The Civil Rights Act of 1964–Racial Discrimination by Labor Unions

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THE CIVIL RIGHTS ACT OF 1964
RACIAL DISCRIMINATION BY LABOR UNIONS

On May 1, 1963, in New York City, a fifty-story office building was being constructed. Out of the one hundred structural steel-workers, masons and carpenters employed, not one was a Negro. On the same day in Milwaukee, eighty-three carpenters, nineteen electricians, and fourteen workers in the plumbing, pipefitting and operating trades were engaged in the construction of a hospital; only four were Negroes.\(^1\) In February of 1966, the five construction and building trade unions in St. Louis had a combined membership of 5,000; only three were Negroes.\(^2\) In 1962, eleven percent of the labor force was non-white; yet twenty-two percent of the unemployed were Negro.\(^3\) The median income of the white male worker in 1960 was $5,137; for the non-white it was $3,075.\(^4\) More recent reports indicate that the relative position of the Negro in the economy has improved only slightly, if at all.\(^5\)

While the causes of the inferior position of the Negro are deeply rooted in American history,\(^6\) undoubtedly, the major factor has been the denial of equal employment opportunities.\(^7\) This in turn has been somewhat attributed to the discriminatory practice of various institutions which have acquired extensive control over employment.\(^8\) Of these groups, it is generally accepted that racial

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\(^1\) Reports on Apprenticeship by the Advisory Committees to the United States Commission on Civil Rights 1 (1964) (hereinafter cited as Apprenticeship Reports).
\(^4\) Id. at 2514.
\(^5\) Non-white families had a median income of $3,330 in 1962. Kheel, Guide to Fair Employment Practices 2 (1964). In 1963, 5.7% of the work force was unemployed as compared with 10.9% of the Negroes. At the beginning of 1964, four million were unemployed, of whom one million were Negroes. Young, To Be Equal 53, 82 (1964). In February, 1966, 3.7% of the total labor force, including 7% of the Negro work force, was unemployed. N.Y. Times, Mar. 13, 1966, § 4, p. 6, col. 2-4.
\(^7\) See Pettigrew, A Profile of the Negro American 168-76 (1964); Report of the United States Commission on Civil Rights 73-91 (1963) (hereinafter cited as Civ. Rights Comm.).
discrimination by numerous labor organizations has been an important determinant of the economic gap between the Negro and white communities. During the last twenty years, federal legislation has been enacted in an attempt to regulate union activity, and many states now have Fair Employment Practice Laws (hereinafter referred to as FEP) that provide for administrative agencies (hereinafter referred to as FEPC) which investigate and attempt to eliminate discrimination in employment. On the federal level, one of the more recent attempts to eliminate union discrimination is contained in Title VII of the Civil Rights Act of 1964, believed to be the most comprehensive civil rights legislation ever enacted by Congress.

The purpose of this note is to examine the labor organization provisions and enforcement procedures of Title VII in order to determine to what extent, if any, they will aid in providing equal employment opportunities for Negroes. This will be done by discussing the major methods of discrimination employed by unions and the resultant effect they have had on the current status of the Negro. The data derived therefrom will then make more meaningful the critique of the prohibitions and remedies available under Title VII. In concluding, a brief

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9 See Gould, The Negro Revolution and the Law of Collective Bargaining, 34 Fordham L. Rev. 207-10 (1965); Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563-67 (1962). There is no intent to imply that racial discrimination in employment involves only labor unions; indeed, many believe the role of management to be greater in this respect. E.g., Norgren & Hill, op. cit. supra note 8, at 40; Sovern supra at 565-66.


attempt will be made to define the duty and limits of the law in creating equal employment opportunities for Negroes.

Methods of Discrimination

In the discussion that follows, it will be significant to remember that Negroes have not been the only group affected by union discrimination. However, since the Negro has been the nation's largest and most disadvantaged minority, his condition will serve as the basis of this analysis. It is also important to bear in mind that many of the union practices to be discussed have not been deliberately directed against the Negro, but rather, in favor of others or in order to achieve such objectives as job security. Regardless of the intent, such activities constitute discrimination in that they have adversely affected the employment opportunities of the Negro.

In order to illuminate its effects, and for subsequent reference, union discrimination will be discussed in two contexts: (1) when union action precludes the Negro from obtaining employment by denying him membership in the union; and (2) when union action affects the Negro who is already employed, regardless of union membership.

Exclusionary Methods

The power of a union to discriminate in employment by denying membership is greatest when an employer depends upon the union for his supply of labor. For this reason, exclusionary methods are more consequential in the craft unions where employment is traditionally sporadic, and where employers are unable to employ a permanent labor force. This is especially true in the building trades where employees are recruited from large labor pools controlled by the union. Due to the fact that union membership provides employment and the worker's contact with his employer is limited, the employee tends to associate more with the union which represents job security. For these and other reasons, such unions become tight-knit and united against outside interference.

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14 Representatives of the Mexican-American Community have argued that non-Negro minority groups have been neglected since legislation has been primarily aimed at the Negro. CCH EMPLOYMENT PRAC. GUIDE, New Developments, 1965, § 8009 at 6023.

15 For statistics on Negro workers see 2 U.S. CODE Cong. & Ad. News 2513-17 (1964); CIV. RIGHTS COMM., op. cit. supra note 7, at 83-90; Young, op. cit. supra note 5, at 73-74.


17 Ibid. See APPRENTICESHIP REPORTS 112-14 (1964).
(1) The Caucasian Clause

In the past, union constitutions often contained provisions limiting membership to Caucasians. This open exclusion of the Negro was, to some degree, encouraged by the "voluntary association" doctrine established by the courts, which analogized unions to private clubs. With the growth of labor unions during the 1930's, the application of the "voluntary association" doctrine became impractical, and the courts began to recognize the quasi-public nature of the union. This, along with the labor movement's effort to gain public support, probably explains why the "Caucasian clause" is no longer used.

(2) Testing

However, the removal of racial bars in union constitutions did not result in the elimination of discrimination. Instead, subtler methods, such as the discriminatory administration of admissions examinations, began to be utilized. The union admissions committees had complete control and could interpret the results of the examination so as to exclude certain minorities. This device had added significance in the skilled crafts where the passing of an apprenticeship examination was usually a prerequisite for union membership. Whether such practices continue at the present time is difficult to ascertain since no test is entirely objective, and, in the final analysis, the intent of the administrator will determine the purpose for which testing is used. It is also possible that many entrance examinations are discriminatory per se since they contain certain questions which the non-white may be unable to answer due to his cultural background and the previous discrimination to which he has been subjected.

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18 NORGREN & HILL, op. cit. supra note 8, at 41; Summers, supra note 16, at 33-34.
22 Summers, supra note 16, at 35.
23 For a report on entrance procedures in various New Jersey unions see APPRENTICESHIP REPORTS 94-99 (1964).
24 CCH EMPLOYMENT PRACTICE GUIDE, New Developments, 1965 §8009 at 6022. Modern testing techniques are geared to compensate for the cultural and environmental background of the Negro. Studies have proved that a poor environment can adversely affect an individual's performance on many I.Q. tests. See PETTIGREW, op. cit. supra note 7, at 100-35.
(3) Nepotism

Closely related to testing was the practice of "nepotism." Benjamin Franklin's remark that "he that hath a trade hath an estate" aptly illustrates the belief, which was prevalent among the skilled craftsmen, that the right to work was a property right which could be passed on through his estate. This attitude was reflected by the "grandfather clauses" inserted in many craft-union constitutions which gave admission priority to the sons, relatives, or nominees of present members, and resulted in the preservation of the all-white membership of the union. An alternate method which achieved an identical result was a provision which required any applicant for admission to be sponsored by a union member. Studies indicate that "nepotism" is still common among many small craft unions. This preferential treatment has been justified by reasoning that such favoritism is intended to benefit union members rather than to discriminate against others. Such logic was criticized in a recent New York decision which stated that "filial preference is contrary to modern day societal objectives concerning job qualifications. . . . Admission . . . based exclusively upon the applicant's qualifications to perform . . . as determined by objective criteria is to be encouraged." This is an emerging view, and hopefully other jurisdictions will follow suit.

Job Control

(1) The Hiring Hall

Once a Negro is excluded from union membership, his subsequent deprivation of employment opportunity will depend on how effectively the union controls job access. Prior to 1947, job control could be maintained through a closed-shop agreement whereby an individual not a union member was unable to obtain employment. This device was invalidated by

26 Hill, supra note 21, at 65-66. Professor Hill advocates the recognition of these clauses as prima facie evidence of discrimination.
27 See Norgren & Hill, op. cit. supra note 8, at 45-46.
28 Apprenticeship Reports 73-75 (1964).
29 Cf. Strauss & Ingerman, supra note 25, at 304-05.
30 State Comm'n For Human Rights v. Farrell, 43 Misc. 2d 958, 965, 252 N.Y.S.2d 649, 657 (Sup. Ct. 1964). In this case the court upheld the Commission's demand that the sheet metal workers union set up objective criteria for admission. The Commissioner found that the union had no Negro members, and that 80% of the apprentices were related to union members.
31 Comment, supra note 19, at 214-17.
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the Taft-Hartley Act and was replaced by the "hiring hall." The hiring hall developed, under union control, in the maritime and construction trades, among others, to eliminate the hardships created by the sporadic and temporary nature of employment and to provide a dependable supply of manpower. Agreements were made under which employers became bound to accept only applicants referred to them by the union hiring hall, and if this exclusive hiring hall was restricted to union members, a de facto closed shop resulted. Today, an exclusive hiring hall is valid if the agreement prohibits discrimination based upon union membership and is maintained for the benefit of all individuals seeking employment. However, due to the very nature of its operation, the exclusive hiring hall may continue to deprive the Negro of employment opportunities. This is particularly true when workers are referred on the basis of seniority. Such an arrangement provides jobs during the slack periods mainly to those who have received substantial employment in the past, in most instances union members. Job opportunities for those who have received little or no employment in the past, in most instances non-union Negroes, are limited to the active periods. Thus, the Negro is unable to build any meaningful seniority for the future due to the relatively small amount of employment he receives. In New York, for example, it was reported that many unions in the building trades recruit out of town workers rather than hire local Negroes. In addition, union members are most often apprised of job opportunities for the reason that little is done to publicize openings outside of the hiring hall.

(2) Apprenticeship Training

The method by which skilled craft unions have been most successful in controlling employment opportunities has been through apprenticeship training. The significance of such

33 NORGREX & HILL, op. cit. supra note 8, at 47.
36 See, e.g., id. at 668-69.
37 Hill, supra note 21, at 64.
39 See APPRENTICESHIP REPORTS 2-4 (1964); Strauss & Ingerman, supra note 38, at 283-86.
training is that it qualifies workers for journeyman status which is a prerequisite for virtually any job in the skilled trades.40

Ironically, the South was the traditional training ground for Negro craftsmen, but in the early part of the twentieth century the number of Negro apprentices in the South declined. When the Negro migrated North, the situation became worse because Negroes were not initially trained and thus Negro journeymen were not available to train Negro apprentices.41 Unions had complete control over the training program, and thus, the number of Negro apprentices was limited by such devices as "grandfather clauses" and discriminatory entrance examinations.42 This condition was reflected in the 1960 census which reported that only 3.3 percent of the apprentices in this country were Negro. In New York and California, the two leading industrial states, the percentage was lower.43

In recent years, a great deal of state and federal legislation has been enacted to deal with the problem of discrimination in apprenticeship training. Today, many apprenticeship programs have been set up under joint union-management control and are supported by government funds.44 The Secretary of Labor delegated to the Bureau of Apprenticeship and Training the power to review apprenticeship programs in order to insure that they are not discriminatory, and to register only those programs which satisfy its requirements.45 State laws prohibit discrimination in apprenticeship training and the FEPC investigates charges of racial discrimination.46 Federal funds have also been made available to vocational high schools which train Negro youths in the skilled trades.47 In addition, jobs in this area are plentiful and the prediction for the future is that many more skilled craftsmen will be needed.48 Yet, reports show that Negroes are being excluded from the expanding electrical, pipe, and metal trades and have found work mainly in the trowel trades, carpentry, and painting where employment has either been growing slowly or diminishing during

42 Hill, supra note 21, at 76-78.
43 Strauss & Ingerman, supra note 38, at 285-86.
44 Apprenticeship Reports 5-12 (1964).
48 Id. at 76.
the past decade.\textsuperscript{49} The reports of the White House Conference on Equal Employment Opportunity demonstrate that there has been no significant increase in the number of minority group apprentices.\textsuperscript{50}

One of the reasons for this tragic failure has been the lack of initiative and enforcement powers of the state agencies\textsuperscript{51} dealing with the problem. These agencies have not taken the affirmative action necessary to deal with the tradition of racial discrimination that has now become highly institutionalized on the level of the small shop and local union.\textsuperscript{52} Even where the Negro does gain admission to an apprenticeship program, the need for supervision remains because the speed with which he learns will depend, in large measure, on the quality of the training he receives.\textsuperscript{53} Due to the fact that apprenticeship wages are small, the Negro may be forced to seek more profitable employment elsewhere. In addition, Negro youths are graduating from government supported vocational schools only to find the skilled crafts closed to them because of union-management agreements whereby the number of apprenticeship openings is regulated by a ratio of apprentices to journeymen, rather than by current demand.\textsuperscript{54} Finally, and most significantly, the Negro is being excluded from the growing skilled-crafts because of his failure to apply for apprenticeship programs, which has been attributed to the Negro's lack of information concerning the procedure of application. Such information is usually available only to the white friends and relatives of the union members, and little effort is made by unions to publicize available apprenticeships.\textsuperscript{55} Also, due to previous discrimination, the Negro does not envision a skilled trade as a potential vocation.\textsuperscript{56} In many instances where the Negro does apply for apprenticeship training, he lacks the qualifications. To be eligible for most apprenticeship programs the applicant must now have a high school diploma and must pass a formal screening examination which usually stresses knowledge of elementary mathematics. Negro drop-outs and students of segregated schools normally cannot meet

\textsuperscript{49}Id. at 76-77, Strauss & Ingerman, supra note 38, at 291.
\textsuperscript{50}CCH EMPLOYMENT FAC. GUIDE, NEW DEVELOPMENTS, 1965 ¶ 8009 at 6020.
\textsuperscript{52}Id. at 61. The New York Apprenticeship Council, created to promote an orderly development and supply of skilled journeymen, has been reported to be reluctant to raise the issue of minority-representation in apprenticeship because of the fear that labor-management may no longer register with the Council. APPRENTICESHIP REPORTS 121 (1964).
\textsuperscript{53}Strauss & Ingerman, supra note 38, at 298.
\textsuperscript{54}APPRENTICESHIP REPORTS 120-21 (1964). See Hill, supra note 51, at 65.
\textsuperscript{55}Strauss & Ingerman, supra note 38, at 293-94, APPRENTICESHIP REPORTS 26 (1964).
\textsuperscript{56}Strauss & Ingerman, supra note 38, at 292.
these requirements. Thus, the pendulum of discrimination completes its swing: the Negro fails to qualify or apply for apprenticeship training due to past discrimination; when skilled jobs do become available, there are consequently few qualified Negroes available to fill them. Whether denial of employment under these circumstances constitutes legal discrimination, and, if so, what can be done to remedy the situation, may well determine the future effectiveness of the law in providing equal employment opportunities for the Negro.

On the Job Discrimination

(1) The Collective Bargaining Process

In the industrial complex (as contrasted to the construction trades where the hiring hall has provided the employees) management has usually done the hiring and, as a result, the ability of the union to control job access, and thus limit employment through denial of union membership, has been less effectual. In this situation, the union stands to gain more from granting membership to the Negro after he has gained employment, and relegating him to lower paying jobs through a collective bargaining agreement with the employer. The problem of racial discrimination in industrial unions has been due, in part, to the nature of the collective bargaining process.

Pursuant to the National Labor Relations Act, the bargaining representative chosen by a majority of the employees in a unit has "exclusive authority," during the bargaining process, to represent all the employees in that unit, whether or not they are members of the union. The reason for granting "exclusive authority" is to foster collective bargaining by superseding all individual contracts between the employee and employer. For the purposes of this discussion, the importance of the collective bargaining process is that it controls the vital areas of grievance procedure and seniority.

(1) (a) Grievance Procedure

Generally, the grievance procedure is "a means of making decisions about disputes that arise either out of the meaning and application of principles spelled out in the basic [collective bargaining]
agreement or from a problematic aspect of the relationship between
management and employees not covered by the agreement." 62
Under the bargaining agreement, a grievance committee is set up to
process all employee complaints against management. In many
instances, these committees have demonstrated little interest in the
welfare of the non-union or minority union members who have
usually been Negroes. 63 This has led to a refusal or a less vigorous
attempt to press Negro complaints against management. 64 Although
the National Labor Relations Board is empowered to grant relief in
such instances of racial discrimination, 65 these practices may be diffi-
cult to prove due to their subtle nature.

(1) (b) Seniority

Basically, seniority is a system whereby the oldest man in point
of service, ability and fitness for the job is given the choice of jobs,
is first promoted within the range of jobs subject to his seniority
line, and is last laid off. 66 In the past, through the collective
bargaining system, unions have obtained racially separate seniority
lines which have limited the Negroes to the poorer paying and
unskilled work. 67 Thus, the Negroes were unable to transfer to
better jobs, and were often paid lower wages for the same work. 68

(2) The Segregated Local

One method whereby the collective bargaining apparatus is
utilized as a means of discrimination is the practice of segregating
Negroes into separate locals, as exemplified by the southern railroad
industry. 69 At first, auxiliary locals composed entirely of Negroes
were set up, and their affairs conducted by a white local. 70 Under

62 Blaine, Hagburg & Frederick, The Grievance Procedure and Its
Application in the United States Postal Service, 15 LAB. L.J. 725, 726
(1964).
63 Summers, The Right to Join a Union, 47 COLUM. L. REV. 33, 51-52
(1947).
64 Id. at 51-53; KEEL, GUIDE TO FAIR EMPLOYMENT PRACTICES 51
(1964).
65 E.g., Independent Metal Workers Union, Local 1, 147 N.L.R.B. 1573
(1964). For a discussion of the duty of "fair representation" imposed upon
collective bargaining agents by the National Labor Relations Act see Cox,
The Duty of Fair Representation, 2 VILL. L. REV. 151 (1957); Herring,
The "Fair Representation" Doctrine: An Effective Weapon Against Union
Cal. 1961), aff'd, 336 F.2d 543 (9th Cir. 1964).
67 Pollitt, supra note 47, at 70.
68 KEEL, op. cit. supra note 64, at 50; HILL, supra note 51, at 28.
69 NOGREN & HILL, op. cit. supra note 58, at 41-45.
70 Id. at 42.
these conditions, union membership for the Negro meant little more than an opportunity to pay dues in order to obtain a work permit.\textsuperscript{71} In 1944, when the auxiliary local was declared illegal under certain circumstances,\textsuperscript{72} it was replaced by the segregated local which theoretically gave Negroes a separate charter, the right to vote, and the power to choose their own officers.\textsuperscript{73} In practice, however, it often operated in the same manner as the auxiliary local. The Negro local was discriminated against by the white local in the bargaining process, and the development of employment ghettos limited the Negroes to the lower paying jobs.\textsuperscript{74}

Due to many state FEP laws and a recent NLRB decision,\textsuperscript{75} segregated locals and racially separate seniority lines are gradually passing from the labor scene today.\textsuperscript{76} However, when separate seniority lines merge, and Negro locals are absorbed by the white local, more complex problems arise. How should the Negro, who has been limited to unskilled work and deprived of seniority opportunities in the past, be affected by the new seniority line to be formed? Should seniority be dispensed with, and the Negro allowed to enter into any job classification for which he can qualify by passing a competitive examination? Should he be awarded retroactive seniority? To what extent should the Negro be represented on the executive board after a merger of segregated locals? A skilled Negro may be placed in a group of unskilled workers and be unable to transfer to a group of skilled employees. The reverse of this situation is also possible if the Negro is assigned to a group of highly skilled and better educated whites, against whom he cannot compete. In either case his job mobility will be limited.

Although racial discrimination appears to be on the wane in industrial unions,\textsuperscript{77} the solution to the above problems may appear difficult when viewed in light of the collective bargaining process and union democracy.\textsuperscript{78} Union policies will continue to be dictated

\textsuperscript{71} Comment, Union Membership: Privilege or Right? 27 Wash. L. Rev. 211, 224-25 (1952); Summers, supra note 63, at 60-61.
\textsuperscript{73} Norgren & Hill, op. cit. supra note 58, at 43-45.
\textsuperscript{74} Id. at 43-45. Cf. Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir.), rev'd per curiam, 350 U.S. 892 (1955); Independent Metal Workers Union, Local 1, supra note 65.
\textsuperscript{75} Independent Metal Workers Union, Local 1, supra note 65, at 1577, wherein the National Labor Relations Board stated that it could not constitutionally support a union that based its eligibility for membership upon race.
\textsuperscript{76} See Norgren & Hill, op. cit. supra note 58, at 44.
\textsuperscript{77} Pollitt, Racial Discrimination in Employment: Proposals For Corrective Action, 13 Buffalo L. Rev. 59, 71 (1963).
by white majorities, many of whom will be unwilling to relinquish the advantageous positions they have achieved, in many instances, at the expense of the Negro. The extent to which the law may regulate the internal operations of unions will be limited by the “majority will" concept of democracy. This may be an instance in which the law cannot provide a complete answer because the solution lies basically in the process of education and in the alteration of certain attitudes prevalent in society today.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 \(^{79}\) (hereinafter referred to as the Act) is the cornerstone of a massive attack upon discrimination. Other titles of the Act endeavor to achieve first-class citizenship for the Negro through the elimination of racial discrimination in voting, education and public accommodations. Title VII reflects a realization that the right to vote has little meaning without adequate employment opportunity, and that education is fruitless if gainful employment is denied to the graduate.\(^{80}\)

The Commission

The Act was born of compromise.\(^{81}\) As originally drafted, Title VII was to be administered by a federal agency empowered to eliminate discriminatory practices by cease and desist orders.\(^{82}\) Due to the strenuous opposition of many congressmen, the agency was stripped of its coercive powers, and relegated to the role of a mediator.\(^{83}\) As finally enacted, the Act calls for a five-man bipartisan Equal Employment Opportunity Commission, the functions of which are: (1) to administer the provisions of the title; (2) to investigate unlawful employment charges; and (3) to attempt to resolve disputes through informal methods of conference, conciliation and persuasion.\(^{84}\)

A complaint may be filed with the Commission by an aggrieved individual or by a member of the Commission,\(^{85}\) provided a deference


\(^{80}\) 2 U.S. CODE CONG. & AD. NEWS 2355 (1964).

\(^{81}\) In the House of Representatives, the bill was debated for 64 hours, 155 amendments were offered and 34 were approved. 110 CONG. REC. 12866 (daily ed. June 10, 1964) (remarks of Senator Dirksen).


\(^{85}\) 78 Stat. 259, 42 U.S.C. § 2000e-5(a) (1964). In order for a member of the Commission to file a charge, he must have reasonable cause to believe a violation of Title VII has occurred.
of sixty days is observed. During this period, the petitioner must exhaust any state or local remedy which prohibits, and establishes means of relief from, the unlawful employment practice alleged. The sixty days is increased to 120 days during the first year after the effective date of such state or local law. After the expiration of the deference period, an action may then be commenced before the Commission. The Commission must furnish the respondent with a copy of the complaint, and conduct a preliminary investigation in order to determine whether there is reasonable cause to believe that the charge is true. Upon a determination of "reasonable cause," the Commission must endeavor to eliminate the alleged unlawful employment practice by methods of conference, conciliation and persuasion.

Without an enforcement arm, the ability of the Commission to prevent future racial discrimination by labor unions appears dubious. State FEPCs have had little success in combating discrimination with informal methods of conciliation, and the grant of enforcement powers to such agencies has been often advocated. However, it is possible that the conciliatory efforts of an agency endowed with federal authority will command a more positive response.

Additional limitations on the power of the Commission to act are evident throughout Title VII. Formal charges of discrimination and the results of conciliatory efforts must be kept confidential. The sanction of publicity for racial discrimination has been proposed by many who have criticized the secretive nature of state FEPC

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86 78 Stat. 259, 42 U.S.C. § 2000e-5(b), (c) (1964). The Commission has designated 31 states entitled to the 60 or 120 day deference based upon a sufficient state or local remedy. CCH EMPLOYMENT PRAC. GUIDE, Federal Rules, 1966 ¶ 17,252, at 7370.
87 78 Stat. 259, 42 U.S.C. § 2000e-5(b) (1964). This section makes no reference to the petitioners' success or failure at the state level and no requirement is stated other than the 60 or 120 day deference. It appears, therefore, that an action may be brought before the Commission regardless of what transpires on the state level. Accord, Berg, supra note 82, at 83.
89 Ibid.
91 Hill, Twenty Years of State Fair Employment Practice Commission: A Critical Analysis With Recommendations, 14 BUFFALO L. REV. 22, 24-25 (1964). The Chairman of the Equal Employment Opportunity Commission testified before the House Committee on Education and Labor for proposed legislation to strengthen Title VII. This legislation would have given the Commission a meaningful enforcement arm. CCH EMPLOYMENT PRAC. GUIDE, New Developments, 1965 ¶ 8024, at 6035.
procedures.\textsuperscript{93} For the purpose of investigating a charge filed, the Commission may examine witnesses and require the production of relevant documentary evidence;\textsuperscript{94} however, when met with a refusal, a court order is necessary to effect compliance.\textsuperscript{95} Finally, labor unions, employers and employment agencies subject to Title VII are required to keep records of matters relevant to the determination of unfair labor practices, and to make reports therefrom, as the Commission prescribes.\textsuperscript{96} However, this section does not apply to matters occurring in a state which has enacted an FEP law during any period in which the party concerned is subject to such law.\textsuperscript{97} At present, thirty-nine states have fair employment laws, and thus are exempt from the record-keeping requirements of the Commission.\textsuperscript{98} Also, in the few instances in which this provision does apply, application may be made to the Commission, or a civil action may be commenced in a federal court, for relief if the party required to make the report believes the requirement would cause him undue hardship.\textsuperscript{99}

On the positive side, the Commission will be able to utilize its incidental powers effectively. Under Title VII, an individual Commissioner may initiate an investigation by filing a complaint with the Commission.\textsuperscript{100} The advantages of this provision are readily ascertainable. In many instances, the Negro may not recognize discrimination because of the complex economic and social structure in which it occurs, and even when the discriminatory practice is apparent, the Negro may fail to complain due to the potential embarrassment, or lack of faith in legal remedies.\textsuperscript{101} The Commis-

\textsuperscript{93} E.g., Hill, supra note 91, at 25; Rabkin, Enforcement of Law Against Discrimination in Employment, 14 Buffalo L. Rev. 109, 111-13 (1964).
\textsuperscript{97} 78 Stat. 262, 42 U.S.C. § 2000e-8(d) (1964). This section stipulates FEP "law" without any qualifications. Therefore, the state is exempt regardless of whether its laws have record keeping requirements. Accord, Berg, supra note 82, at 89; see 110 Cong. Rec. 12296 (daily ed. June 4, 1964).
\textsuperscript{98} CCH EMPLOYMENT PRAC. GUIDE, State Laws, 1966 ¶1400, at 751.
\textsuperscript{100} 78 Stat. 259, 42 U.S.C. § 2000e-5(a) (1964). A member of the Commission may file a complaint when he has reasonable cause to believe that a violation of Title VII has occurred. Whether this will be given a strict or liberal application will depend upon the Commission's interpretation of "reasonable cause." See 110 Cong. Rec. 12297 (daily ed. June 4, 1964). The Commission has already stated that the fact that Negroes are not employed at a particular plant does not justify a finding of "reasonable cause." CCH EMPLOYMENT PRAC. GUIDE, Federal Rules, 1965 ¶17,251, at 7357. However, it has also stated that a member of the Commission may conduct an inquiry where information reliably suggests discriminatory practices. Id. ¶17,255, at 7367.
\textsuperscript{101} See CCH EMPLOYMENT PRAC. GUIDE, New Developments, 1965 ¶8016, at 6027.
missioners will develop the necessary expertise, and be able to take the affirmative action that is required to terminate the subtler methods of discrimination. In addition, once a Commissioner files a complaint, union-wide investigations may be conducted based upon the Commissioner’s power to compel the production of relevant documentary evidence and material. The Commission will be able to turn over the fruits of pertinent investigation to the Attorney General or to an aggrieved individual when a civil action is brought under Title VII. Such use of the material is possible because the proscription against publicizing refers only to the charge filed and the conciliation efforts.

The Commission may also enter into concession agreements with individual states which have effective anti-discrimination statutes whereby the operation of Title VII would be suspended. In effect, the agreement would give jurisdiction over complaints arising under Title VII to state agencies whenever the practice complained of also violates state or local law. This would be an inducement for local FEPCs to vigorously attack racial discrimination.

Finally, the Commission is empowered to file suit for enforcement whenever it has grounds to believe that an individual or organization is not complying with a federal district court order issued under Title VII. This provision will enable the Commission to insure the effectiveness of court orders.

During the first one hundred days of its operation, over 1,300 complaints were filed with the Commission, and enlightened settlements were reached in the first two cases involving labor unions. However, the stubborn resistance of hard-core racial discrimination that is sure to be encountered in the future may exemplify the need for enforcement powers within the Commission.

**Civil Actions in the Federal District Courts**

The coercive enforcement of Title VII is achieved via the federal district courts which may grant “such affirmative relief as may be appropriate,” including injunction, reinstatement, and back

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104 78 Stat. 262, 42 U.S.C. § 2000e-8(b) (1964). The Commission may rescind this agreement if it determines that it no longer serves the interest of the effective enforcement of Title VII.
107 CCH EMPLOYMENT PRAC. GUIDE; New Developments, 1965 ¶ 8024.
108 Id. ¶¶ 8021, 8023.
pay. The court may also appoint an attorney for the aggrieved individual, authorize the commencement of an action without the payment of fees, costs or security, and award attorney's fees to the prevailing party.

"Such affirmative relief as may be appropriate" delegates to the courts broad discretion in the formulation of remedies. Court orders could be issued enjoining a union from acting as the exclusive bargaining agent of the employees until it can show that it no longer engages in discriminatory practices. Unions might also be ordered to set up objective standards for admission and to cease and desist from utilizing customary entrance requirements which have discriminated against Negroes.

(1) Individual Suits

If the Commission has been unable to obtain voluntary compliance within thirty days (or sixty days if the Commission determines it necessary) after a charge is filed, it must notify the aggrieved individual who then has thirty days to commence a civil action in the appropriate federal court. If the original complaint was filed by a member of the Commission, the action may be brought by any person alleged to be aggrieved by the charge. The Commission may not prosecute a complaint in the courts and from the plain wording of the statute, it appears that state and Commission remedies must be exhausted before a civil action can be commenced.

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111 78 Stat. 259, 42 U.S.C. § 2000e-5(k) (1964). This section, though, does not provide attorney’s fees where either the United States or the Commission is the prevailing party.
114 The statute states that Commission proceedings and civil actions may be brought by aggrieved “persons.” 78 Stat. 259, 42 U.S.C. § 2000e-5(a), (e) (1964). This would appear to provide for suits by organizations because “person” is defined under Title VII as including, among others, one or more individuals, labor organizations and associations. 78 Stat. 253, 42 U.S.C. § 2000e(a) (1964). However, it has been reported that the Commission refused to process a complaint filed by a labor union on the ground that only aggrieved individuals could take such action. N.Y. Times, March 11, 1966, p. 19, col. 1.
115 See 110 CONG. RES. 13693 (daily ed. June 17, 1964). The Commission has stated that it will attempt to intervene or appear as amicus curiae in certain civil actions brought under Title VII. CCH EMPLOYMENT PRAC. GUIDE, Federal Rules, 1966 ¶ 17,252, at 7369.
116 Accord, Berg, Equal Employment Opportunity Under The Civil Rights
Under Title VII, civil actions by individuals may well play a small role in the prevention of racial discrimination by labor unions. Comprehensive proscriptions against discrimination have long existed under the National Labor Relations Act, but the expense and delay of the judicial system have seriously limited the enforcement of these laws. Furthermore, the cumbersome procedural sequence that must be followed before bringing a civil action under Title VII will serve to diminish the attractiveness of judicial proceedings. An individual who has failed to obtain relief on the state level and before the Commission may be reluctant to invest the time and possible expense of a civil action.

(2) Attorney General’s Suits

The Attorney General of the United States, with the permission of a federal court, may intervene in a private suit of “general public importance.” Provided “general public importance” is given a


118 The complex procedure an individual must follow before bringing a civil action under Title VII is summarized as follows:

(a) where the alleged unlawful employment practice occurs in a state that has its own FEP law, notice and a 60 or 120-day deference must be given to a proper state agency;

(b) after the deference period has expired, or the state proceedings have terminated, whichever is earlier, a charge may be filed before the Commission, in writing and under oath, within 210 days after the alleged unlawful practice occurred or 30 days after notice has been received that the state proceeding has ended, whichever is earlier;

(c) if the state has no FEP law, a deference is not given and the charge must be filed before the Commission within 90 days after the alleged unlawful practice occurred;

(d) if the Commission is unable to obtain compliance within 30 days after the charge is filed, or 60 days if further efforts are warranted, a civil action may be commenced;

(e) the federal court may then, in its discretion, stay proceedings up to 60 days pending efforts by the Commission or state agency to obtain voluntary compliance. 78 Stat. 259, 42 U.S.C. §§ 2000e-5(a)-(e) (1964).


liberal interpretation, this provision will assist indigent plaintiffs in many instances by relieving them of the burden of litigation.

More broadly based is the Attorney General's power to initiate a civil action when he has reasonable cause to believe that any person or group is engaged in a "pattern or practice of resistance" to the full enjoyment of the rights protected by Title VII, and that the pattern or practice is of such a nature, and is intended, to deny the full exercise of those rights. The Attorney General may go directly to the federal court since there is no requirement of prior deference to state agencies or to the Commission as in the case of a suit by an individual. An application may be made for a three-judge court if it is certified that the action is of "general public importance," and the case must be assigned for hearing at the earliest practicable date and be expedited in every way. The Attorney General may request such relief as he deems necessary, including a permanent or temporary injunction and a restraining order.

These provisions of Title VII could, to a certain extent, cure the Commission's lack of enforcement powers. Working with the Commission, the Attorney General may gather statistical data which will aid in prosecuting labor organizations that maintain a practice of discrimination against Negroes. Such actions would be more effective than individual suits which seek to remedy isolated acts rather than the system which facilitates the discrimination.

The extent of the relief which federal courts may grant when a "pattern or practice" exists is uncertain. A strict construction of the statute would indicate that remedies are limited to the prevention of the discriminatory acts proved, but a liberal interpretation

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122 See 110 Cong. Rec. 12298 (daily ed. June 4, 1964). The Attorney General is also free to make a referral to the Commission as an aggrieved party. Ibid.
124 This mandate may mitigate the delay often characteristic of civil actions under the National Labor Relations Act. Supra note 117.
126 See text accompanying footnotes 100-03 supra.
127 Affirmative action based upon pattern-centered approaches instead of individual complaint procedures has been proposed to make state FEPCs more effective. Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations, 14 Buffalo L. Rev. 22, 24-25 (1964). It has also been suggested that whenever conciliation fails, the Commission should automatically refer the complaint to the Attorney General for a civil action. CCH EMPLOYMENT FRAC GUIDE, New Developments, 1965 §§8009, at 6016.
128 The statute authorizes the Attorney General to request "such relief, including . . . a permanent or temporary injunction, restraining order or other order against the person . . . responsible . . . as he deems necessary to insure the full enjoyment of the rights. . . ." under Title VII, 78 Stat.
would enable the courts to give direct aid, such as back pay or reinstatement, to any aggrieved individual regardless of whether he is a formal party to the Attorney General's suit.\textsuperscript{129}

The proof that will be necessary to constitute a "pattern or practice of resistance" to Title VII is also an open question. However, it is certain that more than a single act will be necessary. Senator Humphrey, a sponsor of the Senate bill, stated that the language of the statute "is meant to exclude action in sporadic instances of violations of rights, which will be left to correction by individual complainants. . . ."\textsuperscript{130} He added that such a pattern or practice would exist "only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature."\textsuperscript{131}

On February 4, 1966, the first "pattern or practice of resistance" suit was brought against five construction and building trade unions in St. Louis. The unions' combined membership of five thousand persons included only three Negroes.\textsuperscript{132} The continuance of this type of affirmative action by the Attorney General may do much to fulfill the policies advocated by the original framers of Title VII.\textsuperscript{133}

**The Substantive Law**

Labor organizations subject to Title VII are forbidden to deny membership because of race, color, religion, sex or national origin or to discriminate in membership, or in any other way that would adversely affect an individual's status as an applicant for employment.\textsuperscript{134} This status includes apprenticeship or membership in other training programs.\textsuperscript{135} Unions are also prohibited from attempting to cause an employer to discriminate, or from themselves discriminating against an individual because he has opposed an

\textsuperscript{129} If relief is given to any individual aggrieved by the "pattern or practice," complainants may be encouraged to bypass state agencies and the Commission and request the Attorney General to bring suit.

\textsuperscript{130} 110 Cong. Rec. 13745 (daily ed. June 17, 1964).


unlawful practice or cooperated in an investigation or proceeding under the Act.\textsuperscript{336}

The above proscriptions are so comprehensive that they may be construed to bar all discrimination in membership or all activities which limit employment opportunities.\textsuperscript{337} This would include segregated locals, racially separate seniority lines,\textsuperscript{338} discriminatory entrance examinations\textsuperscript{339} and any other arbitrary method of differentiation by labor unions. The opponents of Title VII feared that the broad language of this section would effectively prohibit valuable methods by which unions evaluate employment skills, and also would mandate the admission of minority groups on the basis of quotas in order to rectify existing imbalances in union membership.\textsuperscript{340} To allay this apprehensiveness, various exceptions and clarifying provisions were appended to Title VII.

(1) The Requirement of Intent

The House of Representatives' bill was amended in the Senate to require a showing of intent in order to sustain a violation of Title VII.\textsuperscript{341} This was to insure "that inadvertent or accidental discrimination will not violate the title. . . ."\textsuperscript{342} If the federal courts decide that direct evidence is necessary to prove intentional discrimination, the plaintiff's burden may be onerous. However, this appears unlikely, and intent will probably be inferred from circumstantial evidence.\textsuperscript{343} For instance, although the fact that a union has few Negro members will not alone sustain an inference of intent, the Negro plaintiff may fulfill his burden of proof if he also shows that he is qualified for admission and has been rejected. It should then be incumbent upon the union to come forward and rebut the inference of intent to discriminate by showing a valid reason for its refusal to admit.

\textsuperscript{337} See Hickey, supra note 112, at 202.
\textsuperscript{338} CCH EMPLOYMENT PRAC. GUIDE, New Developments, 1965 ¶ 8020j, at 6031.
\textsuperscript{339} CCH EMPLOYMENT PRAC. GUIDE, Federal Laws, 1966 ¶ 17,252 at 7366.
\textsuperscript{343} Ibid. "The proposed change does not involve any substantive change in the title. . . . It means simply that the respondent must have intended to discriminate." The United States Supreme Court has taken a liberal approach toward the necessity of requiring proof of intent in discrimination cases. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963) (proof of intent may be inferred from inherently discriminatory acts); Radio Officers' Union v. NLRB, 347 U.S. 17, 44-45 (1954) (a person is held to intend the foreseeable consequences of his conduct).
Due to the requirement of intent, proof of good faith or ignorance of the law may negate any relief under Title VII, but in situations where the innocent discrimination results from a "pattern or practice" the court should order that these actions cease in the future.

(2) Remedying Racial Imbalances

The proponents of the Act often stated that minority groups need not be given preferential treatment in order to remedy existing racial imbalances in employment. But, as a result of persisting doubts, a section was added which eliminates the possibility of retroactive application of Title VII. In practice, however, the very existence of the law may result in pressures to increase the percentage of minority group representation. Furthermore, any deliberate attempt to maintain an existing racial imbalance will violate the Act. For example, where waiting lists for union membership or apprenticeship training were, prior to the effective date of Title VII, maintained on a discriminatory basis, the continued use of such lists may be held an unlawful employment practice.

(3) Bona Fide Seniority Systems

The statute definitively states that it is not an unlawful employment practice for an employer to maintain different terms, conditions or privileges of employment pursuant to a bona fide seniority system. Thus, seniority rights that exist pursuant to a collective bargaining agreement made prior to the effective date of the Act remain intact. This would be true even if white workers had attained their seniority due to past discrimination against Negroes. Contrariwise, any act based upon a seniority rule which is inherently discriminatory would violate Title VII. Moreover, despite the proscription against preferential treatment, the federal

\[144 \text{ See Berg, supra note 133, at 71.} \]
\[145 \text{110 Cong. Rec. 12297 (daily ed. June 4, 1964).} \]
\[147 \text{110 Cong. Rec. 6986 (daily ed. April 8, 1964).} \]
\[148 \text{Id. at 6992.} \]
\[149 \text{78 Stat. 255, 42 U.S.C. § 2000e-2(h) (1964). Another section of the Act states that it shall not be an unlawful employment practice for a labor union to refer for employment members on the basis of religion, sex or national origin in instances where religion, sex or national origin is a bona fide occupational requirement. 78 Stat. 255, 42 U.S.C. §2000e-2(e) (1964). However, it is significant to note that this section does not grant an exemption on the basis of race or color.} \]
\[150 \text{110 Cong. Rec. 6986 (daily ed. April 8, 1964).} \]
\[151 \text{Id. at 6992.} \]
\[152 \text{Id. at 6986.} \]
courts may be able to order that a Negro, who has been deprived of seniority in the past because of discrimination, be allowed to enter into any job classification for which he can qualify.\footnote{153}

The application of Title VII to seniority rights based upon discriminatory collective bargaining agreements is of crucial importance, and the federal courts would do well to follow the standard set by the Commission in one of the first problems it mediated.\footnote{154} That situation involved the merger of racially separate and functionally related seniority lines which had restricted Negroes to certain jobs in a company. The company first proposed that the dual seniority lines be horizontally merged to form a single line based upon the wage scale. This would have placed the Negroes at the bottom of the line and would have limited their movement up until the white workers had first progressed. The Commission rejected this plan and put forward the following proposal which was accepted: (a) formally segregated lines should become intermeshed or dovetailed horizontally, based upon job classification; (b) every job classification in the line should be open to Negroes and whites without discrimination; and (c) job rates should be non-discriminatory. Thus, the new line of promotion would be based solely upon the skill required in each of the jobs in the line of progression.\footnote{155}

\begin{enumerate}
\item[(4)] Professionally Developed Ability Tests
\end{enumerate}

In 1964, a finding by the hearing examiner of the Illinois FEPC that a Negro applicant for a job was not accorded equal employment opportunity caused much concern in the United States Senate.\footnote{156} The examiner concluded that an aptitude test which did not take cultural deprivation into account was discriminatory.\footnote{157} Subsequently, an amendment was added to Title VII which provides that it shall not be an unlawful employment practice to act upon the results of a "professionally developed" ability test so long as it is not used for the purposes of discrimination.\footnote{158}

What constitutes a "professionally developed" ability test is not easily discernible. During the Senate debate over this provision,\footnote{159} It has been suggested that seniority terms should not apply to an older Negro who has been deprived of employment opportunities due to past discrimination. See Hickey, \textit{Government Regulation of Union Racial Policies}, 7 B.C. \textsc{Indus. \\& Comm. L. Rev.} 191, 221-22 (1966).\footnote{160} CCH \textsc{Employment Prac. Guide, New Developments}, 1965 \S 8032, at 6051.\footnote{161} \textit{Ibid.} \footnote{162} The report of the hearing examiner is reprinted at 110 \textsc{Cong. Rec.} 5476-79 (daily ed. March 19, 1964).\footnote{163} \textit{Ibid.} \footnote{164} 78 Stat. 255, 42 U.S.C. \S 2000e-2(h) (1964).
and in response to objections that it would be unlawful for an employer to use qualifications tests based upon verbal skills and other factors which might relate to environmental conditioning of the applicant, Senator Clark stated: "The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance." Although this statement would indicate a grant of broad discretion to labor unions in the use of ability tests for entrance qualification, other factors would appear to limit this discretion.

A recent study has undermined traditional aptitude tests which place heavy emphasis on verbal skills. The study concluded that environmental and cultural background affects performance on many approved intelligence quotient examinations because these tests are geared to the abilities of white middle-class applicants. In addition, further experimentation showed that test performances of Negroes increased substantially on non-verbal examinations. Thus, a federal court could interpret "professionally developed" to mean that examinations must provide for cultural and environmental differences between applicants in certain instances.

Effective Date and Coverage

Title VII was enacted into law July 2, 1964, and, in general, became effective July 2, 1965. To be subject to the Title a union must be engaged in an industry "affecting commerce." A labor organization is such an industry if: (1) it has one hundred or more members during the first year after the effective date of Title VII, seventy-five or more during the second year, fifty or more during the third year, or twenty-five or more thereafter; and (2) it is the certified, recognized, or actual bargaining representative of employees in an industry affecting commerce. There is no minimum membership limitation where a labor union operates a hiring hall.

The gradual application of Title VII, along with the many concessions granted the individual states, reveals a congressional intent that local agencies first be given an opportunity to eliminate discrimination in employment. The basis of this approach is the

160 Intent to discriminate may be inferred if a Negro applicant is required to meet high standards that are in no way related to the employment skills necessary.
161 N.Y. Times, Feb. 27, 1966 § 1, p. 25, col. 1.
hope that state FEPCs will be induced to attack employment discrimina-
tion lest the federal government intervene.\footnote{66}

CONCLUSION

The Limits of the Law

Although the success or failure of Title VII in preventing racial discrimina-
tion by labor unions will depend, to a large extent, upon the affirmative action taken by the Commission and the Attorney General, of greater significance may be the attitude of the federal courts. The "spirit" as well as the letter of the law must be obeyed in order to eliminate established regulations and customary practices of discrimination which have excluded many minorities from equal employment opportunities. As cases are decided, one question that will have to be answered by the courts is whether it is within the judicial province to enforce the "spirit" of Title VII, or whether this task might best remain an educative function.

The employment situation of the Negro mandates an immediate response by the courts. Hopefully, a positive approach will be taken.

\footnote{66} Affirmative action on the state and local level since the passage of Title VII has been favorable. For instance:


(c) On March 20, 1966, the chairman of the New York City Commission on Human Rights stated that he had given the building trade unions a deadline of a week to file reports on what progress they had made in integrating their membership and apprenticeship programs. \textit{N.Y. Times}, March 21, 1966, p. 1, col. 3. The president of the building trade unions, upon the expiration of the one week period, announced that he had no reports to give. \textit{N.Y. Times}, March 28, 1966, p. 20, col. 1.

(d) The president of the New York Building and Construction Trades Council stated that Negroes and Puerto Ricans were needed and welcome in the building trades. He stated that "we don't want the minority groups to think this is just talk. Anyone in the building trades who doesn't want to cooperate, we'll knock them into line." \textit{N.Y. Times}, March 13, 1966, p. 75, col. 3. In addition, many organizations undertook voluntary action to alleviate the employment condition of the Negro:

(a) The AFL-CIO announced that it will spend $10,000 a year for the next three years in order to train Negroes to pass union apprenticeship tests. \textit{N.Y. Times}, Feb. 23, 1966, p. 24, col. 1.

(b) Many Law Students Civil Rights Research Councils have been created. \textit{Time}, May 21, 1965, p. 64.