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The Civil Rights Potential of the Labor Management Relations Act: The Current Approach

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Comments

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I. INTRODUCTION

The National Labor Relations Act[1] (Act) was enacted by Congress in 1935 to promote industrial peace through the regulation of employment relationships among employers, unions, and individuals. It has been the principal labor law in this country for nearly forty years and has twice[2] been amended to reflect Congressional intent to insure the balance of power between business and labor, and to secure the rights of individuals to engage in, or refrain from engaging in, collective bargaining or other concerted activities for their own mutual aid and protection.[3]

Interference with protected employee rights by employers or unions has been expressly proscribed by section 8 of the Act.[4] It has long been held that employees who engage in protests against their employer's racially discriminatory policies are engaging in protected activities[5] within the meaning of the Act, and an employer who causes an adverse effect on the employment status of employees engaged in such protests commits an unfair labor practice.[6] Under such circumstances, however,

1. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-88 (1970), *formerly* ch. 372, §§ 151-68, 49 Stat. 449 (1935) [hereinafter referred to as the Act.].

2. The Act was further supplemented by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1970).

3. 29 U.S.C. § 157 (1970). This section is commonly referred to as section 7 which provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

4. *Id.* § 158. This section is commonly referred to as section 8. Employer unfair labor practices are set forth in section 8(a) and union unfair labor practices in section 8(b).

5. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

6. Building Serv. Employees, 188 N.L.R.B. 141 (1971); Mason & Hanger-Silas Mason Co., 179 N.L.R.B. 434 (1969); Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402 (1964), *remanded,*

the unlawful conduct is the employer's interference with the protest and not its racially discriminatory policies.[7]

Decisions of the National Labor Relations Board (Board) and several circuit courts of appeals in the past decade have expanded the concept of individual rights to include freedom from racially discriminatory policies and practices by either employers or unions.[8] Such policies or practices by an employer have been held to constitute unfair labor practices and have potentially established the Act as a bona fide anti-discrimination statute.[9] Recent developments in the law, however, may have had a significant effect on the availability of the Act as a tool for eliminating invidious discrimination on account of race or other protected classifications by an employer.[10]

The potential of the Act as an anti-discrimination statute has developed concurrently with the enactment of Title VII of the Civil Rights Act of 1964.[11] The purpose of Title VII is to eliminate discrimination in employment on account of race, color, religion, sex, or national origin.[12] It is an anomaly of sorts, that although the Act preceded Title VII by nearly thirty years, it was not until Title VII became a reality that the civil rights potential of the Act was recognized.[13]

This comment will focus on the question of the legitimacy of the Act as a civil rights statute. It will deal with the potential of the Act as a vehicle for eliminating racial and other types of discrimination in employment. This comment will discuss the rationale and applicability of the major decisions and cases that indicate the trend of the law's development. It will analyze the substance of the law, the jurisdiction of the Board and the extent to which legal standards of other federal laws are available in unfair labor practice issues grounded on discrim-

349 F.2d 1 (9th Cir. 1965), *orig. decision aff'd,* 166 N.L.R.B. 551 (1967), *enforced,* 419 F.2d 216 (9th Cir. 1969).

7. *See also* Leiken, *The Current and Potential Equal Employment Role of the NLRB,* 1971 DUKE L.J. 833, 865-66 [hereinafter cited as Leiken].

8. Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), *remanding sub nom.* Farmers Cooperative Compress, 169 N.L.R.B. 290 (1968); Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), *enforced,* 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967); Local 1367, Int'l. Longshoreman's Ass'n., 148 N.L.R.B. 897, 1083 (1964), *enforced,* 368 F.2d 1010 (5th Cir. 1966); Independent Metal Workers Union, 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181, *enforcement denied,* 326 F.2d 172 (2d Cir. 1963). The National Labor Relations Board [hereinafter referred to as the Board] is the enforcing agency of the Act.

9. *See* cases cited note 8 *supra.*

10. Jubilee Mfg. Co., 82 L.R.R.M. 1482 (1973).

11. 42 U.S.C. §§ 2000e-15 (1970) [hereinafter referred to as Title VII]. The sections with which we are concerned are sections 701-16 of Title VII.

12. *Id.* § 2000e-2.

13. *See* cases cited note 8 *supra.*

ination of the type proscribed by Title VII. In short, it will critically evaluate the Board's role in an area of the law that has implicitly been reserved for another governmental agency.[14]

II. The Duty of Fair Representation

The early cases dealing with discrimination in employment involved labor unions. In *Steele v. Louisville & Nashville Railroad,*[15] the Supreme Court found a duty of fair representation[16] implicit in the union's status as an exclusive bargaining representative under the Railway Labor Act.[17] Acknowledging that a union may exercise their statutory authority to represent in a manner which may have unfavorable effects on some of its members, the Court noted that such discrimination must be based on relevant considerations.[18] Holding that racial discrimination can never be a relevant consideration, the Court concluded that the union had breached its duty under the Act by discriminating between groups or classes of employees within the bargaining unit because of their race.[19] The *Steele* equal protection concept was later adopted by the Court in several decisions[20] brought under section 9(a)[21] of the Act.

For almost twenty years following these decisions the Board limited its involvement in this area to withholding certain statutory protections from unions which engaged in discriminatory activities. Thus, a union that failed in its duty to represent all of its members has had its certification rescinded by the Board.[22] Further, a discriminatory pro-

14. It is the author's contention that the enactment of Title VII expressed the will of Congress that the elimination of discrimination in employment should be vested solely in the agency expressly established for that purpose—the Equal Employment Opportunity Commission [hereinafter referred to as EEOC].

15. 323 U.S. 192 (1944).

16. *Id.* at 203.

17. 45 U.S.C. §§ 151-88 (1970).

18. 323 U.S. at 203.

19. *Id.*

20. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

21. 29 U.S.C. § 159 (1970). This section is commonly referred to as section 9. Section 9(a) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

22. Pittsburgh Plate Glass Co., 111 N.L.R.B. 1210 (1955); Hughes Tool Co., 104 N.L.R.B. 318 (1953); Larus & Bros. Co., 62 N.L.R.B. 1075 (1945). *See* Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 Colum. L. Rev. 563, 595 (1962) [here-

vision in a contract was generally held to be no bar to a new election under the Act's contract-bar rules.[23] These statutory privileges were withheld on the theory that to extend federal protection in such instances would violate the fourteenth amendment of the Constitution.[24]

Until this past decade an employer's racially discriminatory conduct was relatively safe from Board processes. It is well settled that an employer has no duty, of constitutional origin, that corresponds with the duty of fair representation imposed on unions by the courts.[25] Therefore, since there was no statutory prohibition against racial discrimination by an employer until 1964,[26] it was generally held that victims of invidious and discriminatory practices had no direct remedy against an employer. Nevertheless, discriminatory acts by an employer have been collaterally involved as interferences with employees' section 7 rights under the Act in several isolated cases.[27] The Board has also set aside a representation election won by an employer who appealed to the racial prejudices of its workers in pre-election propaganda.[28] In each of these cases, however, racial discrimination was considered only in a collateral sense and was not held to be a direct violation of the Act.

III. Invidious Discrimination as an Unfair Labor Practice: The *Miranda* Doctrine

The Board's 1962 decision in *Miranda Fuel Company*,[29] ushered in a new concept of Board involvement in matters dealing with discrimination by both unions and employers on account of race, sex, and national origin. Subsequent cases[30] decided by both the Board and the courts have established a rather dubious potential for the Act as a bona fide civil rights statute.

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inafter cited as Sovern]; Note, *Applicability of Unfair Labor Practices to Racial Discrimination: Enforcement Under Civil Rights Act*, 50 Cornell L. Rev. 321, 323-24 (1965).

23. Pioneer Bus Co., 140 N.L.R.B. 54 (1962).

24. *Id.* at 55 *See also* Leiken, *supra* note 7, at 838-42 for a discussion on the Constitutional basis of the duty of fair representation doctrine.

25. Boyce, *Racial Discrimination and the National Labor Relations Act*, 65 Nw. U.L. Rev. 232, 253 (1970); Leiken, *supra* note 7, at 863.

26. Title VII became effective July 1, 1964.

27. Richardson v. Texas & N.O.R.R., 242 F.2d 230 (5th Cir. 1957); Ozan Lumber, 42 N.L.R.B. 1073 (1942); American Cyanamid, 37 N.L.R.B. 578 (1942), *as amended*, 39 N.L.R.B. 1129 (1942).

28. Allen Morrison Sign Co., 138 N.L.R.B. 73 (1962); Sewell Mfg. Co., 138 N.L.R.B. 66, (1962). Racial appeals by unions have also invalidated elections. *See* NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675 (4th Cir. 1966).

29. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172, (2d Cir. 1963).

30. *See* cases cited note 8 *supra*.

Miranda ironically enough, did not involve an issue of discrimination because of race or sex, but the principles established therein have been applied to such types of discrimination in subsequent cases.[31] *Miranda* involved the case of a white truck driver who was placed at the bottom of a seniority list by his employer at the request of the union pursuant to the collective bargaining agreement which vested in the union the administration of its seniority provisions.[32] In a three to two decision, the Board incorporated the equal protection-duty of fair representation concept[33] implicit in section 9(a) of the Act into section 7, and declared that a union that engages in unfair or irrelevant treatment of its members, and an employer who participates with the union in such activity, have committed unfair labor practices under section 8 of the Act.[34] Thus, for the first time, discriminatory conduct against members-employees based on irrelevant considerations, race, sex, or otherwise, was found to be both union and employer unfair labor practices.

The basis of the Board's rationale in its *Miranda* decision was its theory that section 7 of the Act gives "employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment".[35] In effect, the Board simply read into section 7 the union's section 9 duty to represent all its members fairly and indiscriminately. Once this principle was established the Board's finding of the commission of an unfair labor practice by the union was largely a mechanical application of the facts to 8(b)(1)(A) which proscribes a labor organization from restraining or coercing employees in the exercise of their section 7 rights.[36]

The Board in *Miranda* also found the union in violation of 8(b)(2)[37] on the theory that it caused an employer to adversely affect the employment status of an employee and that such an effect was the foreseeable result of its conduct. The Board held that:

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31. *Id.*
32. 140 N.L.R.B. at 181.
33. *Id.* at 185.
34. *Id.* at 186.
35. *Id.* at 185.
36. 29 U.S.C. § 158(b)(1)(A) (1970). Section 158 is commonly referred to as section 8. Section 8(b)(1)(A) provides:
It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . .
37. *Id.* § 158(b)(2) (1970). Section 8(b)(2) provides:
It shall be an unfair labor practice for a labor organization or its agents. . . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . .

> A statutory bargaining representative and an employer . . . violate section 8(b)(2) and 8(a)(3) when for arbitrary or irrelevant reasons or upon the basis of unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.[38]

Thus, even where an employer's conduct would not have been in violation of 8(a)(3)[39] had it acted alone, where a union causes an employer to adversely affect an employee's employment status for arbitrary or irrelevant reasons, it has violated 8(b)(2) which proscribes a labor organization from causing an employer to violate 8(a)(3). In other words, when a union causes an employer to violate *its* (the union's) duty of fair representation implicit in section 7, both are held to have committed unfair labor practices. This circuitous bit of reasoning to find a union unfair labor practice seems a bit strained.

As indicated in the foregoing discussion, the Board in *Miranda* also found the employer in violation of both 8(a)(1) and (3) of the Act.[40] The Board's decision was based on a theory of derivative liability and the employer's commission of an unfair labor practice was completely dependent upon the culpability of the union.[41] Thus, the employer was found to have violated 8(a)(1)[42] when it participated with the union in reducing the employee's seniority status,[43] an act already found to have been a union unfair labor practice under 8(b)(1)(A). And, as noted above, the employer was held to have violated 8(a)(3) because the union caused it to affect the seniority status of an employee for arbitrary or irrelevant reasons,[44] an act in violation of the union's duty of fair representation under section 7, but not independently of union conduct, an employer unfair labor practice. The significance of this aspect of the *Miranda* decision is that an employer, despite its lack of a statutory duty not to discriminate against employees for arbitrary, irrelevant, or invidious reasons unrelated to their union

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38. 140 N.L.R.B. at 186.
39. 29 U.S.C. § 158(a)(3) (1970). Section 8(a)(3) provides:
It shall be an unfair labor practice for an employer. . . . (3) by 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 . . . .
40. 140 N.L.R.B. at 190.
41. *Id.* at 188.
42. 29 U.S.C. § 158(a)(1) (1970). Section 8(a)(1) provides:
It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .
43. 140 N.L.R.B. at 185-86.
44. *Id.* at 188.

or concerted activities, was brought under section 8 of the Act and subject to joint liability for a breach of union duty.

The Board's *Miranda* decision contained a vigorous dissent[45] by Members Fanning and McCulloch and was denied enforcement by the Court of Appeals for the Second Circuit.[46] The dissenting members of the Board and Judge Medina, who wrote the majority opinion for the Second Circuit, both expressly rejected the majority's section 7–8(b)(1)(A) theory.[47]

The *Miranda* theory by its very nature lends itself to application in cases of discrimination based on race, sex, or other clearly arbitrary and irrelevant considerations and has been applied in subsequent cases[48] dealing with discrimination of these types. Although the theory has not been universally accepted by courts[49] that have had the opportunity to rule on its validity, it is Board law and must be contended with until expressly overruled either in each of the circuits or by the Supreme Court.

One final point on *Miranda* should be stated here because of its applicability to the material that follows, and that is simply that regardless of the status of the *Miranda* theory in terms of its validity, it clearly stands only for the proposition that (1) a union commits an unfair labor practice when it treats its members in an arbitrary or irrelevant manner or classifies them based on unfair considerations, and (2) an employer commits an unfair labor practice only when it acquiesces to a request of a union and thus participates with the union in a discriminatory act. The employer's liability is therefore derivative of and dependent upon the union's conduct. Nothing in *Miranda* is authority for the proposition that an employer who engages in job discrimination without union participation has committed an independent employer unfair labor practice as proscribed by section 8(a) of the Act.

IV. Racial Discrimination as an Employer Unfair Labor Practice: The *Packinghouse* Approach

The 1969 decision by the Court of Appeals for the District of Columbia in *Packinghouse Workers v. NLRB*[50] extended the *Miranda*

45. *Id.* at 191.
46. 326 F.2d 172 (2d Cir. 1963).
47. *Id.* at 176-77.
48. *See* cases cited note 8 *supra*. *See also* Note, *Racially Discriminatory Union Conduct: Constitutional Commands For the NLRB*, 56 Iowa L. Rev. 1044, 1049-53 (1971).
49. 326 F.2d 172 (2d Cir. 1963).
50. 416 F.2d 1126 (D.C. Cir. 1969).

theory to an employer who, independently of a union, engages in racially discriminatory conduct. The case came to the court on appeal from a Board decision that the employer had violated 8(a)(5)[51] of the Act by refusing to bargain with the union about allegedly racially discriminatory practices. The Court of Appeals for the District of Columbia upheld the Board on its 8(a)(5) finding, but remanded the case to the Board to determine whether the employer's policies or practices invidiously discriminated against its employees on account of their race.[52] In remanding the case to the Board, the court concluded that such policies or practices violate 8(a)(1) of the Act because they have the effect of interfering with an employee's section 7 rights by inhibiting its "victims from asserting themselves against their employer to improve their lot."[53] In this respect the court said:

> We find that an employer's invidious discrimination on account of race or national origin has such an effect. This effect is twofold: (1) racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*[54]

Thus, for the first time an arbitrary or discriminatory practice by an employer, not directly related to an employee's union or concerted activities, was held to be an unfair labor practice.[55] Interesting enough, the court did not hold that all unjustified discrimination is by itself a violation of the Act. Rather, it based its decision on the fact that there existed a combination of an unjustified or illegal racist practice coupled with an induced docility in the group discriminated against.[56] Thus, if the court is correct, it would seem that discrimination of the type that resulted in the *Miranda* case[57] may not be an 8(a)(1) violation

51. 29 U.S.C. § 158(a)(5) (1970). Section 8(a)(5) provides:
It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . .
52. 416 F.2d at 1130.
53. *Id.* at 1135.
54. *Id.*
55. *Id.* at 1138.
56. *Id.* at 1135.
57. 326 F.2d 172 (2d Cir. 1963) (invidious discrimination in the administration of the seniority provisions of the agreement). See text corresponding to notes 29-36.

where the employer acts alone, but that unjustified or illegal discrimination on account of race would always be an unfair labor practice since the Court of Appeals for the District of Columbia expressly held that racial discrimination has the effect of creating docility in the group discriminated against.[58] The court's decision seems to indicate that docility must be proven except where the discrimination alleged is based on race or national origin.[59]

On remand the Board found that the evidence did not support a finding that the employer had maintained policies and practices of invidious racial discrimination and, therefore, it held there was no violation of 8(a)(1).[60] Rejecting the trial examiner's recommendations, the Board held that the General Counsel did not meet its burden of establishing the existence of unlawful racial discrimination.[61]

One interesting aspect of *Packinghouse* is that the underlying theory was enunciated by the court in the context of a case which did not put the issue of an 8(a)(1) violation squarely before it.[62] Furthermore, the recent decision in *Jubilee Manufacturing Co.*,[63] makes it apparent that the Board has elected not to adopt as Board law the theory on which the decision was based.

V. The Current Approach: *Jubilee Manufacturing Co.*

Jubilee is a case recently decided by the NLRB which involved the application of the legal theories enunciated in *Miranda* and *Packinghouse* to a situation involving alleged sex discrimination by an employer.[64] The questions presented to the Board by that case was whether sex discrimination by an employer constituted a violation of 8(a)(1), (3), and (5) of the Act.[65]

Jubilee Manufacturing Company and the United Steelworkers were engaged in the negotiation of a new contract and had bargained to impasse over the union's proposal to eliminate provisions in the collective bargaining agreement which enabled the employer to grant wage increases on a unilateral basis. The contract between the parties

58. 416 F.2d at 1135-36.
59. *Id.* at 1135.
60. Farmer's Cooperative Compress, 78 L.R.R.M. 1465, 1472 (1971).
61. *Id.* at 1468-69.
62. 416 F.2d at 1134 n.12. The Board's *Packinghouse* decision was appealed to the court on an 8(a)(5) issue. *See* note 52 *supra,* and related textual material.
63. 82 L.R.R.M. 1482 (1973).
64. *Id.* at 1484.
65. *Id.*

also provided for a job classification and bidding system. Although more than two-thirds of Jubilee's bargaining unit employees were females, they were generally classified in the lower paying jobs, or even where classified in the same jobs as male employees, received a lower rate of pay. In prosecuting the case as a violation of section 8(a)(1) and (3) of the Act the General Counsel had alleged that a combination of the employer's job classification and bidding systems and its contractual right to unilaterally grant wage increases had the *effect* of enabling the employer to pay wage rates on a sexually discriminatory basis.[66] The basis of the 8(a)(5) complaint was that the employer had bargained to a point of impasse on its insistence on retaining this allegedly illegal contractual provision in the collective bargaining agreement.[67]

Expressing its disagreement with the decision of the Court of Appeals for the District of Columbia in *Packinghouse,* the Board rejected the notion that discrimination based on race, color, religion, sex, or national origin was a per se violation of 8(a)(1) and (3) of the Act and dismissed the complaint.[68] Holding that such discrimination is not "inherently destructive" of employee section 7 rights, the Board majority decided that actual, as opposed to speculative, evidence is necessary to establish the required relationship between an employer's allegedly discriminatory conduct and the interference with protected employee rights.[69] The Board also dismissed the 8(a)(5) charge on the basis that the evidence was insufficient to establish that the employer had refused to bargain about alleged sex discrimination.[70]

The theory on which the 8(a)(1) issue was presented to the Board was simply an extension of the *Packinghouse* decision of the Court of Appeals for the District of Columbia to a sex discrimination case. Expressly rejecting the legal conclusion of that court,[71] the Board reasoned that it is not an inevitable result that employer discrimination will have the effect of setting one group against another or otherwise inhibit minority employees from asserting their rights against the employer-perpetrator of the discrimination.[72] Given the fact of increased militancy of minority groups today, the Board reasoned that

66. *Id.* at 1486-87 (emphasis added).
67. *Id.* at 1484.
68. *Id.*
69. *Id.*
70. *Id.* at 1485.
71. *Id.* at 1484.
72. *Id.*

discrimination may, in fact, have just the opposite effect and cause members of minority groups to coalesce and work together in concerted activity against their employer's discriminatory practices.[73]

This aspect of the *Jubilee* decision will undoubtedly be appealed by the United Steelworkers, particularly since section 10(f)[74] of the Act permits an aggrieved party to seek review of a Board decision by the same court that decided *Packinghouse* and enunciated the law which the Board has now rejected. On appeal, the Court of Appeals for the District of Columbia would have to overrule *Packinghouse* to affirm *Jubilee* and since there has been no significant change in the composition of that court nor any significant intervening developments in the law that result seems unlikely. Consequently, because of the novelty and importance of the question a Supreme Court test is a distinct possibility.

The court could, of course, affirm in *Jubilee* without overruling *Packinghouse* simply by distinguishing sex discrimination from that based on race. Arguably, the court could decide that sex discrimination is not that type of invidious discrimination that automatically creates the apathy or docility in the group discriminated against that it had found inherent in a racial discrimination situation.[75] There is no question that sex discrimination is illegal,[76] but the basis of the unfair labor practice in the court's *Packinghouse* decision was the conjunction of the unreasonable and illegal discrimination with the induced docility in the discriminated group.[77] In other words, it is a combination of the two—an illegal act coupled with induced docility —that makes out the violation of the Act. Distinguished in this manner, *Packinghouse* and *Jubilee* can be reconciled.

Although this approach may be well-founded in terms of traditional attitudes of society which have historically attributed to members of the Negro race a minority status, it is hardly consistent with the modern tendency to attribute to females a similar minority status. Nor is it con-

73. *Id.*
74. 29 U.S.C. § 160(f) (1970). Section 160 is commonly known as section 10. Section 10(f) provides:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

75. 416 F.2d at 1135.
76. 42 U.S.C. § 2000e-2 (1970).
77. 416 F.2d at 1135.

sistent with the modern trend of legislation,[78] executive announcement,[79] and constitutional amendment[80] which represent a recognition by the federal government of the female as a minority entitled to protections similar to that extended other minority groups. However, these conditions look toward the legality of the discrimination, which is only half of the *Packinghouse* requirement. The other critical element of the *Packinghouse* decision is based on the theory that racial discrimination creates a docility among minority workers which causes them to forego the pursuance of concerted activities guaranteed by section 7. There is a firm basis for this reasoning because there is sufficient historical evidence in society of a suppression of the Negro race so as to allow the court to take judicial note of such facts.[81] The same reasoning is not applicable to discrimination based on sex because the traditional social concepts of race discrimination are not available to the court. Sex discrimination may be proven by statistical data under the applicable legal standards to be an illegal act,[82] but the concept is so new to society that it cannot be said that sex discrimination, per se, creates such a feeling of apathy and docility within a female group that it would have the effect of inhibiting such employees from engaging in concerted activities guaranteed by section 7. Thus, the court could rationally hold that although, as found by the Board in *Jubilee,* proof of a relationship between the alleged discriminatory conduct and the intereference with employee rights is required in a sex discrimination case,[83] such specific proof is not required to establish an 8(a)(1) violation grounded on racial discrimination.

The basis of the 8(a)(3) complaint in *Jubilee* was that the employer's conduct had demonstrated to employees belonging to the union the complete ineffectiveness of the bargaining representative thereby discouraging them from engaging in union activity.[84] In effect, the Board was being urged to establish an independent employer unfair labor practice for the employer whose maintenance of a policy and practice

78. Equal Pay Act, 29 U.S.C. § 206(d)(1) (1963); 42 U.S.C. § 2000e-2 (1970).
79. Exec. Order No. 11246, 3 C.F.R. 339 (Comp. 1964-65); United States Dep't. of Labor Rev. Order No. 4, 41 C.F.R. 60 (1971).
80. U.S. CONST. amend. (proposed), adopted by Congress March 22, 1972, and submitted to legislatures of the states for ratification under U.S. CONST. art. v.
81. 416 F.2d at 1136-37.
82. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970). Although these are race discrimination cases, the principles are equally applicable to cases involving alleged sex discrimination.
83. 82 L.R.R.M. at 1484.
84. *Id.*

of discrimination in the face of resistance by the union to eliminate such practices pursuant to its obligation of fair representation of its members, demonstrated to unit employees the union's ineffectiveness in dealing with its statutory obligations.[85] Implicit in this theory was the suggestion that the employer's acts would have the foreseeable consequences of discouraging employee support of the union and thus have the effect of discouraging membership in the union in violation of 8(a)(3).[86] In rejecting this theory the Board said:

> Nor do we find merit in the contention that a policy and practice of invidious discrimination in the face of a union's ineffective efforts to eliminate such discrimination has the 'foreseeable consequence' of discouraging union membership within the meaning of Section 8(a)(3) of the Act, and discouraging the exercise of Section 7 rights within the meaning of Section 8(a)(1) of the Act. Ineffective efforts in other areas, as for example when a union seeks unsuccessfully to gain a wage increase, may well result in the union's losing face with the employees it represents. Yet, to say that an employer's refusal to give a wage increase violates Section 8(a)(3) or (1) because of this loss of face seems to us beyond the reasonable intent of the Statute.[87]

The decision of the Board on the 8(a)(3) issue is sound as the General Counsel's theory on this point was based on neither logic nor precedent. Never before has the Board held that an employer's discriminatory conduct alone, unrelated to union or concerted activities, is proscribed by 8(a)(3). The premise of the General Counsel's position would appear to have been grounded on *Miranda* principles but clearly represents a definite extension thereof. In *Miranda,* the court held that arbitrary or irrelevant classifications of employees tends to discourage union membership and found that participation by the employer in the union's unfair labor practice was an employer unfair labor practice as well.[88] In *Jubilee,* however, it was argued that the Board should find an 8(a)(3) violation without union participation,[89] a concept which derives no authority from *Miranda* nor any other known legal precedent. Furthermore, since the *Miranda* theory is of dubious validity itself, particularly when considered in light of the

85. *Id.*
86. *Id.*
87. *Id.*
88. 140 N.L.R.B. at 185-86.
89. BNA DAILY LAB. REP. No. 85, at A-16 (1972).

Second Circuit's refusal to enforce it,[90] it would appear that the Board was correct and this position, if advanced on appeal, will not stand the test of court scrutiny.

Nor was the General Counsel's argument to the Board based on sound labor relations logic. As pointed out by the Board, it is apparent that the same effect—that of demonstrating to unit members the ineffectiveness of the union—would occur any time that an employer refuses to acquiesce to a union demand.[91] There is, of course, no reason why the refusal to concede to a union demand in a matter involving discrimination, absent anti-union motives, would discourage union membership any more than would its refusal to grant a wage increase or other benefit demanded by the union. Clearly, an employer's denial of the latter benefit would not violate 8(a)(3) even though it may also demonstrate the ineffectiveness of the union and thus discourage union membership. It is just as clear that neither should the employer's refusal to acquiesce to a union's demand on the subject matter of discrimination violate 8(a)(3) of the Act.[92]

Jubilee was also charged with a violation of 8(a)(5) on the theory that it had bargained to impasse on a contract provision which was the tool by which it could operate in a sexually discriminatory manner, thereby attempting to force the union to become a party to an agreement which violated its duty of fair representation.[93] It was also contended that the employer, by insisting upon the maintenance of the contractual provision by which it had the authority to perpetuate sex discrimination, had bargained to impasse upon a subject which is illegal under federal law and is therefore an illegal subject of bargaining.[94] According to the General Counsel, there was sufficient statistical evidence to support a finding of sex discrimination according to Title VII standards and the employer had not come forward to justify its invidious practices.[95] In short, it was argued that the Board should apply the standards of other federal laws—in this case Title VII[96]—to make the initial finding of illegality, apply that finding to the facts of this case, and on the principle of well-settled law that a party is not required

90. 326 F.2d 172 (2d Cir. 1963).
91. 82 L.R.R.M. at 1484.
92. *Id.* See quoted portion of Board's decision in textual material related to note 87 *supra*.
93. BNA DAILY LAB. REP. No. 85, at A-16 (1972).
94. *Id.* at A-17.
95. *Id.* at A-16 to -17.
96. The same argument could also be made with respect to the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

to bargain on an illegal subject, conclude that the employer had refused to bargain in good faith in violation of 8(a)(5) of the Act.

The argument advanced by the General Counsel represents a rather novel approach to a refusal to bargain question. The Board neatly sidestepped the issue by concluding that there was insufficient evidence to establish that this employer had refused to bargain over alleged sex discrimination, and further, that it was the union's conduct that had prevented meaningful bargaining on that subject.[97] Since the Board's conclusion on this point was a determination of fact and therefore will not likely be disturbed on appeal,[98] the question whether the standards of other federal laws are available to the Board to determine the legality of a bargaining subject has been left open by the Board.[99]

The Board's decision in *Jubilee* has significantly limited its anti-discrimination potential and has reversed the trend of those decisions that had established the Act as a vehicle for eliminating discrimination in employment.[100] Given the state of the law's development and the availability of the *Packinghouse* court as a forum for appeal, *Jubilee* in all probability will be reversed. Should this occur the Supreme Court may have to decide the extent to which the Board has jurisdiction over conduct that has been expressly proscribed by Title VII.

VI. The Jurisdiction of the Board

In *Packinghouse,* the Court of Appeals for the District of Columbia citing the legislative history of the Act, expressly ruled that Title VII did not deprive the Board of jurisdiction in racial discrimination cases and held that the Board has concurrent jurisdiction with the Equal Employment Opportunity Commission (EEOC).[101] The legislative history is not as clear on that point as the court would suggest. A close analy-

97. 82 L.R.R.M. at 1485.

98. 29 U.S.C. § 160(e) (1970). Section 10(e) provides:
The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

99. It is clear that an employer who bargains to impasse on an illegal subject of bargaining commits an unfair labor practice under this Act. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). It is equally clear that a proposal which on its face discriminates against employees because of their race or sex is an illegal subject of bargaining. Hughes Tool Co., 147 N.L.R.B. 1573 (1964). It is not so clear, however, to what extent a contractual provision, non-discriminatory on its face but discriminatory either in effect or application, is an illegal clause within the scope of the bargaining duty. The answer to that question may depend upon whether the standards of Title VII are available to determine the legality of the conduct.

100. 82 L.R.R.M. 1482 (1973).

101. 416 F.2d at 1133 n.11.

sis of the applicable history would seem to indicate that Congress did not intend that Title VII should preempt the Board from jurisdiction over any subject matter that it exercised at the time, but there is nothing in the legislative history to indicate that Congress foresaw an expansion of the Board's civil rights activity into new areas.[102] Therefore, since the scope of the Board involvement in discrimination cases at the time Title VII was being debated in Congress was primarily limited to cases involving a union's breach of its section 9 duty of fair representation,[103] it is more logical to conclude that Congress intended that the Board and the EEOC should exercise concurrent jurisdiction only in the limited area which the Board had already extended its jurisdiction.[104] This is an especially forceful argument when considered in light of the fact that Congress has rejected amendments to the Act which would expressly make racial discrimination an unfair labor practice for both employers and unions.[105]

The conclusion that the passage of Title VII precludes the Board from asserting jurisdiction over matters expressly prohibited by that statute becomes even more apparent when its statutory language is compared with that of the Act. Section 703(a)[106] of Title VII, which deals with unlawful employment practices for an employer, and section 703(c),[107] which imposes corresponding obligations on labor

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102. Note, *Allocating Jurisdiction Over Racial Issues Between the EEOC and NLRB: A Proposal,* 54 CORNELL L. REV. 943, 954 n.65 (1969) [hereinafter cited as *Racial Issues*].

103. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Ford Motor Co. v Hoffman, 345 U.S. 330 (1953); Wall Corp. v. NLRB, 323 U.S. 248 (1944).

104. *See Racial Issues,* note 102 *supra.* A Department of Justice letter to Senator Joseph S. Clark, presented during the Congressional debates, supports this view. The letter stated in part:

> . . . [I]f a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction . . . Title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. . . .

110 CONG. REC. 7207 (1964).

105. *See Racial Issues,* note 102 *supra.*

106. 42 U.S.C. § 2000e-2 (1970) provides:

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

107. *Id.* § 2000e-4 provides:

> (c) It shall be an unlawful employment practice for a labor organization . . . (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, seg-

unions, are both couched in terms very similar to section 8 language of the Act.[108] This is particularly the case with section 703(c)(1) and (3) which clearly expands on the prohibitions of sections 8 (b)(1)(A)[109] and 8(b)(2)[110] by expressly referring to discrimination on account of race, color, religion, sex or national origin. The conclusion is inescapable that Congress did not believe that discrimination on the arbitrary grounds enumerated was already proscribed by the Act and within the jurisdiction of the Board.

It is also significant that Congress did not grant enforcement powers to either the EEOC or the Board when it enacted Title VII.[111] Although one may argue that Congress did not need to grant the Board power to enforce Title VII since it already had jurisdiction over similar matters by virtue of the Act, the more logical conclusion is that Congress, mindful of the national policy of a uniform system of labor regulation as enunciated by the Supreme Court in *Building Trades Council v. Garmon*,[112] intended to maintain separate the invidious types of discrimination prohibited by Title VII from those related to union or concerted activity which were already proscribed by the Act. In *Garmon* the Court established the "preemption doctrine" for the Act. It there held that state and federal courts must defer to the competence of the Board in any matters which are arguably subject to sections 7 and 8 of the Act.[113] Congress was certainly aware of the preemption doctrine when it decided that state remedies must be exhausted before any action can be brought under Title VII,[114] and further, that federal district courts would have original jurisdiction of actions brought under that statute.[115] It would hardly be consistent with *Garmon* for Congress to have enacted a legislative scheme that would create con-

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regate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

108. Note, *Labor Law: Applicability of Unfair Labor Practices to Racial Discrimination: Enforcement Under Civil Rights Act—Independent Metal Workers*, 50 CORNELL L. REV. 321, 327-28 (1965).

109. 29 U.S.C. § 158(b)(1)(A) (1970).

110. *Id.* § 158(b)(2).

111. 42 U.S.C. § 2000e-4(F) (1970). Congress may have believed that the Board did not have the expertise to handle this type of discrimination complaint. *See* note 108 *supra*.

112. 359 U.S. 236 (1959).

113. *Id.* at 245.

114. 42 U.S.C. § 2000e-5(b) (1970).

115. *Id.* § 2000e-5(f).

current jurisdiction by the courts and the Board over matters already prohibited by the Act.[116] Consequently, it must have believed that invidious discrimination of the type proscribed by Title VII was not arguably within the protection of that Act. Again, the conclusion is inescapable that Congress, in providing for court enforcement of Title VII, was of the opinion that the Board did not possess jurisdiction over racial and other similar types of prohibited discrimination.

The comparative language of these two statutes, the legislative history of Title VII and consistency with the national labor policy, all lead to the conclusion that Title VII should preempt the Board of jurisdiction in race discrimination cases, especially in those that are based on *Miranda* and *Packinghouse* theories. Some writers, however have argued for an allocation of jurisdiction between the EEOC and Board which would, in effect, give the EEOC primary jurisdiction over all racial discrimination matters and the Board overlapping jurisdiction with the EEOC only in racial issues connected with some other independent exercise of its jurisdiction.[117] If the Board is to have jurisdiction at all this would appear to be the most satisfactory accommodation consistent with the purposes of the two statutes. Regardless of allocation, however, it is clear that the cases, even prior to *Jubilee,* expanded Board jurisdiction into racial discrimination matters only insofar as patterns or practices[118] of invidious discrimination are apparent, and the courts have not, as yet, considered a single act of discrimination an employer unfair labor practice. Consequently, since the reasoning of *Miranda* and *Packinghouse* is not conducive to an examination of isolated discriminatory acts, it is likely that the EEOC under Title VII will retain exclusive jurisdiction in this area even if *Jubilee* is reversed and the Board is given jurisdiction over racial or other prohibited forms of discrimination by an employer.

VII. The Application of Title VII Standards to Unfair Labor Practices Under the Act

It was previously noted that the Board's *Jubilee* decision will likely be reversed by the Court of Appeals for the District of Columbia. As-

116. For an opposing view of the effect of the preemption doctrine on the jurisdiction of the Board in discrimination cases that could be brought under Titie VII, *see* Sovern, *supra* note 22, at 595 n.610.

117. *See Racial Issues, supra* note 102, at 951.

118. 416 F.2d at 1130. *See also* Leiken, *supra* note 7, at 866.

suming that event occurs and, further, that the Board accepts the conclusion of that court as Board law and asserts jurisdiction over matters dealing with invidious discrimination, it is then faced with the problem of adopting a standard by which it can determine whether discrimination exists. This, of course, raises the question as to how the civil rights potential of the Act can square with Title VII. Just as was the case in *Packinghouse,* where the Board on remand found that the employer did not engage in invidious discrimination, the initial question that the Board should ordinarily consider in any case based on such discrimination before it can address itself to the unfair labor practice issues, is whether the employer did, in fact, discriminate against its employees for one of the published reasons.

The position of the General Counsel in *Jubilee* was that the Board should adopt the standards of other federal laws[119] to decide the issue of sex discrimination, and then apply Board law to the 8(a)(1), (3), and (5) unfair labor practice issues. Under Title VII, an employment practice is unlawful if it adversely affects a disproportionate number of persons in a protected class regardless of the employer's motive or intent.[120] The Supreme Court has held that Title VII is directed at the consequences of employment practices and that good intent, or absence of discriminatory intent, does not redeem employment practices which operate to discriminate against minorities.[121] In other words, an employment practice, lawful on its face but discriminatory in effect, violates Title VII regardless of the employer's motivation unless the employer can carry the burden of proving a legitimate business necessity which outweighs the discriminatory effects of the practice.[122] Therefore, any practice that can be statistically[123] shown to have an adverse affect on a protected group, presumptively violates Title VII, and, if the General Counsel's *Jubilee* theories prevail, is an unfair labor practice as well.

The Board expressly rejected this theory in the context of its 8(a)(1) decision in *Packinghouse.* In rejecting the trial examiner's conclusion that the statistical evidence established the fact of racial discrimina-

119. *See* note 89 *supra.*
120. Griggs v. Duke Power Co., 401 U.S. 849 (1971); *see* Note, *Title VII of the Civil Rights Act of 1964—Educational and Testing Requirements Invalid Unless Job Related,* 10 DUQ. L. REV. 270-72 (1971); Note, *Arrest Records and Employment Discrimination, Gregory v. Litton Industries, Inc.,* 32 U. PITT. L. REV. 254-56 (1971).
121 401 U.S. at 432.
122. *Id.*
123. *Id.* at 430-32.

tion, the majority there held that "numerical possibilities" do not establish that the employer "deliberately discriminated in the assignment or distribution of these jobs on the basis of race or national origin rather than on the basis of qualifications".[124] *Packinghouse* was not subsequently appealed on the basis that the Board applied an improper legal standard in deciding the case, and there is absolutely no judicial authority for the proposition that Title VII standards are applicable to an 8(a)(1) issue grounded on discrimination of the type prohibited by that Act. For the same reasons discussed in the section of this comment dealing with Congressional intent in enacting two statutes to deal with two distinct problems,[125] the adoption of this theory is a rather remote prospect. Therefore, since motivation and intent have historically been considered of greater relevance in 8(a)(3) cases than in 8(a)(1) cases,[126] it is even more improbable that Title VII standards will be adopted to decide 8(a)(3) cases involving racial or sexual discrimination issues. Consequently, an identical issue involving a question as to the *existence of discrimination* which is decided concurrently by the Board and EEOC, may well end up with results that could create inconsistent means of conduct for an employer.

The foregoing analysis deals primarily with the legal standards applicable to an action brought concurrently under the Act and Title VII to determine the fact of racial discrimination. Motivation and intent are also of primary importance in determining whether an 8(a)(3) unfair labor practice has been committed even after the factual determination has been made.[127]

The essential elements of an 8(a)(3) unfair labor practice are (1) proof that an employer's conduct favored one group or groups of employees over others in a manner which tended to encourage or discourage their membership in a union, and (2) proof that the employer's conduct was motivated by an intent to affect union membership.[128] Thus, in a race discrimination case brought under the Act motive is of two-fold importance. In order to find discrimination under the first element, it must be shown that the employer intended to favor one group of employees over another because of their race. Assuming that

124. 78 L.R.R.M. at 1472.
125. *See* textual material related to notes 108-18 *supra*.
126. Janofsky, *New Concepts in Interference and Discrimination under the NLRA: The Legacy of American Shipbuilding and Great Dane Trailers*, 70 COLUM. L. REV. 81, 94-96 (1970) [hereinafter cited as Janofsky].
127. *Id.*
128. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32 (1967).

the first element is proven, then it must be shown that the employer's discriminatory conduct was motivated by an intent to encourage or discourage union membership. As distinguished from that approach a violation of section 703 of Title VII occurs when the effect of an employer's act is to favor one group of employees over a protected group of employees without regard to the motivation of the employer.[129] Stated concisely, in an 8(a)(3) action the burden of proof is on the Board,[130] while under Title VII the burden rests with the employer.[131]

Although the differences in legal standards of a Title VII action and one under section 8 of the Act are apparent on their face, when applied to a racial or sexual discrimination issue and considered in light of the present status of the law in regard to motivation and burden of proof in 8(a)(3) cases as hereinafter discussed, they may represent differences without a significant distinction.

In *NLRB v. Great Dane Trailers, Inc.*,[132] the Supreme Court analyzed the status of the law relative to motive and burden of proof in 8(a)(3) cases. Citing its decisions in *NLRB v. Erie Resistor Corp.*,[133] *NLRB v. Brown*,[134] and *NLRB v. American Ship Building Co.*,[135] the Court noted that it had distinguished between employer conduct that is "inherently destructive"[136] of employee rights and that which has only a "comparatively slight"[137] effect on employee rights. In the former, the Court held that the conduct bears "its own indicia of intent" and is proscribed without proof of an underlying motive[138] despite evidence of business justification by the employer.[139] In the latter, however, proof of a substantial and legitimate business end by the employer overcomes employer conduct which has a comparatively slight effect on employee rights and improper motivation must be affirmatively proven.[140] Noting these decisions the Court held in *Great Dane* that once the Board has proven that an employer has engaged in discriminatory conduct which has *some* adverse effect on employee

129. *See* Griggs v. Duke Power Co., 401 U.S. 849 (1971).
130. *See* Janofsky, *supra* note 126, at 95.
131. 401 U.S. at 849.
132. 388 U.S. 26 (1967).
133. 373 U.S. 221 (1963).
134. 380 U.S. 278 (1965).
135. *Id.* at 300.
136. *Id.* at 287, 311.
137. *Id.* at 289, 311-13.
138. 373 U.S. at 228, 231.
139. *Id.* at 229.
140. 380 U.S. at 289, 311-13.

rights, the burden of proof shifts to the employer to show that his conduct was lawfully motivated and served substantial business ends.[141]

Applying these principles to an 8(a)(3) charge alleging discrimination on account of race, it would appear that any evidence of racial discrimination would be enough to shift the burden of proof to the employer to show business justification for its conduct.[142] The Supreme Court has held that racial discrimination can never be a relevant consideration.[143] Therefore, it is reasonable to conclude that such discriminatory conduct by an employer is of the type that is inherently destructive of employee rights.[144] Since racial discrimination is inherently destructive of employee rights the motivation for the conduct is presumed unlawful and the employer thus has the burden of overcoming that presumption with evidence of substantial business justification such as will outweigh the discriminatory effect of the conduct. Unlawful motive thus being presumed the employer's conduct is therefore subject to a burden of proof which in all important respects equates that of a Title VII action. Under this rationale it matters little whether the action was brought under the Act or under Title VII. In either case, the burden is on the employer to offer evidence of a substantial and legitimate business need that would outweigh the discriminatory effect of its conduct.

Consideration of the question in terms of the 8(a)(5) issue presents an altogether different matter. There the issue is not so much as to whether the employer was motivated by union animus as it is whether the matter on which it has bargained to impasse is an illegal subject of bargaining. Here the ultimate question is one of legality rather than one of intent, even though intent may be an important element in determining the legality of the conduct.

Most of the cases that have dealt with illegal subjects of bargaining have involved matters which were illegal[145] under the Act or else were inconsistent with the purposes of the Act.[146] In *United Mine Workers*

141. 388 U.S. at 34.
142. *Id.*
143. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).
144. The Board in *Jubilee* decided that sex discrimination was not inherently destructive of employee rights. 82 L.R.R.M. at 1484.
145. NLRB v. National Maritime Union, 175 F.2d 686 (2d Cir. 1949), *cert. denied,* 338 U.S. 954 (1950); Penello v. United Mine Workers, 88 F. Supp. 935 (D.D.C. 1950); Amalgamated Lithographers Local 17, 150 N.L.R.B. 985 (1961).
146. NLRB v. News Syndicate Co., 365 U.S. 695 (1961); Great Lakes Carbon Corp. v. NLRB, 360 F.2d 19 (4th Cir. 1966); Gay Paree Undergarment Co., 91 N.L.R.B. 1363 (1950).

v. Pennington,[147] however, the Supreme Court held that a union's agreement with one employer which imposed wage scales on another was not exempt from the federal antitrust laws.[148] Implicit in the Court's decision is that a violation of that statute would frustrate national labor policy and constitute an illegal subject of bargaining.[149] The *Pennington* rationale may well be applicable to the 8(a)(5) question raised but not answered in *Jubilee.*[150] Certainly, had an action been brought under Title VII in the first instance with a finding by the EEOC that the employers had engaged in invidious sex discrimination, the Board would recognize that decision as a conclusive finding that the subject matter on which the employer bargained to impasse was illegal. Therefore, there seems to be no reason, especially in light of *Pennington,* why the Board should not, in the first instance, determine the legality of the matter by the application of Title VII standards.

VIII. Conclusion

Prior to the recent *Jubilee* decision the Act, by virtue of the *Miranda* and *Packinghouse* decisions, was potentially available as a tool for eliminating employer job discrimination on account of race, color, religion, sex or national origin. The rationale of these decisions would appear to have been influenced by the social climate of the day and had resulted in an extension of the Act into an area that is not consistent with its basic purposes.[151] Neither the legislative history[152] of the Act nor thirty years of administrative and judicial interpretation[153] support the *Miranda* and *Packinghouse* theories as applied to an employer. Even assuming the validity of the *Miranda* theory that a union's section 9 duty of fair representation is implicit in section 7, and a breach of that duty is therefore a basis for a union unfair labor practice,[154] it takes a strained application of that theory to find a basis for an employer unfair labor practice grounded on racial or other similar forms of discriminatory conduct.

147. 381 U.S. 657 (1965).
148. Sherman Act, 15 U.S.C. §§ 1-7, 12-27 (1964).
149. 381 U.S. at 664-67.
150. 82 L.R.R.M. at 1485.
151. 29 U.S.C. § 141(b) (1947).
152. *Racial Issues, supra* note 102, at 954 n.65.
153. *See* textual material related to notes 15-28 *supra.*
154. *See* textual material related to notes 35-36 *supra.*

Assuming arguendo, however, that *Jubilee* is reversed and the unfair labor practice theories advanced are in that case eventually upheld by the Supreme Court thereby confirming the Board's jurisdiction over the subject matter, the Board should decline to exercise that jurisdiction except in matters that raise issues peculiarly within its statutory province.[155] The Board should defer to the greater expertise of the EEOC in deciding issues of discrimination because of race, color, sex, religion or national origin, and should consider allegations of discrimination only to the extent that the discrimination issues are connected with some other independent exercise of its jurisdiction.[156] Furthermore, since the Board should handle discrimination issues only in a collateral sense, it is submitted that a determination by the EEOC as to the existence of discrimination by an employer should be binding on the Board when it exercises its jurisdiction in the suggested limited fashion.

Even where the Board does operate within this limited jurisdiction it will sometime be necessary for it to decide whether an employer has engaged in discriminatory conduct.[157] In such cases, the Board should not adopt the standards of other federal laws to determine the existence of discrimination as urged by Jenkins dissent in *Packinghouse*[158] and the United Steelworkers Union in *Jubilee,*[159] except in 8(a)(5) cases where the issue is whether the employer has bargained to impasse on an illegal subject. Under the latter circumstances it would seem logical, as was implicit in the Supreme Court decision in *Pennington,*[160] that the legality of the employer's conduct ought to be determined by the standards of the statute that made the conduct illegal.

Jubilee represents a significant development in the growing body of law involving an employer's duty not to discriminate against its employees because of their race, color, religion, sex or national origin. The Board reversed the trend of the developing case law that had established the Act as an anti-discrimination statute by rejecting the

155. *Racial Issues, supra* note 102, at 956-57.
156. *Id.* at 950.
157. *Jubilee* did not oust the Board of jurisdiction in all cases involving discrimination on the basis of race, color, religion, sex or national origin. The Board will continue to consider whether such acts of discrimination violate sections 8(a)(1), (3), and (5) when there is actual evidence of a direct relationship between the alleged discrimination and the Board's traditional and primary functions of fostering collective bargaining, protecting employee rights and conducting representation elections. 82 L.R.R.M. at 1484.
158. 78 L.R.R.M. at 1473.
159. *See* note 89 *supra.*
160. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965).

legal conclusion of the *Packinghouse* court that an employer's policies and practices of such forms of discrimination are a per se violation of section 8(a)(1) of the Act.[161] Should the *Jubilee* decision be appealed to the Court of Appeals for the District of Columbia, as it undoubtedly will be,[162] that court should overrule its *Packinghouse* decision and affirm *Jubilee* as being more consistent with the central purposes of the Act to foster collective bargaining, protect employee rights and conduct representation elections.[163] Congress has enacted Title VII to rectify the social injustices at which the *Packinghouse* decision was directed. The Board has finally recognized that fact. It is time for the court to do likewise.

FRED W. VEIL

161. *See* textual material relating to notes 71-73 *supra*.
162. *See* textual material relating to notes 74-83 *supra*.
163. 82 L.R.R.M. at 1484.