

1965

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Recommended Citation

Ronald R. Davenport, *The Unions - The Implicit Enemy*, 4 Duq. L. Rev. 527 (1965).

Available at: <https://dsc.duq.edu/dlr/vol4/iss4/3>

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THE UNIONS—"THE IMPLICIT ENEMY"

RONALD R. DAVENPORT*

... [A]s we enter the second century of the Negro's emancipation the most important problem he confronts is how to get back in the labor market. Dean Louis Pollak¹

INTRODUCTION

In a syndicated article, Ralph McGill asks whether the economic plight of the Negro in the United States will continue to be a statistic merely for social workers.² The New York Times, recognizing that "Negroes make up one tenth of the civilian labor force," but that "they account for one fifth of the unemployed," recommends a federal works program, similar to that utilized during the depression, to end high Negro unemployment.³ Civil rights leaders meeting in Washington at the behest of the federal government call for massive federal governmental programs and new and stronger legislation to combat the problem of Negro unemployment—as well as many other problems facing the Negro community.⁴ Nonetheless, the air of quietude remains. Unemployment in the white community is at its lowest level in recent years, the economy is booming, and the federal government worries about inflation.⁵ A "Watts" occurs, a commission is empaneled, a study is issued, and the Negro's economic plight grows progressively worse.⁶ Both federal and state officials attempt to educate businessmen and labor unions in the economics of racial discrimination and their community responsibility, but businessmen and local labor unions covertly and overtly resist education. The community at large remains indifferent (until, of course, its safety or economic well-being is threatened by a "Watts"). The plight of the Negro goes from bad—to worse—to impossible.

Commencing with President Roosevelt's Fair Employment Practices Commission⁷ and culminating in President Kennedy's Committee on Equal Employment Opportunity,⁸ the federal government has been singularly unsuccessful in ending discrimination in employment and in the

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1. Comment, 14 BUFFALO L. REV. 76 (1965).
2. Pittsburgh Post-Gazette, Nov. 20, 1965.
3. N.Y. Times, Dec. 12, 1965, § 4, page 10B.
4. N.Y. Times, Nov. 18, 1965, § 1, page 24.
5. N.Y. Times, Dec. 1, 1965, § 1, page 1.
6. N.Y. Times, Dec. 7, 1965, § 1, page 1.
7. Established in 1941.
8. Established in 1961.

unions.⁹ This failure is not unique: many states who have fought racial discrimination in these areas have experienced the same dismal result.¹⁰

The history of failure must not be continued in the present administration: a tool exists to attack in part the economic disaster now being experienced by the Negro community. That tool, the end product of a series of semi-serious attempts by the federal government to combat racial discrimination in employment, is Title VII of the 1964 Civil Rights Act entitled Equal Employment Opportunity.¹¹

Title VII generally prohibits discrimination based on "race, color, religion, sex or national origin."¹² This legislation is certainly not as strong as it could be, and hopefully not as strong as it will be, but it is a beginning. If used aggressively, it may be an effective beginning.

This paper is primarily limited to an examination of sections 703(c) and (d) of Title VII which specifically prohibit discrimination by employers and labor unions in the administration of apprenticeship and other training programs. Of necessity, other sections of Title VII are mentioned where appropriate.

"THE IMPLICIT ENEMY"¹³

The relationship of the Negro community to the labor movement has all the characteristics of a serio-comic opera. But instead of the hero rescuing the heroine in distress and carrying her off to that never-never land to live happily ever after, he saves her from death, but then does not know what to do with her. As our opera ends, the heroine not only must protect herself from the villain, but wonders if she must also receive protection from her rescuer. To appreciate fully the problems of the Ne-

9. See, 1961 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT ON EMPLOYMENT [hereinafter cited as REPORT ON EMPLOYMENT]; 1963 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT; REPORTS ON APPRENTICESHIP BY THE ADVISORY COMMITTEES TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1964) [hereinafter cited as REPORT ON APPRENTICESHIP]; Strauss and Ingerman, *Public Policy and Discrimination in Apprenticeship*, 16 HASTINGS L.J. 285 (1965); Albert, *N.L.R.B.-F.E.P.C.?*, 16 VAND. L. REV. 547 (1963); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962) [hereinafter cited as Sovern].

10. Feild, *Hindsight and Foresight about F.E.P.C.*, 14 BUFFALO L. REV. 16 (1963); Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. REV. 22 (1964); Comment, 74 HARV. L. REV. 526 (1961); Girard and Jaffe, *Some General Observations on the Administration of State Fair Employment Practices Laws*, 14 BUFFALO L. REV. 114 (1964).

11. 42 U.S.C. § 2000a (1964).

12. See, § 703(a), Employer Prohibited from Discriminating; § 703(b), Employment Agency Prohibited from Discriminating; § 703(c), Labor Unions, Employers and Joint Labor-Management Committees Controlling Training Programs Prohibited from Discriminating.

13. CAYTON AND MITCHELL, *BLACK WORKERS AND THE NEW UNIONS* (1936) [hereinafter cited as CAYTON AND MITCHELL].

gro's relationship to the unions, one must first look at the relationship between the Negro and the craft unions. From their organization in the nineteenth century to the rise of the industrial unions of the 1930's, the craft unions followed a policy of indifference, if not outright hostility, to the Negro worker.¹⁴ Samuel Gompers, the president of the AFL, paid lip service to the inclusion of Negroes in craft unions, but he had neither the support nor the power to accomplish it.¹⁵ The result of this hostility and indifference was the creation of a feeling of scepticism in the Negro community as to the sincerity of craft union organizers who attempted to organize Negro workers. Indeed, the Negro worker felt that with the coming of an AFL-affiliated union he would either be immediately replaced on one pretext or another or eventually be displaced by a white worker.¹⁶

The attitude of the Negro worker toward AFL unions was quite different, generally speaking, from his attitude toward CIO unions.¹⁷ First, CIO unions were organized on a plantwide basis, as contrasted with the AFL's craft organization. Secondly, contrary to the AFL, the CIO made extensive use of Negro organizers. In places where the Negro work force was significant, the CIO unions adopted a policy of "conscious preferment,"—one or more union officials would be Negroes. Thus, although the Negro worker had a similar distrust of white CIO officials, he had more confidence in industrial unions because of the very obvious Negro participation. As a practical matter, of course, CIO unions did discriminate on a racial basis, but, generally speaking, the CIO followed a nominal policy of non-discrimination.¹⁸

To implement its national policy of nondiscrimination, the CIO organized a Civil Rights Committee (CRC) to handle racial problems within the unions.¹⁹ However, "it was clear from the outset that the CRC was to be primarily a public-relations organization with advisory powers on racial matters."²⁰ The CRC has had a rather controversial history in terms of its relations with the Negro community. In 1949 it was severely criticized as being little more than "window dressing" and as serving no useful purpose.²¹ Some ten years later, after the AFL-CIO merger, it was

14. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* (1964) [hereinafter cited as MARSHALL]; CAYTON AND MITCHELL, *supra* note 13.

15. *Ibid.*

16. *Ibid.*

17. *Ibid.*

18. ". . . [I]t would be misleading to give the impression that the CIO automatically follow equalitarian policies and got Negro support while all AFL locals discriminated and were shunned by Negroes. . . . [S]ome CIO locals barred Negroes from membership and others permitted segregated locals." MARSHALL 45.

19. Committee to Abolish Racial Discrimination, established in 1942.

20. MARSHALL 47.

21. Pittsburgh Courier, Aug. 29, 1949.

again under attack. At that time the NAACP severely criticized the unions for the existing discrimination and for failing to do more to eliminate discrimination in its member unions.²² In answer to these objections, the chairman of CRC replied that the basic purpose of CRC was education, and that no useful purpose would be served by revoking the charters of member unions which discriminated.²³

Most of the headline-producing discrimination occurs in craft unions. Craft unions derived their power from exclusion and control of admission into the profession,²⁴ whereas the industrial unions derived their power from increased membership which took place after the individual was hired.²⁵ As a practical matter, the craft unions are not merely discriminatory racially, but discriminate against all who are not a part of the "family."²⁶ Again speaking practically, one must recognize that since Negroes were historically prohibited from joining many unions, this all-inclusive discrimination completely barred Negro participation in the trade. It is small solace to an unemployed Negro who is either barred from joining the union or barred from an apprenticeship training program on the basis of race to be treated "equally" with a white whose forebearers at least theoretically had the opportunity to join the union.²⁷

This is not to say that organized labor has not helped the Negro community. From the beginning the industrial labor movement has been egalitarian. Dedicated to the improvement of the lot of the working man, it has supported minimum wage, maximum hours, social security, medicare, and other progressive legislation. Certainly such legislation has directly benefited the Negro community. Labor has also been at the forefront in the fight for civil rights for the Negro.²⁸ Without the support of labor, the passage of the various civil rights bills would have been more difficult, if not impossible.²⁹ To that extent, the Negro community is indebted to labor. However, to rescue the heroine without fully protecting her from the villain or without providing her with the means to protect

22. *Supra* note 14.

23. *Ibid.*

24. Strauss and Ingerman, *supra* note 9; Hill, *supra* note 10; MARSHALL.

25. *Ibid.*

26. *Ibid.*

27. At least argumentatively there is no difference in this situation from the "grandfather" clause voting case. The New York State Commission for Human Rights adopts this analogy in *Lefkowitz v. Farrell*, C-9287-63 (1964 mimeo).

28. It is interesting to note that the AFL-CIO did not support the march on Washington. However, individual unions such as the UAW did support the march.

29. George Meany, in testifying before the Special Subcommittee on Labor of the House Committee on Education and Labor, not only supported H.R. 8219, a bill to withdraw federal funds from apprenticeship programs which discriminated on a racial basis, but he also stated, "The problem demands much more than a piecemeal approach. It demands vigorous action to stimulate employment; it demands a strong, enforceable fair employment practices law."

herself is the height of cynicism. The obvious result is to leave the heroine easy prey for the villain, or to subject her to the whims and caprice of her rescuer. Thus, for the union to espouse the cause of racial equality while at the same time denying Negro participation in the craft unions and in apprenticeship training programs, is to call to question the seriousness of the AFL-CIO commitment to ending racial discrimination in the unions.³⁰ In the 1964 Civil Rights Bill the community reaches the rather ridiculous position of worker *versus* worker, separated on the basis of race, with the federal government being required to mediate the dispute.

EXECUTIVE ACTION: A MATTER OF TIMIDITY

Historically, the attack on employment discrimination has been primarily carried by two branches of the federal government: the executive and the judicial.³¹ Responding to the threat of a march on Washington by Negroes, President Roosevelt, in 1941, issued Executive Order 8802 establishing a Fair Employment Practices Commission.³² This Commission, however, was limited in its authority to an investigation of defense industries.³³ Subsequently, in 1943, after the Commission had suspended operations because of a dispute over public hearings on a complaint filed against a group of railroads and railroad unions, President Roosevelt issued Executive Order 9346³⁴ which established FEPC as an autonomous agency in the Executive Office of the President. He also broadened the authority of the agency to include all government contractors as well as to prohibit discrimination in union membership.³⁵ The Roosevelt-established FEPC went out of existence on June 28, 1946.³⁶

In 1948 President Truman issued Executive Order 9980³⁷ establishing a Fair Employment Board within the Civil Service Commission which had the authority to review the treatment by department heads of com-

30. Some members of the Committee to Abolish Racial Discrimination of the CIO supported the position that the charters of member unions which discriminated should be lifted. However, a majority of the Committee refused to adopt this position. As mentioned above, the Director of the combined AFL-CIO Civil Rights Committee specifically stated that the function of the Committee was education. Thus we see, at best, a commitment by the union to end discrimination no greater than the inadequate and ineffective commitment of the various state FEPC.

However, it would be unfair to criticize the AFL-CIO without mentioning the stand adopted by George Meany supporting legislation to end discrimination in apprenticeship training. Meany went so far as to threaten to recruit non-union Negroes for governmental contracts where the craft unions refused to admit Negroes.

31. For a history of federal government executive activity, see REPORT ON EMPLOYMENT.

32. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

33. *Supra* note 9.

34. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943).

35. *Supra* note 9.

36. *Ibid.*

37. Exec. Order No. 9980, 13 Fed. Reg. 4311 (1948).

plaints alleging racial discrimination. After reviewing the departmental decision, the Board could make recommendations. If the recommendations were ignored by the department, the Board had the right to appeal directly to the President.³⁸ Approximately one year prior to leaving office, President Truman created the Committee on Governmental Contract Compliance.³⁹ This Committee, composed of representatives from industry, the public, and the principal government contracting agencies, sought to eliminate discrimination in private businesses which dealt directly with the federal government.

Shortly after taking office, President Eisenhower decided to reorganize the Committee on Governmental Contracts Compliance established by President Truman.⁴⁰ He changed its name to the President's Committee on Government Contracts and increased its membership to fifteen members. To give the Committee status, he appointed then Vice-President Nixon as its chairman. The Committee had the paper responsibility of effectuating "the national nondiscrimination policy."⁴¹ Actually, however, the various governmental contracting agencies had the primary responsibility of enforcing the nondiscrimination clause of government contracts. Thus, the real function of the Committee was to act in an advisory capacity to the various governmental contracting agencies.⁴² During his first term of office, President Eisenhower also established the President's Committee on Government Employment Policy.⁴³ An interdepartmental committee operating outside the authority of the Civil Service Commission, it replaced the Fair Employment Board of the Civil Service Commission, which had been established by President Truman.

President Kennedy, on March 6, 1961, issued Executive Order 10925⁴⁴ establishing the President's Committee on Equal Employment Opportunity. Not only did this committee have the responsibility of eliminating discrimination in employment as practiced by the federal government and by federal government contractors, but it was also given the responsibility of gaining the cooperation of labor organizations whose members were engaged in work on government contracts.

The various committees established by Presidents Roosevelt, Truman, Eisenhower, and Kennedy had in common one basic characteristic: a

38. *Supra* note 9.

39. Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951).

40. Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953). The REPORT ON EMPLOYMENT states that this newly constituted committee "attempted to negotiate increased opportunities for minority group workers in training and recruitment services. Its attempts were largely *ineffective*." [Emphasis added.].

41. For a discussion of the evolution of federal employment policy, see REPORT ON EMPLOYMENT 5.

42. REPORT ON EMPLOYMENT.

43. Exec. Order No. 10590, 20 Fed. Reg. 409 (1955).

44. Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

lack of enforcement powers. The various committees were limited to the use of education, "moral suasion," publicity, and conciliation in their attempts to handle the problem of employment discrimination. With the primary responsibility for enforcement of the alleged governmental policy of non-discrimination resting with the federal agencies, the committees were reduced to an advisory and consultative capacity. Consequently, they were largely ineffectual. Until the passage of the 1964 Civil Rights Bill, an executive enforcement program *with teeth* was conspicuously lacking. It is not unreasonable, therefore, to conclude that until the passage of the 1964 Civil Rights Bill, the various Presidents had not dealt seriously with the problem of employment discrimination.⁴⁵

THE COURT, THE NLRB AND THE DOCTRINE OF "FAIR REPRESENTATION"

With the rise of unionism in the United States, the Negro was placed in a somewhat ambivalent position. Clearly, as a working man his interest lay with the improvement of the working man's power position. The organization of industry, however, resulted in loss to the Negro of past employment gains.⁴⁶ A good example of this is the oft-cited *Steele v. Louisville & Nashville Railroad*⁴⁷ case. In *Steele*, the Brotherhood of Locomotive Firemen and Enginemen, purporting to act as the representative of all firemen, executed an agreement the effect of which was to ultimately exclude Negroes from employment. Fortunately for the Negro firemen, the Supreme Court ruled that such an agreement was improper under the provisions of the Railway Labor Act:

While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.⁴⁸

Thus, the Court established the doctrine of the right of Negro non-union members to "fair representation," *i.e.*, the right to be free from discrimination based on race. For the sake of convenience, the attack on union racial discrimination may be considered as a three-step approach. The first step is the recognition of the right to fair treatment. The second step involves the establishment of the right of Negroes to be admitted into the union. Can a Negro be denied union membership solely on the basis of race? The above question from *Steele* indicates that a union may

45. I define "serious" to mean the use of measures which will result in meaningful change.

46. *Supra* note 14.

47. 323 U.S. 192 (1944).

48. *Id.* at 204.

determine eligibility for membership. Absent a state or federal statutory bar, the union's right to determine eligibility includes the right to discriminate on the basis of race.⁴⁹ Given certification of the union by the federal government, the problem becomes more complex. Is participation of the federal government merely by its certification of the union as the sole bargaining agent sufficient to bring into play constitutional safeguards? This question was answered negatively in *Oliphant v. Brotherhood of Locomotive Firemen*.⁵⁰ In denying Negro plaintiffs admission into the union, the district court and the circuit court of appeals ruled that certification under the Railway Labor Act was insufficient to support a finding of discriminatory federal action.⁵¹ The Supreme Court denied *certiorari*.⁵²

In both *Steele* and *Oliphant*, the courts were dealing with a *privately*-financed attack on union discrimination. The National Labor Relations Act⁵³ provides a mechanism for a *public* attack. For example, if the National Labor Relations Board determines that a labor practice is unfair, the Board has the authority to grant the necessary relief.⁵⁴ Included in the definition of an unfair labor practice is the caveat charging unions with the responsibility of representing non-union members and minority union members fairly and impartially. Thus, when the National Labor Relations Board found discriminatory activity in *NLRB v. Miranda Fuel*,⁵⁵ it ruled that Section 7 of the Act gave

employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. *This right of employees is a statutory limitation on statutory bargaining representatives*, and we

49. If the union is characterized by the court as a private organization then it has all the rights of a private organization which includes the right to discriminate on the basis of race. *Oliphant v. Brotherhood of Locomotive Firemen*, 156 F. Supp. 89 (N.D. Ohio 1957).

50. *Ibid.*

51. "The Federal action taken by an agency of the Congress, was the certification of the Brotherhood of Locomotive Firemen and Enginemen as exclusive bargaining representative for the bargaining unit involved, which included persons who were not acceptable to membership under the Constitution of the Brotherhood. Actions by the Brotherhood can be attributed to the Congress only if the act of certification clothes the Brotherhood with some or all of the attributes of a Federal agency. The court is satisfied that this act is not sufficient to change the character of the organization from that of a private association to that of a governmental agency." *Supra* note 49, at 93.

52. 359 U.S. 935 (1959).

53. 1 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-168 (1958), as amended, 29 U.S.C. §§ 153-160 (Supp. IV, 1959-1962), amending 49 Stat. 449 (1935).

54. 61 Stat. 149 (1947); 29 U.S.C. § 160(b) (1958).

55. 51 L.R.R.M. 1584 (1962), reversed by the United States Court of Appeals on the basis that the evidence did not support a finding that the union had engaged in "irrelevant or invidious discrimination" against the employee. *N.L.R.B. v. Miranda Fuel Co.*, 54 L.R.R.M. 2715 (1963).

conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.⁵⁶ [Emphasis added.]

To the extent that the employer took part in the union's unlawful activity, the Board found violations of Sections 8(a)(1)⁵⁷ and (3)⁵⁸ and 8(b)(2).⁵⁹

The third step in our attack on union discrimination is the segregated local. In the landmark case of *Metal Workers Union (Hughes Tool Co.)*,⁶⁰ the Board was squarely faced with this problem. In *Metal Workers Union*, a white local had negotiated a contract whereby only its members would be eligible for apprenticeship programs. When a member of the Negro local unsuccessfully applied for membership in the apprenticeship program, the white local refused to process his grievance. Ruling that "a labor organization cannot when acting as exclusive bargaining representative, lawfully exclude, segregate, or otherwise discriminate among members of the bargaining unit on racial grounds,"⁶¹ the Board declared the refusal to be violative of Sections 8(b)(1)(A)⁶² and 8(b)(3)⁶³ of the Act.

Sanctioning the MWU, the Board rescinded its earlier grant of certification and issued a cease and desist order.⁶⁴ The severity of the relief

56. *Id.* at 1587.

57. Sec. 8C(a), "It shall be an unlawful practice for an employer—(1) to interfere with, or coerce employees in the exercise of rights guaranteed in section 7."

58. Sec. 8(a)(3) prohibits an employer from discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

59. Sec. 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3), or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

60. 56 L.R.R.M. 1289 (1964).

61. *Id.* at 1291.

62. Sec. 8(b)(1) makes it an unlawful labor practice for a union to "(1) restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7."

63. It is an unlawful labor practice for a union "(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subjected to the provisions of section 9(a)."

64. The Cease and Desist order generally prohibited Local 1 of the Metal Workers Union from refusing to handle and investigate grievances, where such refusal was based on race or color, and causing or attempting to cause an employer to discriminate. The majority in its opinion found the maintenance of a segregated local required the Board to rescind the earlier certification order; "Specifically we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative." In support of its position the majority cites *Shelley v.*

granted in this case indicates a strong attitude on the part of the Board.⁶⁵ The question still remains: will this strong policy be effective in eliminating union discrimination? There can be no question that it will be successful if coupled with other aggressive activities of the federal government. By itself, it will be largely ineffective. For example, in this case the white local of the Metal Workers, to have been ultimately successful, merely had to reject the Negro worker's petition for some allegedly bona fide reason.⁶⁶ Unions, as have people, manifest some sophistication when necessary to accomplish a discriminatory purpose.⁶⁷

STATE FEP LAWS: A QUESTION OF COMMITMENT

New York took the lead in establishing the first state commission to combat employment discrimination;⁶⁸ other states followed New York's example and set up similar commissions.⁶⁹ With the caution of men walking on eggs, the various state commissions adopted "conciliation, persuasion and education" as a basic policy:

Kraemer, 334 U.S. 1 (1948). Following *Shelley* the argument would be that although a union is a "private organization" and therefore can refuse to admit Negroes, *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*, *supra* note 48, it cannot discriminate and receive the aid and assistance of the N.L.R.B.

65. It is interesting to note the change in the attitude of the N.L.R.B. In 1952 the General Counsel took the position that he could find nothing in the Taft-Hartley Act which made it an unfair labor practice to bargain discriminatorily and unfairly against excluded minorities. For a discussion in some detail of the Board's attitude, see Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964).

66. One of the criticisms made by one writer in the field of labor relations and the Negro is that fair representation is defective because "much racial discrimination is accomplished by discrimination on the basis of seniority or training areas in which Negroes because of past discrimination do not rank high. This is extremely difficult to attack because of the wide range of reasonable discriminatory determinations the bargaining agent is permitted to make." Albert, *N.L.R.B.-F.E.P.C.?*, 16 VAND. L. REV. 547, 557 (1963).

67. Of course, this criticism is qualified to the extent that Negroes by their participation in union activities can elect officers who will protect their rights. Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874 (1957).

68. New York State Commission against Discrimination (S.C.A.D.), N.Y. SESSION LAWS, ch. 118, §§ 1-3 (1945).

69. ALASKA STAT. § 23.10.190 (1962); ARIZ. REV. STAT. ANN. §§ 23-371—23-375; CAL. LAWS, ch. 121 (1959); COLO. REV. STAT. §§ 80.24.1-80.24.8 (1953); CONN. GEN. STAT. § 31-563 (1958); DEL. LAWS, ch. 337 (1960); HAWAII, H.B. 21 (1963); IDAHO LAWS, ch. 309 (1961); ILL. REV. STAT., ch. 29, §§ 17-24 and ch. 127, §§ 214.1-214.5 (1959); IND. STAT. § 40-2307 (Supp. 1959); IOWA, H.B. 589 (1963); KAN. GEN. STAT. § 21-2463 (1949); ME. LAWS, ch. 6 (1963); MD. CODE, art. 78A, §§ 7, 7A (1957); MASS. LAWS ANN., ch. 6, § 56, ch. 151B, ch. 272, § 98B; MICH. COMP. LAWS 363.11; MO., S.B. 269 (1961); NEB. REV. STAT. §§ 47-289—47-282 (1966); NEV. REV. STAT. § 338.129; N.J. STAT. ANN., tit. 18, ch. 25 (Supp. 1900); N.M. STAT. §§ 59.9.8-59.9.9 (1953); N.Y. LAWS, ch. 18 (1951); OHIO REV. CODE §§ 4112.01-4112.06, as amended; ORE. REV. STAT. §§ 698.064-698.760; PA. STAT. ANN., tit. 43, §§ 853-896; R.I. GEN. LAWS §§ 29.6.4-29.6.9 (1956); WASH. REV. CODE §§ 49.60.18-49.60.37; W. VA. LAWS, ch. 135 (1961); WIS. STAT. ANN. §§ 111.11-111.97 (1961).

Commissions generally place great emphasis on persuasion, conciliation, and other informal educational procedures. The commissions normally seek to do more than eliminate discrimination in the particular case; they seek to change practices which lead to discrimination, and often use the initial complaint as an opening wedge for a general discussion of respondent's personnel policies. Only a few cases reach the stage of formal hearing. Instead, there is great reliance on the average firm's desire to do "the right thing" and to avoid unfavorable publicity.⁷⁰

* * * *

It (the Commission) has tried to administer the law in an atmosphere of cooperation, not conflict. It has tried to obviate the need of a police operation so extensive as to make enforcement impossible. It has tried through education and persuasion to change the thinking and mores of our people.⁷¹

The result of this failure to adopt a more imaginative and forceful approach is to render fair employment practice laws completely ineffectual in significantly affecting employment discrimination.⁷² It would be unfair, however, to criticize state commissions without mentioning their other problems. Certainly any governmental body involved in the very touchy area of race relations is faced with an extremely difficult problem—balancing the demands of civil rights groups against the manifested hostility and indifference of the community and its political leaders. This hostility and indifference often takes the form of the creation of a commission with limited authority and even more limited resources. A commission without adequate finances results in a commission of limited scope and ambition.⁷³

70. Strauss and Ingerman, *Public Policy and Discrimination in Apprenticeship*, 16 HASTINGS L.J. 285 (1965).

71. Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFFALO L. REV. 79, 97 (1964). Mr. Spitz at the time of this statement was General Counsel to the New York Commission. Apparently however, the New York Commission relies on more than education and persuasion. In *Lefkowitz v. Farrell*, C-9287-63 (mimeo 1964) the Commission, in deciding the case of a Negro who was refused admission into the apprenticeship program of New York Sheet Metal Local 28, took into consideration the union's historic pattern of discrimination and required Local 28 to adopt objective selection criteria. After a vigorous battle the Commission's position was subsequently enacted into law (N.Y. EXECUTIVE LAW § 296(1-a)(a)). For a full discussion of this case see Strauss and Ingerman, *supra* note 70.

72. Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. REV. 22 (1964); Feild, *Hindsight and Foresight about F.E.P.C.*, 14 BUFFALO L. REV. 16 (1964).

73. See, e.g., District of Columbia, Commissioner's Policy Orders, Nov. 25, 1953, April 9, 1958, as amended, May 9, 1961. IND. STAT. § 40-2307 (1956) and KY. LAWS. ch. 76 (1960). See also, Feild, *supra* note 72.

While the enabling legislation of many commissions grants sufficient authority to do a job, normally the commission is hampered by its improper attitude.⁷⁴ Unfortunately, even where a commission has the teeth to do an effective job, it treats education as its sole solution. This is *not* and *will not* be the answer. Recognizing the necessity of educating a majority of the community about the problems of race relations and employment, one is still faced with the duty of translating that education into effective action. It is rather paradoxical that society teaches certain standards of community conduct but does not pass and enforce laws to bring about this result. A commission which limits itself to education and ignores its enforcement teeth is *ab initio* of little use to the Negro community.⁷⁵

APPRENTICESHIP AND TRAINING PROGRAMS

"Education and training is the answer; what the Negro must do is to prepare himself for profitable employment."

The difficulty with these statements (which the Negro hears constantly) is that they fail to take into consideration the very serious problem Negroes face in obtaining proper training for blue collar and semi-professional work. Not only must he break through the barrier which prohibit his admission, but he must also obtain from the training program a marketable skill. So far, he has been unable to do either because apprenticeship programs are generally governed by racially-oriented joint union and employer committees. Although the federal government, prior to the passage of the 1964 Civil Rights Bill, had adopted a policy of "no discrimination because of race in the administration of federally aided programs of vocational education,"⁷⁶ discrimination was rampant.⁷⁷

74. See, e.g., CONN. REV. STAT. § 31-193 (1958); MICH. STAT. ANN. § 13.884(1) (1960); N.J. STAT. ANN. § 18.25-4 (Supp. 1960); N.Y. EXECUTIVE LAW § 290; OHIO REV. CODE ANN. § 4112.08 (Supp. 1959); PA. STAT. ANN., tit. 47 §§ 951-953. See generally Pollitt, *Racial Discrimination in Employment: Proposals for Corrective Action*, 13 BUFFALO L. REV. 59 (1964).

75. Hill, *supra* note 72, suggests that to make state commissions effective, basic changes would have to be made which would include:

1. Greater use of mandatory powers.
2. Affirmative action based upon patterns centered approaches instead of the individual complaint procedures.
3. Drastic reduction in the number of rejected complaints.
4. Public disclosure of basis for settlements.
5. Expanded availability of Commission facilities.

76. Prior to the passage of the 1964 Civil Rights Bill, "No statutes explicitly outlined Federal Policy regarding the availability of training for members of minority groups. A regulation issued in 1948 (13 Fed. Reg. 8789) however does provide: 'In the expenditure of Federal Funds and in the administration of federally aided programs of vocational education, there shall be no discrimination because of race, creed, or color.'" REPORT ON EMPLOYMENT 97. "However, this position as construed by H.E.W. did not prevent the granting of training funds to segregated schools." *Ibid.* But since March 22, 1963, approval of M.D.T.A.

Since many of the vocational training programs are federally financed, the rather anomalous situation exists in which the federal policy against discrimination clashes head-on or rather fails to clash with federally-financed discriminatory training programs.

The training programs available to Negroes not only reflect early 18th Century American thinking but continue to perpetuate an existing evil.⁷⁸ Traditionally, vocational education has operated on the premise that the trainee should receive training only in the areas in which he can obtain employment. Consequently, since the job opportunities of Negroes have historically been few in number and scope, their vocational training has generally been limited to those skills the need for which is either declining or is not expanding at a rate comparable to the growth realized in other skills for which people are being trained.⁷⁹

In its 1961 Report on Employment, the United States Commission on Civil Rights reported that the Department of Health, Education and Welfare issued a directive providing that:

Entrance to a vocational class should be based principally upon three factors:

1. the desire of the applicant for the vocational training offered;
2. his probable ability to benefit by the instructions to be given; and
3. his chances of securing employment in the occupation after he has secured the training, or his need for training in the occupation in which he is already employed.⁸⁰

One cannot argue with a position which stresses the desire of an applicant as a prime consideration. Certainly, no one should be forced to accept training that he does not desire. If one may assume that "his probable ability to benefit by the instruction" means the ability of the trainee to comprehend what is being taught, then the second factor is both reasonable and proper. It is the third factor which causes concern. Since it is true that many of the present training programs do not reflect current job opportunities for Negroes,⁸¹ this third criterion would be an improve-

and A.R.A. programs have been contingent upon no discrimination or racial segregation. 1963 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT 79.

77. REPORT ON EMPLOYMENT.

78. *Ibid.*

79. *Ibid.*

80. "45 C.F.R. 102.85 (Supp. 1957) (*no longer in effect*) [Emphasis added.]. This has been superseded by 45 C.F.R. 102.41(3) (1960). . . . However, the removal of the quoted regulation does not negate H.E.W.'s policy that training should be given only to those who can benefit by the instruction, as explained over the telephone by the Assistant Director of Vocational Education, Department of Health, Education and Welfare, June 26, 1961."

81. *Supra* note 77.

ment only to the extent that it would provide training pursuant to an understanding of available opportunities. It is more than doubtful that this is sufficient to bring about meaningful change in the Negro's employment statistics. While the attitude of HEW is more aggressive than that adopted by various state FEP commissions which limit themselves to the performance of an educational and conciliation function, it is nonetheless inadequate. It parallels the approach of the Bureau of Apprenticeship and Training which seeks to promote the voluntary provision of training opportunities for Negroes by management and the unions⁸²—an idealistically sound policy. One should not have to be coerced to do what is right, but should do so voluntarily. However, as was stated by the Advisory Committee to the Civil Rights Commission in its report on apprenticeship: "As long as the federal government depends on such voluntary relationships with management and the unions, perhaps little real progress can be expected."⁸³ The federal government must first provide and require training for qualified Negroes regardless of employment possibilities. Secondly, it must make every effort toward the utilization of those skills in which Negroes are trained.⁸⁴ Only such an aggressive policy will break patterns of discrimination and bring about concomitant change in Negro employment statistics.⁸⁵

703(c) AND (d)—WHAT IS PROHIBITED?

Recognizing that the force of law must be used to improve the Negro employment status, Congress in the 1964 Civil Rights Bill provided that:

- (c) It shall be an unlawful employment practice for a labor organization—
- (1) to exclude or expel from 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

82. REPORTS ON APPRENTICESHIP 15.

83. *Id.* at 17.

84. In *Todd v. Joint Apprenticeship Com. of Steel Wks. of Chicago*, 223 F. Supp. 12 (N.D. Ill. 1963) the court held that the Federal government agencies, the G.S.A. and the Bureau of Apprenticeship and Training, "directly and significantly made possible and aided in the perpetuation of the Joint Committee and Union's discriminatory policies" and by so doing "if not directly at least indirectly" denied "plaintiffs their constitutional rights."

85. The Negro American Labor Council has recommended the establishment of an AFL-CIO Apprenticeship Program Board to establish uniform apprenticeship standards and to implement a policy of selection based on merit alone "without regard to nepotism, cronyism, or race." *Supra* note 77, at 143.

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) 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.⁸⁶

Paragraph 1 of Section 703(c) makes it an unlawful employment practice for a union "to exclude," expel, or discriminate on the basis of race. Since, however, the debate on this section in Congress was particularly scant, the question remains as to what Congress actually intended to prohibit. Certainly Paragraph (1) prohibits the union from having a "white-only" membership clause in its constitution since such a clause would work to exclude Negroes strictly on the basis of race.

A more important question, however, is whether or not this section would bar other discriminatory practices. For example, consider the requirement that an applicant must be recommended for union membership by two union members.⁸⁷ As a practical matter, such a provision totally excludes Negroes from membership. Since there are generally no Negroes in the particular union with such a requirement, it is well nigh impossible for a Negro applicant to obtain the necessary recommendations for admission. It seems, therefore, that 703(c)(1) would prohibit unions from establishing such a requirement where its effect is to bar the Negro from membership.

In Paragraph 703(c)(2) Congress provides that it is an unlawful employment practice to limit, segregate, or classify membership in unions on the basis of race. This section also declares illegal any classification of individuals on the basis of race so as to affect adversely their status as employees. The effect of this section is two-fold: to prohibit the establishment and the maintenance of the segregated local and to wipe out lines of seniority based upon race. Thus, in unions which follow a practice of maintaining segregated locals and separate lines of seniority, Negroes will be able to "bump" whites of less seniority rather than being limited strictly to asserting seniority over other Negroes.

86. 42 U.S.C. §§ 2000a, 2000e-2 (1964).

87. Hill, *supra* note 72.

Section 703(c)(3), which prohibits union pressure upon employers for the purpose of discrimination, raises a rather interesting question. If one may assume that it would violate the provisions of the Act for a union to establish criteria for membership the effect of which is to bar Negro membership, then clearly a union cannot refuse to work with non-union labor who have been denied membership in the union solely on the basis of race. Thus, in those cases where unions have walked off the job in order to force an employer to discharge non-union workers, who have been denied admission to the union strictly on the basis of race, would not Section 703(c)(3) be violated?

During the course of the debate in both the House and the Senate, opponents of the employment section of the bill complained that it was vague and did not provide guidelines for its administrators. Their criticism centered on the fact that the word "discrimination" was not defined. In response, Senator Muskie made the following statement:

Discrimination in this bill means just what it means anywhere: a distinction in treatment given different individuals because of their race, religion or national origin. . . . I submit that, read in their entirety, these provisions provide a clear and definitive indication of the type of practice which this title seeks to eliminate. Any serious doubts concerning its application would, it seems to me, stem at least partially from the predisposition of the person expressing such doubt.⁸⁸

This definition is of course expansive, but the *problems* which Title VII attempt to meet are also expansive. It would be impossible for Congress to consider all the possible variations in fact situations which would render an employer's action legal or illegal. However, the lack of legislative history should not constitute a problem for the Court. The Court has at its disposal interpretations by state courts of state FEP laws and similar interpretations by the National Labor Relations Board.⁸⁹ In addition, Congress has provided rather specific prohibitions. It remains for the Court to utilize this law effectively to accomplish the congressional purpose.⁹⁰

703(c) AND (d)—AN EVALUATION IN LIGHT OF AVAILABLE ENFORCEMENT PROCEDURES

Liberally construed, Sections 703(c) and (d) bar unions and employers from any and all types of discrimination the effect of which is to limit

88. 110 CONG. REC. 12193 (daily ed. June 3, 1964).

89. A discussion of state commissions treatment of the term discrimination can be found in Comment, 74 HARV. L. REV. 526, 558 (1961) and Comment, 32 U. CHI. L. REV. 430, 458 (1964).

90. The Court's role as an initiator of governmental policy pursuant to the Constitution is discussed in Wellington, *The Constitution, The Labor Union, and Governmental Action*, 70 YALE L.J. 345 (1961).

or prohibit Negro participation in unions or in job training or apprenticeship programs because of race. Since the breadth of the law's mouth encompasses all of the concomitant discriminatory practices, only the question of the strength of its teeth remains. An exhaustive analysis of its teeth, *i.e.*, the enforcement procedures, is outside the scope of this paper, but, of necessity in evaluating 703(c) and (d), one must consider very generally the law's enforcement procedures. Senator Clark of Pennsylvania argues that the enforcement procedures in Title VII rob it of its strength.⁹¹ Although the Commission can hear a complaint, make investigations, and attempt conciliation and persuasion, it cannot enforce the Act on its own motion. It must instead rely upon the Attorney General for enforcement of the Act.⁹² Clark contrasts this provision with the House bill⁹³ as passed, which did grant to the Commission initiatory powers, and with a bill⁹⁴ as reported from his committee⁹⁵ which dealt with this same problem. The Senator's bill called for the establishment of an Equal Opportunity Board and the appointment of an administrator with the rank of Assistant Secretary of Labor. The administrator would have the authority to investigate and to make inspections for violations of the Act. His investigations would not have to be preceded by the filing of charges. After attempting conciliation, he would have the authority to initiate a formal complaint before the Equal Opportunity Board. The Board would have the necessary authority to issue broad remedial orders to remedy violations. Reviews and enforcement of the Board's orders would be placed in the court of appeals. The effect of the procedure as proposed by the Senator's committee is to end the necessity for "long and costly" trial procedures in the federal district court. The possible length of the proceedings caused the Senator a great deal of concern, for in his opinion "justice delayed is justice denied."⁹⁶

To say that the enforcement procedures provided by the act are inadequate is an understatement. Indeed, the Attorney General is empowered by the Act to bring an action where he finds "a pattern or practice of resistance"⁹⁷ to the rights protected by Title VII; where he believes the case to be "of general public importance," he can even request a three-judge court.⁹⁸ In all probability, however, the Attorney General, with his many other responsibilities, will exercise the discretion to bring or not to bring an action with greater restraint than would the Commission, much to the detriment of the job seeker who is alleging discrimination.

91. 110 CONG. REC. 12171 (daily ed. June 3, 1964).

92. 42 U.S.C. § 2000e-5 (1964).

93. H.R. REP. No. 7152, 88th Cong., 2d Sess. (1964).

94. S. REP. No. 1937, 88th Cong., 2d Sess. (1964).

95. Senate Committee on Labor and Public Welfare.

96. 110 CONG. REC. 12170 (daily ed. June 3, 1964).

97. *Supra* note 92.

98. *Ibid.*

As a matter of construction and reality, the enforcement procedures of Title VII make the Commission an employment community relations service limited to education, persuasion, and conciliation. It is rather interesting to note that one tactic used by southern opponents of Title VII, in an effort to defeat the bill, was to contrast the unemployment statistics of northern states with FEP laws with the unemployment statistics of southern states with no FEP laws, maintaining that the Negro was actually in a better employment position in states in which no FEP laws had been enacted.⁹⁹ The proponents of Title VII argued that there were other factors involved in these statistics,¹⁰⁰ but they acknowledged that even states with FEP laws were in need of the assistance of Title VII.¹⁰¹ When one considers the fact that state FEP laws, largely ineffective,¹⁰² have historically been administered on the basis of education, persuasion, and conciliation, and the additional fact that the proponents of Title VII recognized the need for a federal law for enforcement in the North,¹⁰³ the pulling of the Commission's teeth is rather difficult to accept.

Education and conciliation on the federal level is not enough. They have failed on the local level and in all likelihood will fail on the federal level.¹⁰⁴ Even assuming that education, persuasion and conciliation will work, they will take time—one thing we do not have, considering the employment statistics of minority workers and the various racial disturbances throughout the country.

A plan of education *plus* aggressive enforcement of the provisions of the Act by the Commission on a day-to-day basis must be adopted.¹⁰⁵ That old trite expression about a chain being only as strong as its weakest link seems particularly appropriate in an evaluation of Section 703(c) and (d). As mentioned before, these sections are sufficiently broad that a liberal interpretation by the courts will meet most if not all of the discriminatory practices heretofore practiced by the unions. However, if the Commission only conciliates, then it remains at best an open question as to its own probable effectiveness and that of Sections 703(c) and (d).

99. 110 CONG. REC. 12174 (daily ed. June 3, 1964) (remarks of Senator Clark).

100. 110 CONG. REC. 12193 (daily ed. June 3, 1964) (remarks of Senator Muskie).

101. *Supra* note 92.

102. *Supra* note 72.

103. *Supra* note 99; *supra* note 100.

104. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 1964 BROOKLYN L. REV. 96, doubts if much can be accomplished under Title VII. Strauss and Ingerman, *supra* note 70, doubt if Title VII will be as effective as presently existing state laws.

105. Senator Clark recognized the need for a strong Commission in his bill and in his remarks. *Supra* note 99.

CONCLUSION

" . . . [T]he present position of the Negro in the economy has been institutionalized. Unless something basic is done, it will reproduce itself for years to come."¹⁰⁶

The institutionalization of the Negro at the lower levels of the economy is the result of many factors: a history of slavery and discrimination, inadequate schooling, and the absolute prohibition of Negro participation in some occupations. It was not merely the sometimes conscious—sometimes unconscious racist character of the American economy which has brought about this situation, it was also the hesitancy of government when boldness was required.¹⁰⁷ Education, persuasion and conciliation were largely ineffective, and the government's high level policy of non-discrimination did not significantly bring about low level effective action.¹⁰⁸ Thus, the federal government has never taken the necessary steps to end the racist character of the American economy.

Mere elimination of the barriers to employment is not the final answer to the question of Negro employment—the inadequacy of the Negro's education and training also stands as a barrier. However, a Negro wanting work can do something about his lack of education and training; he cannot do anything about his race.

Title VII is like a B·B gun in an arsenal of weapons to attack employment discrimination; it can sting, annoy, and maim, but it cannot kill. In light of the gravity of the situation which now faces not only the Negro community but the community at large, no one can afford to engage in stinging actions. Sections 703(c) and (d) are broad enough to be effective if properly implemented. To expect the prohibitions of these sections to bring about meaningful change without a strengthening of their enforcement procedures is unrealistic. As it presently stands, Title VII is an elfin step when giant steps are needed.

106. HARRINGTON, *THE OTHER AMERICA* 1962.

107. *Supra* note 77.

108. *Ibid.*

