Commission feels that the case is weak, *i.e.*, that there is no reasonable cause, it can so inform the complainant who may then still bring suit if he wishes. The private action gives the individual an opportunity to take the initiative in prosecuting his claim if he becomes dissatisfied with the Commission's efforts. Most importantly, it provides an outlet for those cases the agency is unable to handle because of its limited resources, giving the EEOC the opportunity to use its discretion to select the most significant cases without prejudicing individual rights.

Indeed, it is this last factor which argues most persuasively in

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an impartial role in new cases brought before the Commission, a dubious assumption.

favor of a scheme of agency prosecution of private claims combined with a right of private suit. Ultimately, no administrative enforcement mechanism will be fully effective unless Congress provides it with sufficient funding. But a chronic shortage of funding for enforcement of anti-discrimination laws seems to be a political fact of life. Consequently, the system employed should be one which can be least influenced by financial considerations.

Under the cease and desist proposal, there would be the ever-present danger that the fear of congressional retaliation on the agency's budget might occasionally influence its substantive decisions. And, as a practical matter, under-funding of the Commission might lead to substantial delays in the consideration and issuance of cease and desist orders, thus diminishing the effectiveness of Title VII.

But under a scheme giving the agency authority to prosecute private complaints, a shortage of funds, while affecting the number of cases the Commission could handle, would not necessarily result in a bottleneck of the private charges in the agency; the outlet of the private suit would always be available. In addition, while budgetary concerns might in some instances influence the Commission's decision whether to prosecute a particular complaint, the ultimate decisionmaking process in the courts would remain free of such potential prejudice.

Finally, much delay in the remedial process for private complaints could be eliminated by abolishing the mandatory sixty day period of deferral to state FEPC's. To be sure, there is a sound rationale behind the congressional policy favoring local enforcement. Local agencies are likely to be more familiar with community problems,[414] and, if they have done a reasonable job, have accumulated a body of experience and goodwill in dealing with local employers that should be put to use.[415] State enforcement, if properly integrated with the federal scheme, can reduce the pressure of the EEOC's caseload and conserve limited federal anti-discrimination resources.[416]

Yet the means Congress chose to implement this policy of local enforcement has proved an utter failure.[417] The automatic sixty day period of deferral has had several pernicious results; it is often merely an automatic delay before obtaining an effective remedy, either because state agencies do not vigorously enforce their laws,[418] or because respondents frequently ignore state ef-

[414] Witherspoon 1177.

[415] SOVERN 92.

[416] *Id.* at 207.

[417] FEDERAL EFFORT 314; *see* pp. 1215–16 *supra*.

[418] The enforcement record of many state agencies is notoriously bad. *See* Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report,*

forts.[419] In either case, the result is a wasteful duplication of efforts on the state and federal levels.[420]

A better solution would be to amend Title VII to allow complainants to make a binding election between federal and state forums.[421] Obviously, this procedure would eliminate the delay for complainants and the duplication of efforts inherent in the present compulsory deferral scheme. At the same time, it would encourage effective state enforcement. If the state agency became an effective instrument of redress for employment discrimination complaints, aggrieved persons would have no reason to prefer the EEOC to the state FEPC. This would be true even if the powers of the state agency were not as great as those of the Commission, since the local agency might well provide benefits of speed and convenience. On the other hand, if the state machinery were constantly bypassed, the state might be induced to strengthen its FEPC in order to maintain its jurisdiction over employment discrimination within its borders. In this way the federal agency would be in a position to provide leadership to the states in the fight against employment discrimination.

IV. The Executive Order Program

A. Introduction

Under Title VII, enforcement procedure is highly decentralized, dependent primarily on the individual decisions of private complainants. Involvement of the federal executive in combatting job discrimination under Title VII has been peripheral and supplemental. But the federal government has dealt directly with employment discrimination through one very important program — the regulation of federal contractors under Executive Order No. 11,246.[1] The order requires a government contractor or any contractor working on a federally assisted construction project not to discriminate and to take "affirmative action" to insure the absence of discrimination in his employment

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and A Prognosis, 14 How. L.J. 259, 281–82 (1968); Note, *supra* note 3, at 18–19.

On the other hand, several of the state agencies have been most effective; in a recent year the Pennsylvania Commission on Human Rights conciliated all but one of its cases successfully. Witherspoon 1182.

[419] *See* p. 1215 *supra*.

[420] *See 1971 EEOC Appropriations Hearings* 602 (86.4% of all deferred cases must be reconsidered by the EEOC).

[421] Purdy, *Title VII: Relationship and Effect on State Action*, 7 B.C. Ind. & Com. L. Rev. 525, 533 (1966). For an intermediate solution which can be accomplished under the existing statutory scheme, see pp. 1215–16 *supra*.

[1] 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1970). Portions of Exec. Order No. 11,246 are reprinted at pp. 1313–16 *infra*.

process. The Executive Order program has great potential significance. About one-third of the American labor force is employed by companies which hold some government contracts.[2] Viewed against this backdrop, a passive executive attitude toward discrimination by government contractors would produce widely felt and unfortunate consequences. Inaction might be interpreted by private employers as evincing an attitude of governmental indifference, and might therefore be conducive to increased private discrimination.[3] More concretely, the expenditure of large sums of federal money without strict control of their intermediate social impact in the crucial employment arena would senselessly undercut the expanding effort to insure equal employment opportunity through Title VII.

Thus, some system through which the executive branch may monitor the employment practices of government contractors is a virtual imperative, and each president has recognized this need since President Roosevelt initiated scrutiny of the employment practices of government defense contractors in 1941.[4] Of course, regulation of government contractors via executive order is not the only means available to the executive branch if it wishes to secure a positive impact for the expenditure of its own funds. The President might well rely upon more informal, persuasive methods, directed to private employers as a whole in the hope that government contractors would be especially sensitive to his appeals.[5] In lieu of this particular variety of "jawboning," the President might deal more indirectly with discriminatory contractors, asking Congress for specific legislation to deal specially with the problem of discrimination by government contractors, or, alternatively, for more funds to improve enforcement of existing legislation forbidding discrimination by private employers as a whole. A third strategy would be to focus upon regulated industries, applying pressure through the agencies charged with granting licenses or rate increases to those firms who contract with the Government when they are suspected of discrimination.[6]

[2] UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 133 (1970) [hereinafter cited as FEDERAL EFFORT].

[3] *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967) (California constitutional amendment which forbade enactment of statutes banning discrimination in housing manifested an attitude of state approval of discrimination; *held*, violative of the fourteenth amendment).

[4] Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941); *see* note 7 *infra*.

[5] Presidential proclamations, directed at the public at large, would fall within the category of persuasive methods since they carry with them no sanctions and are thus "at best hortatory." STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF THE USE OF PRESIDENTIAL POWER vii (Comm. Print 1957).

[6] A hint of this technique was the recent filing by the Equal Employment Opportunity Commission of a petition for intervention with the Federal Communica-

Yet each of these approaches to discrimination by government contractors has significant limitations. By comparison with direct executive oversight of the employment practices of contractors, each of the three alternatives is roundabout. More specifically, the deterrent or remedial effect of "jawboning" is dubious. Executive requests for additional legislation are routine, and might not succeed in dispelling suspicions of indifference to discriminatory practices. Finally, pressure upon regulated industries provides no assurance that all, or even a substantial proportion of contractors would be reached and forced to comply.

Not surprisingly, then, modern presidents have chosen to regulate directly the practices of government contractors, and the executive order has been the instrument through which this regulation has been effectuated. For thirty years, private employers have been required to assent to a non-discrimination clause as a condition of a government contract award.[7] Although no single legal justification for the requirement has been put forth by commentators[8] and courts,[9] it is at least strongly arguable

tions Commission, challenging a proposed rate increase by AT&T on the ground that the increase is unreasonable in the light of that company's alleged practices of employment discrimination and would therefore violate the Federal Communications Act. *See* N.Y. Times, Dec. 11, 1970, at 1, col. 1.

[7] In addition to Exec. Order No. 8802, *supra* note 4, the following Executive Orders have required a non-discrimination clause in government contracts: Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943); Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (1951); Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953); Exec. Order No. 10,557, 19 Fed. Reg. 5655 (1954); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11,114, 28 Fed. Reg. 6485 (1963); Exec. Order No. 11,246, 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1970). Exec. Order No. 11,246 now encompasses amendments by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967) (sex discrimination) and by Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969) (government employment).

[8] In the last two years, however, there has been no lack of commentary attempting to rationalize the program. *See* Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341; Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Note, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROB. 187 (1970); Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590 (1969); Note, *The Philadelphia Plan*, 45 NOTRE DAME LAW. 678 (1970); Comment, *The Constitutionality of "Affirmative Action" to Integrate Construction Trades: The Philadelphia Plan*, 43 TEMP. L.Q. 329 (1970); Comment, *The Philadelphia Plan and Strict Racial Quotas in Federal Contracts*, 17 U.C.L.A. L. REV. 817 (1970). Persuasive support for executive action to end employment discrimination may be found in 42 OP. ATT'Y GEN. 592 (1961) (on the legal justification of Exec. Order No. 10,925); Legal Memorandum of the Solicitor of Labor: Authority under Exec. Order No. 11,246, in *Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 255 (1970) [hereinafter cited as *Philadelphia Plan Hearings*].

[9] Four cases to date have dealt with the Executive Order program. Though

that for the President to fail to condition government contracts upon non-discrimination would violate the equal protection guarantee of fifth amendment due process.[10] Substantial state financial support of a private entity has long been thought to involve the state sufficiently in the activities of the private entity to constitute action which equal protection requires not to be discriminatory.[11] An alternative rationale is that the contractor performs work for the state which the state would otherwise be forced to perform for itself, hiring its own work force and, of necessity, carefully scrutinizing its own employment practices.[12] Thus the contractor constitutes an agent of the state to whose employment practices the state cannot constitutionally remain indifferent.[13]

To be sure, the state action argument is disturbing because it may compel the constitutional supervision of the employment practices of each contractor with whom the Government does business — no matter how small his operation. The problem may be clearly defined by an example drawn from outside the context of discrimination. If the Government enters into a ten thousand dollar contract for the procurement of envelopes from a small firm with ten employees, is a first amendment claim raised when an employee is dismissed for reading socialist literature? Must he be granted a due process hearing, in any event? In a given case a court might well conclude that state action had not been sufficient-

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none devoted great attention to the issue of the overall legality of any Executive Order program against discrimination by government contractors, each concluded that such a program was legal. Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970); *cf.* United States v. Paperworkers Local 189, 282 F. Supp. 39 (E.D. La. 1968) (preliminary injunctions issued under Title VII and Exec. Order 11,246), 301 F. Supp. 906 (E.D. La.) (permanent injunction decreed), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[10] Fifth amendment due process apparently proscribes at least some actions by the federal government that would be forbidden to the states by fourteenth amendment equal protection. Bolling v. Sharpe, 347 U.S. 497 (1954).

[11] Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) (federal grants to private hospitals engaged in segregation of facilities); Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965) (federal contract with company hiring workers from discriminating union).

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> [W]here a state through its elected and appointed officials, undertakes to perform essential governmental functions . . . with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them.

Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

[13] *Cf.* Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring).

ly established to hold unconstitutional the Government's failure to supervise its contractor's practices.

Yet, even so, the executive must have the power to formulate policies whose coverage is administratively appropriate to the prevention of unconstitutional state involvement.[14] One can, of course, imagine cases in which the *substance* of requirements promulgated by the executive branch would threaten well-articulated policies emanating from the Constitution.[15] In the absence of clear constitutional prohibition, however, an effective executive must have substantive, as well as jurisdictional, leeway to fulfill his constitutional responsibilities. The justification for executive discretion is most persuasive when it is arguable, as in the contracting field, that the President has required no more than the Constitution demands.[16]

In addition to the constitutional justification for an Executive Order program to combat discrimination, a second basis upon which the program might be justified is that of ratification by the Congress. Possible congressional approval of an Executive Order program may be found in the Civil Rights Act of 1964, which in several instances makes explicit reference to the then current Executive Order program.[17] These references indicate that Congress recognized the existence of the Executive Order program and implicitly acknowledged that the program would continue in operation. Another possible source of evidence that Congress has given its imprimatur to the Executive Order program is the continuing appropriations which have been voted for the benefit of the program.[18] Finally, though, the more persuasive justifica-

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[14] The President's duty to "take Care that the Laws be faithfully executed" (U.S. CONST. art. II, § 3) is not limited to legislation but extends to "rights, duties and obligations growing out of the Constitution itself." In Re Neagle, 135 U.S. 1, 63–67 (1890).

[15] For example, it is a violation of due process for the President on his own initiative to attach criminal penalties to conduct. United States v. Eaton, 144 U.S. 677 (1892).

[16] Conflicts between a specific congressional directive and the exercise of executive discretion present a wholly separate question, to be resolved in favor of the legislative command unless it is itself unconstitutional. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring). The possible conflict between the Executive Order program and Title VII of the Civil Rights Act of 1964 is discussed *infra* at pp. 1299–1304.

[17] Act § 707(d), 42 U.S.C. § 2000e-8(d) (1964) exempts an employer from Title VII filing requirements if he has filed compliance information with the President's Committee on Equal Employment Opportunity (the agency then enforcing the Executive Order program); Act § 716(c), 42 U.S.C. § 2000e-15 (1964) provides for conferences among government bodies affected by the new Civil Rights Act — the PCEEO is included.

[18] The Office of Federal Contract Compliance (the current enforcing agency) has received steadily increasing, separate-line appropriations in the Department of

tion for the Executive Order program is that derived from the article II command that the President "take care that the laws be faithfully executed" and from the fifth amendment due process clause. Indeed, the inconclusiveness of the evidence of explicit statutory authorization may be attributable to a general recognition that the argument from the Constitution is sensible and compelling.

B. Structure and Administration

1. 1941 to 1961. — The early history of the Executive Order program to prohibit employment discrimination by government contractors was that of an idea whose time had not yet come. Popular attitudes toward civil rights prior to the 1964 Civil Rights Act construed discrimination not so much as a legal but as a moral wrong. Executive efforts to handle employment discrimination were more hortatory than legal, and sanctions for discrimination were threatened but never imposed.[19]

The executive effort began when President Roosevelt promulgated Executive Order No. 8802 [20] in 1941 in response to demands by black labor leaders for an end to discrimination by companies holding defense contracts.[21] The order established a Committee on Fair Employment Practices ("CFEP") to receive and investigate complaints of employment discrimination. In 1943, Executive Order No. 9346 expanded the program from defense industries to war industries, and expanded the duty imposed from one requiring "non-discrimination" (without further elaboration) to one requiring non-discrimination in "hire, tenure, terms or conditions of employment, or union membership." [22] Structurally, CFEP handled the entire task of policing compliance, a task hampered by the Committee's lack of sanctions and its inability to agree upon what constituted discrimination.[23] While hearings conducted by CFEP served to dramatize particular

Labor appropriations process. *See* Legal Memorandum of the Solicitor of Labor, *supra* note 8, at 263–64 and sources cited therein. In some cases such appropriations have been viewed as implied ratifications. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937); *cf.* United States v. Midwest Oil Co., 236 U.S. 459 (1915). *See generally* Legal Memorandum of the Solicitor of Labor, *supra* note 8, at 258–64 and cases cited therein.

[19] *See* Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis*, 14 How. L.J. 259, 269–74 (1968).

[20] 6 Fed. Reg. 3109 (1941).

[21] History of the political pressures which gave rise to the Executive Order program is contained in L. Ruchames, Race, Jobs, & Politics: The Story of FEPC 3–21 (1953).

[22] 8 Fed. Reg. 7183 (1943).

[23] Segregation, per se, was not regarded as discrimination. *See* L. Ruchames, *supra* note 21, at 41.

instances of discrimination in industry, the Committee itself admitted that it had been unable to make any widespread changes in employment discrimination by the time it was disbanded.[24]

The Executive Order program underwent three significant changes during the 1950's.[25] In the first place, the present administrative structure evolved. Executive Order No. 10,308, promulgated in 1951, for the first time gave the individual agency which signed a contract primary responsibility for administering the non-discrimination clause. Presidential committees [26] continued to receive and investigate complaints, but their role became primarily supervisory: they would recommend changes in the contract clause to the President, issue interpretations of the meaning of the contract clause, and review agency actions.

This administrative change was significant, for it entrusted enforcement power to the agencies, bureaucracies intent upon meeting their own, often short-term, policy objectives, and therefore not entirely committed to equal employment opportunity. On the other hand, this decentralized enforcement structure avoided likely difficulties in funding the Executive Order program. A Congress which throughout the 1950's would refuse to enact fair employment legislation was not likely to appropriate large sums specifically for a committee formed to combat discrimination. It was easier to place the enforcement responsibility in individual departments whose compliance funds could be obtained under undifferentiated requests for administrative funds.[27] At the same time, funds for the Committee on Government Contracts were obtained under a general act allowing a diversion of funds from departments to interagency committees dealing with matters of common interest.[28]

A second significant change in the 1950's was an expansion of the substantive requirements of the Executive Order program.[29] While, as before, only direct federal contracts were covered,[30] the mandatory contract clause now extended the obli-

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[24] *Id.* at 134–36.

[25] Three Executive Orders were promulgated during this period: Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (1951); Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953); Exec. Order No. 10,557, 19 Fed. Reg. 5655 (1954).

[26] The Truman committee was the Committee on Government Contract Compliance. The Eisenhower committee was the Committee on Government Contracts (CGC).

[27] *See* R. NATHAN, JOBS & CIVIL RIGHTS 128–29 (1969).

[28] 31 U.S.C. § 691 (1964).

[29] *See* Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837, 839–42 (1957).

[30] Direct federal contracts are those in which the Government receives the goods or services itself; indirect contracts are those in which the Government finances the purchase of goods and services by a non-Governmental entity. Coverage of in-

gation not to discriminate to "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." [31] Employers also committed themselves to post notices proclaiming this policy.[32]

Finally, toward the end of the 1950's, the federal government faced the problem that an Executive Order without sanctions did not work. Though a system of spot compliance reviews had been initiated, replacing sole reliance on complaints from aggrieved parties,[33] the CGC considered itself powerless to impose sanctions for violation of the Order.[34] In reviewing the history of the Executive Order program, the CGC concluded in 1960 that major changes were necessary to make the program effective.[35] The 1961 incorporation of these changes in Executive Order No. 10,925 [36] heralded a new approach to the problem of employment discrimination by government contractors.

2. The Present Program. — The clause now required in federal supply and construction contracts is taken from Executive Order Nos. 11,246 [37] and 11,375.[38] It is substantially the same as that required under No. 10,925.[39] The contractor must commit himself not to discriminate against any employee or applicant because of race, color, religion, sex, or national origin. Moreover, he must "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." The contractor must advertise his adherence to a policy of non-discrimination, and must advise labor unions with whom he deals of his nondiscrimination obligation. He must, unless

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direct contracts did not begin until 1963. Exec. Order No. 11,114, 28 Fed. Reg. 6485 (1963).

[31] Exec. Order No. 10,557, 19 Fed. Reg. 5655 (1954).

[32] *Id.*

[33] *See* PRESIDENT'S COMM. ON GOV'T CONTRACTS, THIRD ANN. REP. ON EQUAL JOB OPPORTUNITY 9 (1956).

[34] The conception held by the CGC of its role in compliance was limited; thus, in 1957 the CGC contented itself with asking contracting agencies to examine carefully a contractor's compliance record in the process of awarding new contracts. *See* PRESIDENT'S COMM. ON GOV'T CONTRACTS, FOURTH ANN. REP. ON EQUAL JOB OPPORTUNITY 6 (1957).

[35] *See* PRESIDENT'S COMM. ON GOV'T CONTRACTS, FINAL REPORT 14–15 (1961).

[36] 26 Fed. Reg. 1977 (1961).

[37] 3 C.F.R. 402 (1970), 42 U.S.C. § 2000e (Supp. V, 1970), *reprinted in part at* pp. 1313–16 *infra*.

[38] 32 Fed. Reg. 14,303 (1967) (amending Exec. Order No. 11,246 to include sex discrimination).

[39] 26 Fed. Reg. 1977 (1961).

granted an exemption, include the required contract clause in every purchase order or subcontract; and he must allow the contracting agency and the Secretary of Labor access to his books and records to ascertain whether the order, or rules and regulations adopted pursuant to it, are being complied with. Finally, the contractor acknowledges that if he fails to comply, the contract may be cancelled, terminated or suspended, and the contractor may be declared ineligible for further Government contracts.

Not all federal contractors are covered.[40] Transactions for less than $10,000 and contracts for work outside the United States are exempt. The Secretary of Labor and his delegates have the power to exempt contractors from the nondiscrimination clause. Enforcement agencies may themselves exempt contracts if such an exemption is in the interest of national security. Facilities not connected to the site of the contract work may also be exempted.[41] Exemptions in federally assisted construction contracts are treated similarly, though in such contracts the $10,000 figure refers not to the amount of federal aid, but to the total dollar value of the contract in question. Subcontractors under both federal contracts and federally assisted contracts are subject to the requirements of the non-discrimination clause with the same categories of exceptions. Larger federal contractors have additional responsibility: contractors and first tier subcontractors with contracts greater than $50,000 and more than fifty employees are required to file annual reporting forms.[42]

Procedurally, supervision of the current program is vested in the Office of Federal Contract Compliance ("OFCC"),[43] located in the Workplace Standards Administration of the Department of Labor.[44] The OFCC is funded by a separate congressional appropriation which is part of the Department of Labor budget.[45] The various contracting agencies have the primary responsibility for enforcement,[46] and request funds separately,

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[40] The list of exemptions is contained in 41 C.F.R. § 60-1.5 (1970).

[41] Exec. Order No. 11,246 § 204, 3 C.F.R. 404 (1970), 42 U.S.C. § 2000e (Supp. V, 1970).

[42] 41 C.F.R. § 60-1.7(a) (1970).

[43] FEDERAL EFFORT 175.

[44] Executive Order No. 11,246 transferred compliance supervision from the President's Committee on Equal Employment Opportunity to the Secretary of Labor. The Secretary of Labor created the OFCC in 1965, 31 Fed. Reg. 6921 (1966), and transferred all of his authority to it except the power to promulgate rules and regulations of a general nature. This power is nondelegable. Exec. Order No. 11,246 § 401, 3 C.F.R. 409 (1970), 42 U.S.C. 2000e (Supp. V, 1970).

[45] *See, e.g.*, Departments of Labor, and Health, Education, and Welfare Appropriation Act, 1969, 82 Stat. 969, 974 (1969).

[46] Executive Order No. 11,246 § 205, 3 C.F.R. 404 (1970), 42 U.S.C. § 2000e (Supp. V, 1970).

some agencies listing compliance activities as a separate part of their budget, and some lumping them together into general administrative categories.[47]

The bulk of the actual compliance work is carried on by the contracting agencies. Responsibilities for supervising compliance are allocated differently for construction and nonconstruction contracts. If the contract is for supplies, compliance enforcement is delegated to one of fifteen agencies, whose assignments are based on a standard industrial classification scheme.[48] For example, all federal contractor facilities supplying chemicals are monitored by the Atomic Energy Commission, regardless of which agency signs a contract for the purchase of particular chemicals.[49] Monitoring of federally assisted construction contracts and direct construction contracts, however, is carried out by the agency providing the largest dollar amount for a particular contract.[50] Each agency is responsible for organizing its own enforcement program, whose content is subject to OFCC approval.[51] The general outlines of these programs correspond to the OFCC rules, regulations, and orders.[52] Further guidance for compliance agencies will be provided by an OFCC manual on contract compliance which is now being prepared.[53]

Enforcement is carried on through an elaborate monitoring structure. Compliance agencies must inspect fifty percent of their assigned contractors each year.[54] Compliance reviews are required before the award of any contract for more than $1,000,000.[55] Finally, a contractor with more than fifty employees and a contract for more than $50,000 is required to file an "affirmative action" [56] program detailing the steps that the employer will undertake to eliminate job discrimination.[57] Compliance reviews

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[47] R. NATHAN, *supra* note 27, at 128–29.

[48] Compliance Agency Responsibility, Order No. 1 § 2b, 2 CCH EMPL. PRAC. GUIDE ¶ 17,650 (Oct. 24, 1969) [hereinafter cited as Order No. 1].

[49] *Id.* at Attachment 1.

[50] 41 C.F.R. § 60–1.3(d)(3) (1970).

[51] 41 C.F.R. § 60–1.6(b) (1970).

[52] To date, the OFCC has issued four sets of rules and regulations designed to make more specific the requirements of the program: Obligations of Contractors and Subcontractors, 41 C.F.R. § 60–1 (1970) (issued in 1968), *as amended*, 35 Fed. Reg. 10,660 (1970); Affirmative Action Programs, 35 Fed. Reg. 2586 (1970) (not yet codified) [hereinafter cited as Order No. 4]; Sex Discrimination Guidelines, 35 Fed. Reg. 8888 (1970) (not yet codified); Employment Tests by Contractors and Subcontractors, 33 Fed. Reg. 14,392 (1968).

[53] FEDERAL EFFORT 397.

[54] Order No. 1 § 2d.

[55] 41 C.F.R. § 60–1.20(d) (1970), *as amended*, 35 Fed. Reg. 10,660 (1970).

[56] The content of affirmative action is discussed at pp. 1291–99 *infra*.

[57] 41 C.F.R. § 60–1.40 (1970). Construction contractors must have an affirmative action program within 120 days of the contract award unless subject to the

may be triggered by individual complaint or on the compliance agency's own initiative. They typically cover all aspects of an employer's employment record and last five days.[58]

Executive Order No. 11,246 provides a wide array of sanctions that can be used against noncomplying contractors.[59] Names of defaulting contractors may be published; the Department of Justice may be notified and may bring enforcement proceedings to secure the performance of the contract; proceedings may be initiated under Title VII; contracts may be cancelled, terminated, or suspended in whole or in part; and a contractor may be debarred from future bidding on government contracts. All these sanctions may be imposed by the OFCC; the sanctions of publication, suspension, termination, cancellation, or debarment may be imposed by the compliance agency with OFCC approval.[60] Contractors must be accorded a formal hearing before termination, cancellation, or debarment; these hearings must be conducted by the OFCC or, with OFCC approval, by the compliance agency itself.[61]

In theory and design, the Executive Order program has the potential to be a major force in curtailing job discrimination. However difficult it may be to evaluate conclusively the impact of the program on hiring practices,[62] it nevertheless appears that

stricter requirements of special area plans. *Compare id.* at -1.40(c) *with* Order No. 4 § 60-2.1 *and* Memorandum from the Assistant Secretary of Labor, Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11,246 for Federally-Involved Construction § 3, 2 CCH EMPL. PRAC. GUIDE ¶ 16,175 (June 27, 1969) [hereinafter cited as Philadelphia Plan]. Other contractors must submit an affirmative action plan before a contract may be awarded. Order No. 4 § 60-2.2.

[58] R. NATHAN, *supra* note 27, at 130-31. The prototypical review described therein covered all aspects of an employer's establishment, ranging from inspection of employment records, to talks with executives in the reviewed company, to on-site observation.

[59] Exec. Order No. 11,246 § 209(a), 3 C.F.R. 406 (1970), 42 U.S.C. § 2000e (Supp. V, 1970).

[60] 41 C.F.R. § 60-1.27 (1970).

[61] *Id.* at -1.26(b).

[62] Evaluation of the impact of the program is difficult. In the first place, eradication of all but the most insidious forms of discrimination (e.g., segregated working facilities) is hard to measure. A company's lack of black executives may reflect present discriminatory attitudes or the failure of blacks in the company to have gained the experience necessary for executive positions because past discriminatory practices restricted their ability to enter executive training programs. For this reason courts are reluctant to give conclusive effect to showings of differential employment rates for minorities. *See* Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413, 442 (S.D. Ohio 1968). Second, perceived improvements are hard to allocate to any specific program. Since contractors covered by Exec. Order No. 11,246 are also usually covered by Title VII, *see* Act § 701(b), 42 U.S.C. § 2000-e(b) (1964), one does not know which program is responsible for any improvement.

the Executive Order program has not yet fulfilled its promise. For one thing, the program to date has not been vigorously enforced. A former head of the OFCC testified that from its inception in 1965 to mid-1968 there were no contracts cancelled, terminated, or suspended for failure to comply with the nondiscrimination clause.[63] Even today, although notices of proposed ineligibility have been issued and hearings have been held concerning the debarment of three federal contractors, no sanctions have been applied against these contractors.[64] This failure to impose sanctions has suggested to some critics that the OFCC and the compliance agencies are giving the program only lip service, and that contractors do not feel compelled to follow it since sanctions will not be applied.[65]

A second indication of ineffectiveness is the failure of available statistics to demonstrate that employers subject to the program have a better pattern of minority representation in their companies than do other employers. Indeed, one random survey of white collar employees of federal contractors in New York City revealed that contractors who were not only subject to the Executive Order program, but who had also joined "Plans for Progress," a now defunct voluntary organization,[66] had lower percentages of minority representation than did firms not covered by the program.[67] A recent survey of Memphis contractors

[63] Testimony of Edward C. Sylvester Jr., *Hearings on S. Res. 39 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 32 (1969). To some extent this statistic is misleading since not all compliance agency sanctions must be reported to the OFCC. Nothing in the Executive Order or the accompanying regulations so requires. *Cf.* 41 C.F.R. § 60-1.27 (1970).

The Department of the Post Office revealed that it had passed over some low bidders for failure to comply with the Executive Order program. R. NATHAN, *supra* note 27, at 121–22. In fact some contractors have been barred from bidding by the Post Office. *Id.* at 122. Yet there is no requirement that sanctions be publicized. As a result, while there is general agreement among writers that no contractors have been barred from bidding on all government contracts or have had contracts cancelled after they have begun work on them, there is no agreement on the incidence of the other sanctions. *Compare* FEDERAL EFFORT 163–65 *with* Powers, *Federal Procurement and Equal Employment Opportunity*, 29 LAW & CONTEMP. PROB. 468, 484 n.1 (1964). Everyone agrees, however, that the number of contractors against whom sanctions have been applied comprise only an infinitesimal portion of the government contractor population.

[64] FEDERAL EFFORT 164 n.220.

[65] *See, e.g., id.* at 162–166. It has been suggested that the very strength of the sanctions available under Executive Order No. 11,246 has deterred their use. *See* Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590, 592 n.13, 603 (1969).

[66] Plans for Progress, begun in 1961, was a program through which employers voluntarily undertook special efforts to equalize job opportunities within their firms. Note, *supra* note 65, at 593–94 (1969).

[67] R. NATHAN, *supra* note 27, at 135.

also showed that contractors covered by Title VII but not covered by the Executive Order program had a higher proportion of black employees and a higher proportion of black employees in white collar jobs than firms subject to Executive Order scrutiny.[68]

The ineffectiveness of the program can be attributed to several distinct but interrelated problems. First, the program lacks sufficient funds and personnel to do a thorough job of inspection. In 1967 there were a total of 256 people in the entire federal government working full time on contract compliance and only 40 working part-time.[69] As of 1970 about 90,000 business establishments were covered by the Executive Order.[70] The OFCC estimates that one week is required for a thorough compliance review.[71] Thus at least 1000 compliance personnel would be required to meet the OFCC goal of fifty percent inspection [72] each year. The shortage of personnel has led to skimping on compliance reviews, including both failure to cover assigned facilities,[73] and failure to conduct thorough reviews of those facilities which are visited.[74] Though there are some current indications that compliance personnel will be greatly increased in future years,[75] to date there has been no major expansion of the federal contract compliance establishment.

Compliance agency attitudes have in some cases constituted a second hindrance to effective enforcement. One major problem is that compliance activities are still entrusted to procurement officers simultaneously responsible for meeting the substantive requirements of contracts. In the Department of Defense, for example, before sanctions may be imposed for a finding of noncompliance, the military officer in charge of all contract requirements must pass upon the findings and approve any sanctions proposed.[76] He can make final dispositions of all cases.[77] Since

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[68] Marshall & Adams, *Negro Employment in Memphis*, 9 IND. REL. 308, 311–312, Tables 2 & 4 (1970).

[69] FEDERAL EFFORT 156.

[70] *Id.* at 218, 241.

[71] Order No. 1 § 2d. *But see* p. 1285 & n.58 *supra*.

[72] Order No. 1 § 2d.

[73] In fiscal 1969, the Department of Defense conducted 2,703 compliance reviews, though 36,000 facilities were assigned to it. FEDERAL EFFORT 235. The Department of Health, Education and Welfare covered only 2% of the non-insurance company contractor facilities assigned to it. *Id.* at 247.

[74] *Id.* at 237 n.409.

[75] The Office of Management and Budget is now requiring agency submission of a record on equal employment efforts along with budget requests. It is reported that nearly all budget requests for more compliance personnel are now being allowed. N.Y. Times, Dec. 23, 1970, at 28, col. 4.

[76] FEDERAL EFFORT 222.

[77] *Id.*

advancement from his position is geared more nearly to a showing that contractors under his supervision meet the substantive requirements of their contracts than to concern that they adhere to the requirements of the nondiscrimination clause, there is an inevitable tendency for the officer to forgo a laborious investigation of a company's employment posture which could lead to major impediments to contract completion.

A related agency problem is a simple lack of knowledge of the criteria for finding noncompliance, leading to a failure to find noncompliance unless the violation of some specific OFCC directive can be demonstrated. Two examples illustrate this point. In June, 1969, the Department of Defense, responsible for about one-half of all federal contracts,[78] still had no compliance program for construction contracts.[79] The Department explained that it was difficult to proceed in the absence of clear OFCC guidelines.[80] In 1969, Assistant Secretary of Defense Packard accepted verbal commitments for change from three contractors found to be in noncompliance, though it was later determined that OFCC regulations demanded written commitments.[81] The Department acknowledged that it simply did not know that written commitments were required. Though recent guidelines and rules may be of some help, the problem of information is still very much present.

Inefficiency has also stemmed from the delays built into the present bureaucratic structure. Compliance agencies faced with noncompliant contractors pass the case upward to the OFCC, necessitating more time for review.[82] Similarly, compliance agencies have not utilized their power to hold formal hearings for obvious contractor violations,[83] preferring to send the case up to the OFCC if sanctions are in prospect.[84] Conversely, OFCC has had great difficulty collecting data from the compliance agencies.

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[78] *See* Order No. 1, Attachment 2.

[79] Testimony of Walter Walley, Deputy Chief, Office of Contract Compliance, Defense Contract Administration Services, Boston Region, Transcript of Open Meeting Before the Massachusetts State Advisory Committee to the United States Commission on Civil Rights, CONTRACT COMPLIANCE AND EQUAL EMPLOYMENT OPPORTUNITY IN THE CONSTRUCTION INDUSTRY 88–89 (1969).

[80] *Id.* at 90. There are still no separate guidelines applicable to all construction contracts.

[81] History of this incident is contained in *Hearings on S. Res. 39, supra* note 63, at 127–58. 41 C.F.R. § 60–1.40(a) (1970) requires affirmative action programs to be in writing.

[82] FEDERAL EFFORT 257.

[83] 41 C.F.R. § 60–1.26(b)(2)(v) (1970) requires approval of the OFCC before the sanction decision becomes final.

[84] FEDERAL EFFORT 254.

Thus it often has insufficient data to evaluate the performance of compliance agencies and to make changes to improve poor performance.[85]

The final cause of inefficiency stems from the difficulties of meshing OFCC procedures with those under Title VII. Though there is dispute over the question of whether current OFCC interpretations of affirmative action conflict with the requirements of Title VII,[86] there has been only limited conflict between the two regimes over the definition of discriminatory conduct.[87] There have been administrative conflicts, however, when the two programs have been involved in policing the same conduct.[88]

One source of conflict has been the EEOC's reluctance to divulge to the OFCC information gathered during a complaint investigation.[89] Overlapping investigations present another problem: though an Executive Order review may be intended to scrutinize compliance with requirements that the EEOC does not investigate, OFCC and the compliance agencies are naturally reluctant to descend upon a contractor that the EEOC has just finished investigating, for fear of provoking employer outcries of harrassment.[90] Likewise, the OFCC has agreed to postpone contractor inspections and investigations if the same contractor is

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[85] The Department of Defense, for example, in collecting racial and ethnic data from contractors, neglects to ask for differential rates of increases in employment and advancement for minority groups. It is almost impossible for the OFCC to determine how DOD-monitored agencies are progressing since a 5% increase in minority employment is either impressive, disappointing, or poor depending on the overall increase in employment in the monitored industry. FEDERAL EFFORT 240.

[86] *See* pp. 1299–1304 *infra*.

[87] There is no evidence to date that the OFCC takes a different view of the employer's obligation not to discriminate than that taken of § 703(a) of Title VII by the EEOC and the Attorney General. ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ." 42 U.S.C. § 2000e–2(a) (1964)). *Compare* 35 Fed. Reg. 12,333 (1970) (EEOC Testing Guidelines) *and* 29 C.F.R. §§ 14–1604.1 to 1604.7, 14–1604.31 (1970) (EEOC Sex Guidelines) *with* 33 Fed. Reg. 14,392 (1968) (OFCC Testing Guidelines) *and* 35 Fed. Reg. 8888 (1970) (OFCC Sex Guidelines).

[88] In specific fact situations a practice considered discriminatory or non-discriminatory by the OFCC might be differently evaluated by the Attorney General or the EEOC. *See* Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); Farmer, *Equal Employment Opportunity—Case Study of Chaotic Administration*, 1970 FLA. B.J. 400. Future difficulties in interpretation of the substantive requirements may be alleviated by the formation in 1969 of the Interagency Civil Rights Staff Committee, which has as one of its goals the development of uniform standards for measuring compliance. FEDERAL EFFORT 404–05.

[89] FEDERAL EFFORT 387.

[90] *Hearings on S. Res. 39, supra* note 63, at 22; *Philadelphia Plan Hearings* 70, 89.

being investigated by the Justice Department for a possible "pattern or practice" suit, though the Department's investigation might be for different purposes.[91] Finally, compliance agencies report that their efforts to obtain contractor commitments for purposes of reaching a conciliation agreement have been retarded by ongoing negotiations between the EEOC and the contractor.[92] The Interagency Civil Rights Coordinating Committee has made some progress in eliminating this overlap, most notably in the recent agreement that complaints of individual discrimination will be referred from the OFCC to EEOC.[93] But much remains to be done.[94] Improved cooperation seems especially desirable in light of some of the agreements that the OFCC and the EEOC have been able to negotiate when working together, agreements broader in scope than either could have obtained on its own initiative.[95]

A theme common to all these complaints is the nonspecificity of the Executive Order program. The OFCC has given contractors extensive guidance only with regard to sex discrimination and testing.[96] Unlike other regulatory bodies, the OFCC has not amassed sufficient cases of enforcement to develop a body of precedent telling contractors what types of activity will result in noncompliance. One means of remedying this deficiency would be reliance on suits brought under Title VII. Enforcement officers might simply be instructed that behavior judged discriminatory under Title VII will also constitute a violation of the Executive Order program.[97]

There are two other methods by which the requirements of the Executive Order program could be made more specific. The

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[91] FEDERAL EFFORT 402.

[92] *Id.* at 388.

[93] 74 *News & Background Information* 67, 1 BNA LAB. REL. REP. (1970).

[94] One as yet unexplored problem is the effect of one agency's finding of discrimination on the other's freedom to arrive at a contrary result. Apparently an OFCC or compliance agency finding has no conclusive value in a trial under Title VII. *See* United States v. H.K. Porter Co., 296 F. Supp. 40, 57 (N.D. Ala. 1968), *appeal docketed*, No. 27,703, 5th Cir., Mar. 14, 1969. Whether a judicial finding of nondiscrimination forecloses the application of Executive Order sanctions has not yet been considered. There is some authority that it does not. *See* Sprague v. Woll, 122 F.2d 128 (7th Cir.), *cert. denied*, 314 U.S. 669 (1941).

[95] *See, e.g.*, Blumrosen, *The Newport News Agreement — One Brief Shining Moment in the Enforcement of Equal Employment Opportunity*, 1968 ILL. L.F. 269.

[96] 35 Fed. Reg. 8888 (1970) (OFCC Sex Guidelines); 33 Fed. Reg. 14,392 (1968) (OFCC Testing Guidelines).

[97] The Department of Defense changed its stance toward Dan River Mills, a contractor under review, after two court decisions under Title VII. *Hearings on S. Res. 39, supra* note 63, at 48.

first is by permitting private suits for violations.[98] The resulting court decisions would presumably develop a body of precedent interpreting the Order. The second, a method apparently adopted by the OFCC, is to eschew the complicated task of defining discrimination altogether. Instead, OFCC has attempted an end run around the nondiscrimination requirement and has transformed the affirmative action requirement into a repository for the definite guidelines that have to date been lacking under the obligation not to discriminate. The implications of affirmative action will be explored below.

C. Affirmative Action and Beyond

1. From Affirmative Action to the Area Plan. — Executive Order 11246 and its implementing regulations impose two obligations on employers: the employer must adopt a hiring policy that does not look to the race, color, religion, sex, or national origin of applicants and employees; and he must undertake a program of affirmative action to improve the representation of minority workers if they are underutilized. The employer's obligation not to discriminate parallels the requirement of section 703(a) of Title VII.[99] The affirmative action commitment, however, has no explicit counterpart in the language of Title VII, although Title VII may require an employer whose recruiting practices foreseeably result in minority underrepresentation to alter those practices.[100]

There is, in fact, a dramatic distinction between the theoretical meanings of affirmative action under the two regimes. Under Title VII, a court may order that a victim of discrimination be restored to a position equivalent to that which he would have attained in the absence of discrimination. This restitutional remedy may encompass hiring or promoting the victim of discrimination. It may, in that sense, require "preferring" the victim over others who are candidates for a position at the time the remedy is imposed.[101]

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[98] To date such suits have been disallowed on grounds that the Executive Order did not create a private right of action. Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); *cf.* Gnotta v. United States, 415 F.2d 1271 (8th Cir.), *cert. denied*, 397 U.S. 990 (1969) (complaint dismissed for lack of government consent to suit).

[99] 42 U.S.C. § 2000e-2(a) (1964).

[100] *See* p. 1153 *supra*.

[101] Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (No. 1405, 1969 Term; renumbered No. 124, 1970 Term). In *Griggs*, the company had hired both blacks and whites for its labor department, but until the mid-1950's, blacks were prevented from transferring into higher departments. During the same period, whites could transfer without high school education

Under the Executive Order, however, affirmative action is required even when there has been no judicial determination that an employer has discriminated. Consequently, the OFCC has not attempted to require make-whole hiring and promotion like that imposed by courts under Title VII.[102] Its refusal to do so makes good sense. There is no necessary connection between a finding of underutilization [103] and an illegal pattern of discrimination by a particular employer. If an employer's plant is, for example, inaccessible by public transportation from areas of town heavily populated by minority groups, underrepresentation of minorities in his work force may not be his fault.[104] Requiring the employer to make up for all underutilization may be unjust, and if the underutilization has not been the result of employer discrimination, there is no chill to worker rights which must be removed.

Where underutilization is found, what remains of the affirmative action obligation is contained in the theory espoused by OFCC. When there is underutilization, employers covered by the Executive Order must take action consistent with the goal of moving the employment process, viewed as a whole, towards a true merit basis.[105] But that process need not expressly favor minorities, either to dispel past injuries or to limit the duration of underutilization. Classic affirmative actions would include active recruitment by bringing news of job openings to minority workers who otherwise might not know of such opportunities; [106] and, as a means of insuring that minority applicants are not

or testing. When the company initiated a diploma requirement, blacks in the labor department were effectively locked in although whites who had less seniority and no diploma were allowed to retain their prior promotions to higher departments. The court ordered the company to discontinue application of the diploma requirement to those blacks who had been on the job at the time the requirement was imposed — in effect requiring the employer to "prefer" that specific group of black workers to other workers who might have been more qualified for promotion by the standards being applied at the time of the lawsuit. *See* pp. 1142–43 *supra*.

[102] Order No. 4 § 60-2.30.

[103] "Underutilization" is defined as "having fewer minorities in a particular job category than would reasonably be expected by their availability." Order No. 4 § 60-2.11(a).

[104] There is, of course, often a close connection between the location of an employer's plant and the level of minority employment which can fairly be expected of him. More specifically, the employer with several plants located in various sections of the country or in different parts of a metropolitan area may have considerable discretion in choosing which of his plants will perform a government contract. One avenue of contract compliance not yet traveled would be to use federal leverage to control the geographical situs of performance, as well as the employment process which takes root there.

[105] The United States Civil Rights Commission also considers this the OFCC's theory. FEDERAL EFFORT 183–85.

[106] Order No. 4 § 60-2.21.

deterred from applying, advertisement of the employer's adherence to a policy of nondiscrimination.[107] More affirmative affirmative actions are still permissible so long as they promote, rather than subvert, the quest for merit-based hiring. Going a step beyond mere advertising, an employer may thus be obliged to encourage potential minority applicants to throw their names into the hat — through face-to-face contact with company representatives, for example.[108] But in theory, the hat itself will be kept apart, and he who picks from it isolated from all that precedes his choice.

In practice, responsibilities for affirmative action differ depending on the precise nature or amount of the contractor's business with the government. Direct government contracts or construction contracts involving federal aid may fall into five contract categories: (1) contracts for less than $10,000 — not subject to executive order program; [109] (2) contracts for less than $50,000 or involving fewer than fifty employees [110] — required to take affirmative action to ensure equal employment opportunity but responsible for no written program of compliance; (3) construction contracts for more than $50,000 and involving more than fifty employees — subject to the affirmative action requirements, including a written program complying with OFCC regulations; [111] (4) non-construction contracts for more than $50,000 and involving more than fifty employees — subject to special, more limited affirmative action requirements;[112] (5) construction contracts subject to the specific affirmative action requirements of area plans, of which the Revised Philadelphia Plan [113] is the chief example.[114] The discussion which follows will focus on the affirmative action requirements of the area plans. The require-

[107] *Id.*

[108] Order No. 4 § 60-2.25(e) recommends several types of employer programs designed to bring the company to the attention of the minority community. Examples of such programs are campus recruiting and summer jobs for minority youth.

[109] 41 C.F.R. 60-1.5(a) (1970).

[110] *Id.* at 60-1.40(a).

[111] *Id.*

[112] Order No. 4 § 60-2.1 et seq.

[113] Two documents comprise the Revised Philadelphia Plan: Philadelphia Plan, *supra* note 57, and Ranges for Implementation of Philadelphia Plan, 2 CCH EMPL. PRAC. GUIDE ¶ 16,176 (Sept. 23, 1969) [hereinafter cited as Ranges for Implementation of the Philadelphia Plan].

[114] A Washington area plan has also been promulgated for construction in the Washington Standard Metropolitan Statistical Area. Washington Plan, 41 C.F.R. § 60-5 (1971), 35 Fed. Reg. 19,352 (1970) [hereinafter cited as Washington Plan]. Like the Philadelphia Plan, the Washington Plan applies to government contracts for projects the total cost of which exceeds $500,000. *Id.* at § 60-5.2; Philadelphia Plan § 2.

ments of the area plans incorporate all the lesser affirmative action obligations of other government contractors and call into question most dramatically the possible conflicts between affirmative action and the ideal of merit-based hiring.

The inclusion of federally assisted construction contracts in the original coverage of Executive Order No. 11,246 may be considered a recognition by the government that minority workers in the construction industry were almost nonexistent. EEOC figures on minority representation in the unions that account for workers in the construction trades were revealing: [115] excluding the Laborer's Union, the lowest paid of the construction unions, black representation in all the building trades was only 2.5%, compared with black representation of 12% in the non-building unions.

A more pragmatic reason for close scrutiny of employment in federally assisted construction was its visibility. Urban renewal and government building tend to take place in areas of high minority concentration. In many kinds of work, discrimination can be concealed behind closed doors. But the presence of an all-white construction crew working outdoors in plain sight in a black community is a blatant insult. Underrepresentation was also more intractable in the construction industry, because of its special hiring practices. A typical construction contractor maintains only a skeleton workforce on a full-time basis.[116] When working on a project, he will turn to outside sources for employees whom he will hire on a temporary basis for the duration of that project. At the end of the project, these employees will be laid off. Since a ready source of labor is the prime concern of a construction contractor, he finds it most convenient to institute referral arrangements with the local unions containing members in the job categories he needs. This tendency often culminates in exclusive referral arrangements with local unions,[117] the contractor promising to contact the union first when job needs arise. Thus, employers by themselves were incapable of significantly improving minority representation in the workforce.

This employer inability to improve conditions coupled with high visibility made the construction industry a logical target for special efforts.[118] In 1965 the OFCC designated area co-

[115] The EEOC figures may be found in Note, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROBS. 187, 198 (1970).

[116] *Id.* at 197.

[117] The Supreme Court has held that these arrangements are legal unless they encourage union membership by discriminatory practices. Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).

[118] Order No. 4 represents the parallel effort of the OFCC to bring particularity

ordinators for metropolitan or labor market areas to help compliance agencies monitor equal employment in construction.[119] The current OFCC reorganization continues this trend by providing for eleven regional offices [120] in its Office of Technical Assistance to carry on efforts in regional coordination. The choice of area coordinators over the characteristic reliance on compliance agencies was pragmatic: since the workforce of the individual contractor varied from job to job, single compliance agencies dealing only with individual projects could get no picture of the overall employment patterns of a contractor.

Similar concerns stimulated the formulation of special area plans to deal with the construction industry.[121] Initial plans in St. Louis and San Francisco tried to bring all the construction contractors on two large projects together to plan joint efforts to increase minority employment. But because of unwillingness to apply sanctions and failure to secure union participation both plans came to nought.[122]

These plans were succeeded by two area-wide plans, the Cleveland and Philadelphia pre-award plans, which instituted two new concepts in construction employment.[123] The first new idea was to focus OFCC attention on an entire geographic area. The second was to require a promise by a successful bidder to achieve certain ranges of minority employment as a precondition of contract award. Under both plans, when the contracting agency solicited bids for projects it would inform the bidders that they were responsible for the submission of affirmative action programs. Yet the only pre-submission guidance to these programs was found in highly unspecific regulations issued by the Secretary of Labor. The lowest bidder was then invited to a pre-award conference at which he was told that acceptable affirmative action programs necessitated the inclusion of minority manning tables in his bid.[124] For the first time, construction contractors

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to affirmative action for the non-construction contractor. Its chief difference in approach is that the contractor still draws up his own program for remedying minority underutilization rather than having one imposed by the OFCC. Order No. 4 § 60-2.1. Though his goals are derived through the same process employed in constructing timetables under the area plans, Order No. 4 § 60-2.11(a), the ability of the contractor to decide for himself the extent of his deficiencies and the readiness with which he can correct them may well lead to weaker efforts than those of a contractor working under an OFCC-imposed timetable. The initial plans submitted under Order No. 4 had several deficiencies. FEDERAL EFFORT 234.

[119] R. NATHAN, *supra* note 27, at 108.

[120] FEDERAL EFFORT 79.

[121] The early plans are described in *id.* at 167–72.

[122] *See id.* at 168–69.

[123] *Id.* at 169–70.

[124] *Id.* at 170 n.238.

were told that a successful affirmative action plan included guarantees of "best faith efforts" by contractors to achieve certain ranges of minority employment throughout the work force on the construction project. If the contractor did not comply with the contracting agency's notion of affirmative action, he faced the threat of losing the contract award.

The Comptroller General effectively terminated both the Cleveland [125] and the Philadelphia [126] pre-award plans by ruling that, as then formulated, they violated the principles of competitive bidding because of their failure to tell contractors before submission of bids what the scope of their affirmative action requirements would be.[127] Though the Comptroller General could not prevent the executive department from entering into contracts using the pre-award scheme, he did have the power to withhold payment on these contracts,[128] and the OFCC decided to withdraw the pre-award program rather than to test his determination to apply this power.

The OFCC again attempted to hurdle the competitive bidding obstacle in July, 1969, with the issuance of the Revised Philadelphia Plan.[129] The revised plan maintained the concept of ranges of minority employment, but now told the contractor prior to submission of bids the percentage of minority employment he would have to indicate as a goal in his bid in order to be eligible for consideration. This program had clear roots in the earlier pre-award plans. Less evident are the connections between the Philadelphia Plan and the 1968 regulations issued by OFCC. Section 60–1.40 required all contractors who employed fifty or more men and held a contract of $50,000 or more to develop an affirmative action program. The regulations provided that "when there are deficiencies [in minority employment, there shall be] the development of specific goals and timetables for the prompt achievement of full and equal employment

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[125] 47 COMP. GEN. 666 (1968).

[126] 48 COMP. GEN. 326 (1968).

[127]

> Accordingly, in our view where federally assisted contracts are required to be awarded on the basis of publicly-advertised competitive bidding, award may not properly be withheld pursuant to the Plan from the lowest responsible and otherwise responsive bidder on the basis of an unacceptable affirmative action program, until provision is made for informing prospective bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged.

Id. at 328.

[128] *See* Statement of Elmer B. Staats, Comptroller General, in *Philadelphia Plan Hearings* 147 for a discussion of the Comptroller General's authority to withhold contract payments.

[129] Ranges for Implementation of the Philadelphia Plan § 4.

opportunity." [130] There are thus three significant differences between the revised Philadelphia Plan and the program contemplated by the 1968 OFCC regulations. Under the revised Philadelphia Plan, (1) the government, not the contractor, determines the existence of deficiencies, (2) the government decides on goals and timetables, with which the contractor must tentatively commit himself to comply, and (3) these goals and timetables are required as a condition precedent to competing for a contract.

The bid now must contain a statement of the contractor's commitment to seek specified numbers of minority employees in specified trades as of specified times during the job.[131] The requisite ratios of minority workers to total employees for a given trade are derived by the contractor from tables provided by the OFCC. He learns that his minimum goal for 1970 is five percent, then eleven percent in 1971, sixteen percent in 1972, and twenty-two percent in 1973. Thus an acceptable bid must contain a provision that for each of the four years, the contractor's percentages of minority employees will equal the lower of the percentages which comprise the OFCC ranges. For most trade, the spread each year between bottom and top is four percent. To derive the governing figures, the OFCC examined the Philadelphia construction industry, noting seven trades (one was later dropped) in which minority representation was particularity low. Minorities initially composed only 1.6 percent of the chosen trades.[132] The original order then noted that "special measures are required to provide equal employment opportunity in these seven trades." [133] These special measures were to be the setting of specific goals based on consideration of three factors: current minority group members for employment, the need for training programs, and potential impact of the program on the existing labor force.[134]

After a general announcement of the revised Philadelphia Plan, the OFCC held open hearings in Philadelphia to determine the relevant statistics. Their results were announced on September 23, 1969.[135] The process of actually calculating the ranges can be best illustrated by reference to the Ironworkers Union. It was first determined that there was a sufficient number of potential ironworkers from minority groups so that the ranges determined next would not overburden the existing labor market.[136] Second, the annual ironworker attrition rate was determined —

[130] 41 C.F.R. § 60-1.40(a) (1970).

[131] Ranges for Implementation of the Philadelphia Plan § 4.

[132] Philadelphia Plan § 4.

[133] *Id.*

[134] *Id.* at § 6c.

[135] Ranges for Implementation of the Philadelphia Plan.

[136] *Id.* at § 3(b).

7.5 percent.[137] Next, the annual growth rate was determined — 3.7 percent.[138] This produced a total net job vacancy rate of 11.2 percent per year. Finally, the OFCC announced that a fair range, given these figures, would begin at one-half the annual vacancy rate, rounded to five percent in the case of the ironworkers.[139] Essentially, by drawing half of his new employees from minority groups, a contractor could fulfill his affirmative action goals.[140]

Though the Plan deals with specific ranges, it makes clear that failure to meet these goals will not conclusively constitute noncompliance with a contractor's affirmative action obligation. A contractor can escape sanctions by proving that he made "every good faith effort" to meet the requirements.[141] Signs of a good faith effort are (1) communications of employment needs to certain minority community organizations; (2) maintenance of records showing disposition of minority job applications; (3) participation in community minority training programs; and (4) notification of the OFCC area coordinator whenever the employer's efforts to meet his goal have been impeded by union referral practices.[142] It is specifically noted that failure of a union with which the contractor has a collective bargaining agreement to send minority applicants is not a sufficient excuse for noncompliance.[143] Though the precise procedural consequences of failure to meet goals are not outlined in the Philadelphia Plan, it has been assumed that failure to meet specific goals forces the contractor to assume the burden of producing evidence of his good faith effort to meet his goals while the government has the ultimate burden of persuasion on the issue of noncompliance with the Executive Order program.[144]

The Department of Labor has indicated that the Philadelphia Plan is only the first step in an OFCC effort to set specific goals for the construction industry nationwide.[145] The current stance is twofold. On the one hand, the OFCC would prefer to see the development of "hometown solutions."[146] These plans would consist of area-wide agreements between unions, contractors, and mi-

[137] *Id.* at § 3(d).

[138] *Id.*

[139] *Id.* at § 3(f).

[140] *Id.*

[141] *Id.* at § 5.

[142] *Id.*

[143] Philadelphia Plan § 8.

[144] 115 CONG. REC. S17,147 (daily ed. Dec. 18, 1969) (remarks of Senator Javits).

[145] FEDERAL EFFORT 204–05.

[146] *Id.* The Washington Plan contains a specific provision allowing it to be replaced if the contractors covered participate in a hometown solution. Washington Plan, *supra* note 114, at 11.

nority representatives designed to increase minority employment. If a local plan satisfactory to the OFCC were established, federally-imposed solutions would not be needed. On the other hand, if local solutions were not reached, the OFCC would continue to impose area-wide federal solutions with specific goals. Currently, ninety-one cities are under the gun of the OFCC,[147] each aware that failure to produce a local solution could lead to a compulsory federal solution.

The local plan solution has moved apace, helped no doubt by the issuance of a model area-wide plan by the OFCC in February, 1970.[148] At least twelve cities are in various stages of negotiating local plans.[149] Though it is too early to make any definite statements about the impact of these and federally imposed area plans, there are preliminary indications that they will not provide an instant panacea for employment problems in the construction industry.[150]

2. Conflict with Title VII. — The area plans have provoked a developing controversy over the validity of the statistical "ranges" or "goals" which they require of contractors.[151] It will be recalled that employers must agree, as a precondition of participating in government contracts in the area covered by a particular plan, to exert their best efforts to attain given percentages of minority employment at various points in time as the contract moves towards completion. This use of numerical objectives in the area plans may conflict with two specific provisions

[147] FEDERAL EFFORT 204.

[148] *Id.* at 208.

[149] LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL URBAN COALITION, EQUAL EMPLOYMENT OPPORTUNITY IN THE CONSTRUCTION INDUSTRY 19 (1970).

[150] There are early indications that the Philadelphia Plan is not working. While all contractors are meeting their goals, they appear to be doing so by transferring minorities from other jobs, not bringing new minority workers into the construction industry. After more than a year, minority participation in the six affected unions had risen only 0.5%. Kotz, *Hiring Plan: An Exercise in Frustration*, Washington Post, Dec. 13, 1970, at A1, col. 1. *See also* FEDERAL EFFORT 209.

[151] This controversy was triggered by the Comptroller General's holding that the use of statistical goals in the Revised Philadelphia Plan was a violation of Title VII. 49 COMP. GEN. 59 (1969). The Attorney General then held that the plan was not in conflict with Title VII. 42 OP. ATT'Y GEN. No. 37 (1969), reprinted in *Philadelphia Plan Hearings* 274–79. Senator Ervin then conducted hearings on the issue, *see* note 8 *supra*. A rider to a supplemental Labor Department appropriations bill that would have ended the plan was proposed, passed by the Senate, defeated in the House, and then deleted from the bill. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 87 n.19 (1970). Though the only court to consider the use of statistical goals has upheld them, Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), the legality of the tactic is still in doubt.

of Title VII. Section 703(a) of the Act, its general anti-discrimination provision, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." [152] This language suggests that if the use of numerical hiring objectives infects the hiring process with a demonstrable tendency to discriminate against white applicants, then those area plans which require numerical objectives are illegal. The other troublesome provision of the 1964 Act is § 703(j), which states that [153]

> [n]othing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer . . . in comparison with the total number [or] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Whether or not the introductory language of § 703(j) alone excludes Executive Order actions,[154] a reading of § 703(a) together with § 703(j) renders the exclusionary preface to § 703(j) of no legal import. For "preferential treatment" of one group necessarily results in "discrimination" against another; the two patterns of behavior are simply obverse sides of the same coin. Since § 703(a) proscribes all discrimination based on race, color, religion, sex or national origin, presumably it, as well as § 703(j), would ban any act of "preferential treatment" by reaching the discrimination inherent in that act. A sensible interpretation of (j), then, is that it is simply a particular application — in effect, an elaboration — of the general anti-discrimination requirement of the Act.[155] Read together, sections 703(a) and (j) indicate that the overarching policy of the Title is to insure the neutrality of the hiring process — to insure that hiring decisions are made on

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[152] Act § 703(a), 42 U.S.C. § 2000e-2(a) (1964).

[153] Act § 703(j), 42 U.S.C. § 2000e-2(j) (1964).

[154] Arguably § 703(j) applies only to actions whose sole justification is based on Title VII. Legal Memorandum of the Solicitor of Labor, *supra* note 8, at 270; Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1631 (1969).

[155] "This subsection [703(j)] does not represent any change in the substance of the title." 110 CONG. REC. 12,723 (1964) (remarks of Senator Humphrey during debate on the Civil Rights Act of 1964).

merit, with neither positive nor negative reference to minority determinative characteristics.[156]

It is with this polestar of neutrality in mind that one must examine the hiring process likely to result from the use of numerical objectives in area plan contracts. Whether those objectives are labelled "quotas" is therefore relevant only insofar as the use of "quotas," however defined, would cause an erosion of the merit basis of an employer's hiring decisions. A true "quota" would require an employer to maintain a specific level of minority employment, and failure to meet this figure would constitute an irrebutable presumption of discrimination; sanctions would attach without a showing of more. At the other extreme, one might locate a "goal" — an employment figure which, if not met, would constitute evidence of discrimination, but would not independently satisfy the government's burden of persuasion that the employer had actually discriminated.[157] Between the two poles, failure to meet the numerical commitment of a contract might achieve various other levels of evidentiary conclusiveness. For example, a "target" might be defined as a numerical employment objective which if not met would result in a shift to the contractor of the burden of demonstrating that no discrimination has taken place, or that he had undertaken appropriate affirmative action.

The semantic debate over quotas does, then, shed light indirectly upon the central question of merit-based hiring. The more conclusive the evidentiary use of a failure to achieve agreed-upon minority employment in a proceeding for breach of contract, the greater the likely impact of the agreed-upon figures upon the integrity of the employer's hiring decisions. Given the statutory injunctions against hiring based upon considerations other than merit, it is a fair assumption that the danger of transgressing those legal barriers will increase as the evidentiary use of noncompliance with numerical requirements hardens towards the position of an irrebutable presumption.[158]

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[156] Proponents of this view contend that Title VII imposes a standard of "color blindness" on the entire hiring process. 49 COMP. GEN. 59, 65 (1969).

[157] Ranges for Implementation of Philadelphia Plan § 5 lists criteria which will constitute compliance if an employer's range is not met. One interpretation of the range requirement has been that failure to meet it would only shift to the contractor the initial burden of going forward on the issue of contract compliance. The government would still bear the ultimate burden of proof on compliance with the Executive Order program. 115 CONG. REC. S17,147 (daily ed. Dec. 18, 1969) (remarks of Senator Javits). This interpretation has been officially adopted in the Washington Plan. Washington Plan, *supra* note 114, at § 60-5.21(f).

[158] OFCC determination of "bad faith" and imposition of sanctions will, however, be subject to judicial review. Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1010 (E.D. Pa. 1970).

Even when purely verbal complications have been overcome, there has been a tendency to ignore the real life impact of numerical objectives on the hiring process. One commentator apparently deems it conclusive that the objectives are not in fact given "hard" evidentiary value, and may instead be satisfied by a showing of good faith effort by the employer to increase minority representation.[159] It is by no means clear, however, that every evidentiary use of noncompliance save a conclusive (or true "quota") use will satisfy the mandate of Title VII for merit-based hiring. Even if an employer were in theory permitted to demonstrate that he had not discriminated, and that he had undertaken affirmative action although his employment figures were inadequate, the practicalities of proof might mean that statistical shortcomings are all but impossible to rebut. Indeed, even if actual litigation does demonstrate that the inference from statistical inadequacy can be overcome, employers may *believe* that the statistics will operate conclusively, that sanctions may attach, and that it is therefore safer simply to steer clear of trouble and meet the figures agreed upon through "preferential" hiring. It is even foreseeable that employers might find preferential hiring a wise means of avoiding the annoyance and cost of government investigations. Such investigations may be triggered by statistical shortcomings and do not constitute formal proceedings in which the evidentiary use of numerical objectives could be carefully limited.[160]

Other aspects of the numbers problem have also been beclouded by verbal or formal analyses which take insufficient account of the central, practical concern of Title VII with the integrity of the hiring decision. For example, Attorney General Mitchell has suggested that numerical objectives established by the area plans are designed to influence only the recruitment efforts of contractors, and need not affect their hiring decisions.[161] This distinction envisions a three step employment process: recruitment, which requires employer action; application, by candidates for employment; and hiring, the yes or no decision of the employer which is the part of the process nearest to, and thus most closely related to, the actual composition of the work force. Theoretically, pressure applied to the employment process at either the recruitment or the hiring stage will alter the composition of the work force; even assuming a neutral hiring decision, greater recruitment efforts will lead to greater application by

[159] Jones, *supra* note 8, at 379, 381–82.

[160] *See* p. 1166 *supra*.

[161] 42 OP. ATT'Y GEN. No. 37 (1969): "Title VII does not prohibit some structuring of the hiring process, such as the broadening of the recruitment base, to encourage the employment of members of minority groups [citations omitted]."

minority workers and thus a greater probability that those qualified will be hired.

There are, however, several respects in which this recruitment-oriented model breaks down when translated into practical operation and measured against Title VII's quest for a merit-based hiring decision. First, those who make hiring decisions are unlikely to be insulated from the recruitment efforts of their own firms. Recruitment efforts involve costs; it will rarely be a secret to those who hire that adherence to a true merit basis for hiring decisions will cost their employers substantial additional sums for recruiting if a given target is to be reached. The likelihood of insulating recruiting from hiring is diminished further when, as is often the case, a single personnel staff is in charge of both hiring and recruitment.

Moreover, in the construction industry, it is even more unlikely that recruiting and hiring can be separated. For construction contractors, as a rule, rely upon hiring halls for their manpower requirements; rather than recruit employees on an individual basis,[162] construction contractors place job orders with organizations able to refer employees — unions, or community referral services. Once an order is placed, the organization refers the workers and they are put on the job; the employer is finished with the hiring process. The contractor places job orders only for the number of positions he has available, and if one organization cannot fill them, he turns to another.[163] Thus the relevant question is whether a program which encourages employers to "recruit" from organizations specializing in minority employees can truly be said to involve no compromise of the merit foundation of the hiring decision. In the construction industry, recruiting is hiring; and recruiting based on race, religion, or sex is, for all practical purposes, hiring based on those characteristics.

In short, without the benefit of extensive experience with the area plans, there is good reason to suppose that the plans' use of numerical employment objectives will place serious pressure on the merit-based hiring process contemplated by Title VII. The only safe conclusion to be drawn at this time is that the developing law will have to be more sensitive to the practical impact of numerical objectives, and less intent upon verbal resolution of the possible conflict between the legislative and executive approaches to employment discrimination.

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[162] *See* Note, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROBS. 187, 196–97 (1970).

[163] *See* U.S. COMM. ON CIVIL RIGHTS, MASS. STATE ADVISORY COMM., *supra* note 79, at 17–18 (comments of Prof. Blumrosen).

On the other hand, numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move their employment practices in the direction of true neutrality. A prudent step would be to amend Title VII to assure the legality of governmentally imposed and governmentally supervised minority employment objectives. Numerical objectives administered by the Government would ultimately be subject to political control, and — unlike private "quotas" — could be expected to respond to the interests of majority and minority workers alike.

APPENDIX: TITLE VII AND EXECUTIVE ORDER 11,246

Reprinted below are selected portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1964).

Act § 701, 42 U.S.C. § 2000e. Definitions.

For the purposes of this title —

. . . . .

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

. . . . .

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any

kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization —

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

. . . .

Act § 703, 42 U.S.C. § 2000e-2. Unlawful Employment Practices.

(a) Employer practices.

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices.

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices.

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs.

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including

on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

. . . .

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its

administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

. . . .

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance.

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Act § 704, 42 U.S.C. § 2000e-3. Other Unlawful Employment Practices.

. . . .

(b) Printing or publication of notice or advertisement indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception.

It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specifica-

tion, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

. . . .

Act § 706, 42 U.S.C. § 2000e-5. Enforcement provisions.

(a) Charges by persons aggrieved or members of Commission; copy of charges to respondents; investigation of charges; conference, conciliation, and persuasion for elimination of unlawful practices; prohibited disclosures; use of evidence in subsequent proceedings; penalties.

Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings.

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person ag-

grieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) Same; notification of State or local authority; time for action on charges by Commission.

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) Time for filing charges after occurrence of unlawful practices or termination of State or local enforcement proceedings; filing of charges by Commissioner with State or local agency.

A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) Civil actions for prevention of unlawful practices; legal representa-

tion; commencement of action without payment of fees, costs, or security; intervention by Attorney General; stay of Federal proceedings.

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

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(g) Injunctions; appropriate affirmative action; reinstatement, hiring, back pay; reduction of back pay by interim earnings or amounts earnable; limitations on judicial orders.

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring,

reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

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(i) Proceedings by Commission to compel compliance with judicial orders.

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

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(k) Attorney's fees; liability of Commission and United States for costs.

In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Act § 707, 42 U.S.C. § 2000e-6. Civil action by the Attorney General.

(a) Complaint.

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

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Act § 708, 42 U.S.C. § 2000e-7. Effect on State laws.

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided

by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Act § 709. 42 U.S.C. § 2000e-8. Investigations.

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(b) Cooperation with State and local agencies administering State fair employment practices laws; utilization of services; reimbursement; agreements and rescission of agreements.

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

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Reprinted below are selected portions of Executive Order 11,246, as amended, 3 C.F.R. 402 (1970):

Part II, Subpart B, Section 202.

Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"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, re-

ligion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action 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 employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however*, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

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Section 204.

The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C, Section 205.

Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. . . .

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Part III, Section 301.

Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order. . . .

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