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Title VII: Limitations and Qualifications

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TITLE VII: LIMITATIONS AND QUALIFICATIONS

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I. INTRODUCTION

In constructing the hierarchy of important matters in the Great Society, equal employment is not only near the top, but many will urge nothing is more important. It will be of little avail to a Negro to have the right to enter a restaurant if he cannot afford to pay for the meal; and the right to stay at a fine hotel or sit in a theatre are of no importance to a man without money. As the mayor of an important southern city told me some time ago when he expressed his surprise at demonstrators boycotting stores which would not employ Negroes, "I have been spending all my time worrying about a peaceful integration of our schools and I don't understand it." Then he stopped, thought a moment, and said, "But I suppose to a man out of work, a job is more important." While not deprecating the importance of education, nevertheless, unless that education helps the underprivileged achieve a better economic position, there is almost a cruel quality in giving an education which spreads false dreams.

Title VII of the Civil Rights Act of 1964 expresses the desire of most Americans for equal employment opportunity for all Americans. The purpose of the President and the Congress is clear on this. What is not so clear, however, are the effects of the limiting features in Title VII which may result in shutting some employment doors that should remain open. That the limiting language is grounds for immediate concern is undoubtedly true, because much of it was unnecessary, or could have been written in a fashion different from the final result.

Like the iceberg, the good in Title VII is above board and visible. Not so certain, however, is whether what is below the surface is to be feared. For example, what will be the effects of the bona fide seniority provision, and will the ability tests provision be a great cause for concern? Not every bear trap in this statute is analyzed herein, but we have chosen the ones we think most important. Some of what we say is speculative, but the language, lacking absolute certainty and containing the ideas of persons with conflicting interests, almost requires speculation. Some of our fears may prove unjustified, and other

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faults in the law we may not have seen; but our approach is to look for danger spots and try, with human frailty, to uncover the layers of words and syllables until as much clarity as is possible has been achieved. We also attempt to suggest a variety of ways one may look at the language so that the darkness is not so absolute.

II. The Employer Exception

To qualify as an "employer" under Title VII, one must be "a person engaged in an industry affecting commerce who has twenty-five or more employees."[1] Senator Dirksen's explanation for excepting employers with less than twenty-five employees was: "When they get above 25, they get into some reasonable degree of gross national product in terms of income or output or salaries or goods or services. They also lose most of their intimate, personal character they might have had."[2] This is hardly strong support for the existence of the numerical qualification for, clearly, federal exercise of power over interstate commerce[3] need not be conditioned upon the particular person or activity being regulated affecting a reasonable degree of the gross national product[4] so long as that which is being regulated, when multiplied into a general practice, exerts a substantial effect upon interstate commerce.[5] Further, the exception is not in keeping with either other federal law or comparable state laws. No such numerically rigid limitations are contained in the National Labor Relations Act's definition of "employer";[6] the test there concerns the effect of the business on commerce. The New York law against discrimination sets the limit at a mere four employees.[7] In light of New York's law, as well as that of the majority of states with fair employment practice

[1] § 701(b). The complete definition reads as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a state or a political subdivision thereof, (2) bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: Provided that during the first year of the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall be considered employers, and during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

State and local government employees may be covered by § 601.

[2] 110 Cong. Rec. 13088 (1964).

[3] U.S. Const. art. I, § 8.

[4] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[5] Wickard v. Filburn, 317 U.S. 111 (1942).

[6] § 2, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152 (1964).

[7] N.Y. Exec. Law, ch. 118, L. 1945, as amended, § 2, ch. 851, L. 1965.

acts, the limit of twenty-five appears to be excessively high if the purpose is merely to exempt intimate, personal business from the statute's provisions[8] (such as the classic "Mom and Pop" stores with one, two or, possibly, three employees).

Not only is the purpose of the qualification highly questionable, but the precise extent to which it limits the scope of the definition is uncertain. Senator Dirksen estimated that more than ninety per cent of all employers would be excluded from the coverage of Title VII,[9] but Senator Aiken's estimate was seventy to eighty per cent.[10] On the more relevant figure, *i.e.*, the number of *employees* excluded from the title's protection because the employer has fewer than twenty-five employees, Senator Dirksen did not even hazard an estimate. Two other senators had more courage: Senator Aiken estimated the number of excluded employees to be as much as 18.5 million workers,[11] while Senator Stennis put the figure at 17 million.[12] Published statistics, compiled by the Bureau of Census, are not helpful in determining either the number of employers nor the number of employees excluded from the reach of Title VII because the statistics embrace only manufacturers and their numerical division does not coincide with that used in Title VII; the manufacturing concerns are divided into those who employ 10-19 employees and those who employ 20-49 employees.[13] One would have thought that in a matter as important as this, Congress would have attempted to ascertain more information.

This numerical exception also requires us to recognize what amounts to an exclusion of seasonal industries from the cover of Title VII, since the minimum number of employees must be employed for no less than twenty weeks in the calendar year. How many more employers and employees will be removed from coverage because of this provision cannot be currently estimated; nevertheless, we can state with certainty that it will not increase the number of employers, nor was it intended to do so. What justification can be assembled for this limiting factor is hard to imagine.

While there is some speculation in what has been said above, there is enough empirical knowledge behind it to cause trepidation as to how large the gap will be between the promise of the statute and

[8] At present, 25 out of 35 jurisdictions having fair employment practices acts relating to racial discrimination have a lower numerical qualification than the federal statute. See BNA Fair Employment Practices Binder § 451 (1965).

[9] 110 Cong. Rec. 13089 (1964).

[10] 110 Cong. Rec. 9123 (1964).

[11] Ibid. Senator Aiken speaks of 25% of the "total working force" which is 18.5 million, using 1965 statistics and assuming that he was referring to the total civilian working force.

[12] 110 Cong. Rec. 9801 (1964).

[13] Bureau of the Census, Statistical Abstract of the United States, Table No. 1124 (1965).

its reality. Whatever the accurate figure, little doubt exists that the qualification on the term "employer" will clearly cause a very substantial number of both employers and employees to be excluded from the provisions of Title VII. No acceptable basis for this can be found in either the statute or its legislative history. The exception is all the more disconcerting when it is recalled that, while some state laws provide some protection, many states have no law at all, leaving the Negroes in such communities completely dependent upon federal law.[14]

III. Bona Fide Occupational Qualification Exception

Section 703 of Title VII provides that discrimination on the basis of religion, sex or national origin is legitimate "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[15] Phrased this way, we may reasonably surmise that this provision was included in Title VII with the intention of aiding the Negro.[16] So complex a subject is racial discrimination, however, that the best intentions can lead to undesired results. The exception graphically demonstrates the validity of the bit of cant about "the road to hell" for good intentions may result in a double discrimination against Negroes.

One need not be a sociologist to understand that some jobs have, for generations past, been reserved for Negroes by custom. Among these are sleeping car porters, "red caps," restaurant workers, laborers, freighthandlers, cotton warehouse and compress workers and fertilizer workers.[17] As has been pointed out: "Informal job agreements sometimes protect Negro jobs from encroachment by whites and provide colored workers with more jobs than they might otherwise have. Negroes might not have obtained jobs in the [southern petroleum] refineries if it had not been done on a segregated basis."[18] A likely result of the present exception is the application by whites for positions traditionally reserved for Negroes. But if these positions—some of

[14] Fourteen states do not have such statutes and almost all are located in the south. See BNA Fair Employment Practices Binder, supra note 8.

[15] § 703(e)(1). The complete text reads:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or pretraining programs to admit or employ any individual in such program, on the basis of his religion, sex, or national origin, in those circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

[16] 110 Cong. Rec. 7217 (1964) (Senator Clark's responses).

[17] Marshall, The Negro and Organized Labor 97 (1965). Other examples are waiters, bellhops, bus-boys, etc.

[18] Id. at 146.

which have now achieved a fair earning power—were now opened to whites, Negro employment figures would likely decline still further, for the present exception will result in less than reciprocal benefit for Negroes.

An example of the permitted discrimination provided for by this exception, according to Senators Clark and Chase, the floor managers of Title VII, is "the preference of a French restaurant for a French cook."[19] In this instance, the only bona fide occupational qualification should be for an employee experienced in the preparation of French *haute cuisine*, but the legislative history clearly says a "French cook."[20] Will the Clark-Chase logic permit exceptions for a French (Greek, Italian, Chinese, Jewish—each has its partisan) restaurant's insistence upon waiters who are French, the desired attributes once again being authenticity and a certain genetic knowledge of the cuisine? Will this analogy be carried still further to the firm supplying the restaurant with food so that the supplier may insist that the salesman be French? The legislative history already authorizes a business dealing with a particular religious group to create a bona fide occupational qualification for a salesman of that religion.[21] Supplying a restaurant which serves the food of a particular nationality may similarly create such an implicit exception and permit the supplier to insist that its salesman be a member of that nationality. After all, he must deal with a "Frenchman," and everyone knows how temperamental they are.

Very few Negroes are Frenchmen, Italians, Greeks, or Yugoslavs. Omitting "race" and "color" seemingly was intended to prevent discrimination because of race or color, although permitting discrimination in favor of a particular religious or ethnic group. But since so few Negroes are Yugoslavs (of course Pushkin was a Russian, and that's pretty close) one wonders, on second thought, whether the intention—obviously gone astray—was as innocent as it appears. On measuring this against the complete lack of protection for traditionally Negro jobs, some of which it has been mentioned now pay well, our naïvete decreases.

This same exception applies to labor unions and employment agencies so that these organizations may also classify members or applicants on the basis of national origin, religion or sex. But since unions frequently—and employment agencies always—are suppliers of labor, allowing them to classify their members and applicants that way simplifies the process of discriminatory referrals. There may be

[19] 110 Cong. Rec. 7213 (1964).

[20] New York allows this exception only when the attributes sought are "material for job performance." See Commission for Human Rights, Rulings on Pre-employment Inquiries 10 (1964).

[21] 110 Cong. Rec. 7213 (1964).

"legitimate" reasons for classifying employees, but these classifications are available for all employers and it may be a long time before illegitimate use of a legitimate classification is caught. For example, were an employment agency to classify all Scandinavians together, based upon certain "legitimate" needs, who would oversee all the uses that can be made of this classification system?

IV. Bona Fide Seniority System Exemption

The religious or ethnic qualifications just discussed allow an employer to discriminate lawfully in his hiring policies. We now turn to the bona fide seniority system which applies *after* the employer has hired the employee. In substance, section 703(h) permits an employer to apply different standards of compensation pursuant to certain seniority systems. Such variations must be pursuant to the bona fide seniority system and not "the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ."[22]

Perhaps the most important feature of this exception was clearly stated in the Interpretive Memorandum of Senators Clark and Chase: "Title VII would have no effect on *established* seniority rights. Its effect is prospective and not retrospective."[23] (Emphasis supplied.) While separate seniority rosters[24] for Negroes and whites as such will no longer be tolerated, the protection for all whites who have entered the seniority system earlier clearly exists, regardless of future consequences. The advancement that whites have received from such rosters in the past at the expense of Negroes remains in effect and it is less than likely that such advantages will be eliminated voluntarily, no matter how unfair. This is a little akin to asking a Negro to enter the one hundred yard dash forty yards behind the starting line. Add to this the knowledge that educational systems of the United States are less than equal generally, and one can easily see that it may be a generation before Negroes may enter the employment list on the same basis of equality as whites, unhandicapped by ancient seniority systems.

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[22] § 703(h). The subsection applicable to this paper reads:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

[23] 110 Cong. Rec. 7213 (1964).

[24] For the use of separate seniority rosters, see Marshall, op. cit. supra note 17, at 146.

While one may appreciate the congressional desire to avoid problems inherent in measures designed to rectify our past faults (not to forget the votes of those union members whose seniority rights may be affected) in order to obtain passage of the bill, one cannot lose sight of the Negro, deprived of promotion because of his blackness, and whose family has suffered economically during these years. He had and has the right to enter our way of life. In Bogalusa, this writer learned how some Negroes helped train young whites for employment. After the learning period expired, the whites advanced on the seniority ladder while the Negro remained to train still younger whites.

Nothing sacred is implicit in seniority systems, nor need they be permanent. At contract times it is not unusual for unions to affect the seniority rights of members.[25] By writing in the seniority system exception, Congress made no effort to right years of wrong (to give it its best face) in the hopes of setting sail for a reasonable future. Now, because of unequal educational and training opportunities and the resistance of many persons to correcting wrongs, who can say when that future will occur? Obviously, there are serious problems attendant upon correcting these ancient wrongs, but sweeping them under the carpet, as Congress has done, will not make the future easier.

Employment or job training seniority lists which were instituted in a discriminatory manner prior to the effective date of Title VII still exist. Does each person have a vested seniority right to a place on that list, thereby enabling the preference for whites to continue? Since such conduct was probably not illegal originally, it is not certain that continued use of such a list may be held to be an unlawful subterfuge to accomplish discrimination.[26]

Further analysis shows that in order for this statutory exception to be operative the differences must not be the "result of an intention to discriminate." If this meant "solely" because of race, color, etc., the proof of discrimination would be an extremely onerous burden and no effective enforcement could be achieved, because acts of discrimination are not in all cases susceptible of clear and certain demonstration. Senator McClellan attempted to add this word "solely" to section 703(h), but his motion was defeated. To defeat a defense based upon the bona fide seniority system exception, a plaintiff must apparently prove (a) that the defendant-employer intended to discriminate against him; and (b) that the differences in compensation terms, conditions or privileges of employment that he received are the result of such intention to discriminate. Absent an expressed intent to

[25] See Humphrey v. Moore, 375 U.S. 335, 350, where the Court stated: "By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors."

[26] 110 Cong. Rec. 7213 (1964).

discriminate (and in all likelihood such expressed intent will always be absent) we can only infer such intention from the available facts by observing the result. As was recently stated: "Seldom does a party intent on practicing discrimination declare or announce his purpose. It is more likely that methods subtle and elusive are used to accomplish the desired discrimination."[27] In fact, the courts in recent discrimination cases have commonly inferred intention from result.[28] While the wording of the statute appears to require the plaintiff to prove both (a) and (b) from the same evidence, once the discriminatory results are substantially proven, it is likely the discriminatory intent will be inferred.

Another puzzling aspect of this provision relates to the use of the term "bona fide." Given its normal meaning of "good faith," one wonders whether it is not superfluous. Were it not present, no one would assume that a "mala fide" seniority system would be legal; to do so would subvert the purpose of the act. Since it is there, however, we have an obligation to inquire into its appropriate use and meaning. Section 703(h) says that such different standards, or bona fide seniority or merit systems must be "not the *result* of an intention to discriminate." (Emphasis supplied.) Can a seniority system set up prior to the Civil Rights Act which deliberately excluded Negroes ever be bona fide? Who was acting in good faith? It certainly was not the employer, the union or the employee beneficiary of this policy. Convincing a court, in light of Senators Clark and Chase's position, to break into established seniority patterns will be difficult, but fortunately not impossible in light of *Humphrey v. Moore*.[29]

In making this argument, it should be urged that the *result* of a past discrimination continues into the present and future, creating differences in classifications and rates of pay. Such a result is present even though there may be no present intent to discriminate. While such conduct in the past may not have been illegal at that time, no one can deny its discriminatory purpose. The statute does not say the system had to be illegal at the time it was set up; it merely makes wrongful the results of an intent to discriminate. Furthermore, it would be wise to urge a court that there may well be a present intent to discriminate when an employer and a union knowingly continue a practice that was discriminatory in the past—although allowing Ne-

[27] Marrans Constr. Co. v. State Comm'n for Human Rights, 45 Misc. 2d 1081, 1085, 259 N.Y.S.2d 4, 9 (Sup. Ct. 1965).

[28] E.g., Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12 (N.D. Ill. 1963), rev'd on other grounds, 332 F.2d 243 (7th Cir. 1964); State Comm'n for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. 1964); Marrans Constr. Co. v. State Comm'n for Human Rights, supra note 27.

[29] See Humphrey v. Moore, supra note 25.

groes in now—whose discriminatory results are felt in the present and future.

Even if we optimistically assume that the seniority system may be challenged, who will have the standing to do so? Perhaps a young Negro just beginning his working life may not challenge such a list, since he has not been harmed by the past inequity. Similarly, persons who wanted to apply for jobs but did not or were discouraged from doing so will not have standing; their rights probably do not exist, although morally such rights should exist. But what about the Negro who was refused employment at the plant, thereby being denied the opportunity to work his way up the seniority scale, because the job he wanted was not open to Negroes; and those Negroes who did obtain employment but were denied entry into the seniority system? These are questions which cannot easily be answered at this time, but must be the subject of litigation in order to determine the perimeters of the law.

While the past cannot be erased completely, and Senators Clark and Chase may say "no," the statutory language certainly indicates the possibility of relief here. There are problems, however, in fashioning appropriate relief. Money damages can be awarded, such relief being measured by the difference between the employee's current earnings and those earnings he would have attained if he had been taken into the seniority system at a fair time. In fashioning other relief, though, the rights of the union as a contracting party, and the individual white worker cannot be ignored. To give an employee seniority entails more rights than just pay—e.g., lay-off and promotional rights. Placing the victim ahead of someone else on the seniority ladder may cause arbitrations and lawsuits, since such acts may violate contractual obligations as well as the rights of the white employee.

Difficulty will also arise in upgrading the actual skill of the harmed employee so that he may function at a level reasonably close to the level he would have reached if there had been no past discrimination. The NLRB, in order to effect the purposes of the National Labor Relations Act, as amended, has fashioned remedies not built into that statute.[80] A court with equitable powers will also, it is reasonable to assume, permit remedies to right some wrongs.

But if a seniority or merit system has had the effect of excluding, we must remedy that situation by appropriate action, and not go into an elaborate contortion of ratiocination in order to develop an historical dialectic of how this point was reached. This inevitably leads to the point where we can correct the wrong only if it is not too upsetting to the status quo. Rather, we must leave *in esse* the seniority or merit

[80] See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).

system before we plan hiring for the future unless we can persuade the courts, about which I am not optimistic, that, as suggested above, (a) "result of an intention" means that a currently bad result violates the statute regardless of the fact that the intention existed before the act, or (b) one has a current intent to do wrong if one is aware that the result of one's previous acts is a present discriminatory effect.

V. Merit System Exception

Similar to the seniority system exception, and part of the same phrase within section 703(h), is an exception granted to merit systems which are not the result of an intention to discriminate on the basis of race, color, religion, sex or national origin.[81] While seniority systems operate by virtue of rights generally accrued under a collective agreement, a merit system is normally a means of benefiting employees at the discretion of the employer. A challenge to a merit system, as contrasted with the challenge to a seniority system, seems less likely to succeed, since it is based largely on the discretion of the employer, making one's right to an increased benefit less clearly defined.

With a seniority system, benefits are more automatic so that the measure of loss is more easily determined. Assuming that the term "bona fide" applies to merit as well as to seniority systems, under any set of circumstances, can a system based upon merit, operated unilaterally and subject to personal idiosyncrasy, be called bona fide within the meaning of this act? (Presumably "merit system" is different from a code of fixed employment practices set up by the employer unilaterally.) Certainly a reasonable argument could be urged that, except for the most strait-laced merit systems, all such plans—subject as they are to unilateral personal decisions—which in the past have discriminated against Negroes, may be currently attacked.

Although this exception is clearly intended to safeguard an employer's right to reward personnel for superior performance pursuant to a regularized plan, unhappily, a necessary byproduct of such protection is that it provides those who seek to avoid the statute with a built-in escape mechanism. Since it is common knowledge that Negroes have not been allowed to acquire technical training, and since the law does not require the employer to operate training systems, this provision may be utilized by an employer to relegate and limit the Negroes to the most menial tasks.

To urge the protection of established seniority rights (as Senators Clark and Chase have) is to perpetuate the cycle of the underlying evil; *i.e.*, the constant and never-ending assignment of the Negro to

[81] § 703(h). For text, see note 22 supra.

the menial tasks. Positing a bona fide merit system, however, will still keep most Negroes from advancing because they have rarely been given the opportunity to acquire the necessary skill. The southern petroleum industry presents a case history illustrating this dilemma. Some years ago a number of refineries agreed to change their practices and permit Negroes who had finished high school to bid for jobs in operating and maintenance departments. Very few Negroes could qualify for promotion under the new policy because originally they had been hired under the tacit assumption that they would never be promoted from the labor departments. For this reason, few of them were high school graduates.[32] Indeed, southern education, and that provided in many northern areas as well, is not geared to give, or to encourage the Negro to obtain, a high school diploma.

Since the merit system must be subjective in part, making a meaningful distinction between an unbiased and a biased judgment is extremely difficult, except in the obvious never-happening cases. So, to be fair to the employer, permitting him to reward those who serve him best, we participate in setting up a discretionary situation which is much less susceptible of proof of violation than the more rigid seniority system. Whether courts will judge intent by result and determine that a man intends the result that occurs or will require proof of specific intent is once again the problem. Unfriendly courts will unquestionably demand the latter.

By not attempting to attack the fundamental problems, preferring instead to deal solely with the less difficult and less important problems, the statute creates the difficult problem of proving supervisory or management favoritism, or the red-neck prejudice of working inspectors. Proof of white-only merit increases or changes in the system somehow favoring the whites are more easily susceptible of regulation. But the more subtle bigot may deliberately throw a Negro into a position in which he must fail, or will hire only those with little education and training so as to have slight basis for advancement. These are the situations which raise questions that must be litigated.

VI. Differentials Based Upon Quantity or Quality of Production

Legalized differentials in earnings measured by quantity or quality of production do not constitute an unlawful employment practice provided that such differences are not *the result of an intention to discriminate on the basis of race, color, religion, sex or national origin.*[33] (Emphasis supplied.) Once again the same general considerations, as described above, apply. In addition, other special characteristics must

[32] Norgren & Hill, Towards Fair Employment 20 (1964).

[33] § 703(h). For text, see note 22 supra.

be considered. To the Negro working as a porter for many years because he was not allowed into production, a switch now to a field rate method inevitably means a loss of earnings until, if ever, he is able to develop the skill to earn more. Or, assume that an employer uses a system of payment based upon quality of production. Upon completion the product is sent to a checker (who, because of previous history, is white) to approve the work and, if necessary, remedy any defect. After making various notations on the record of the worker who originally made the product as to whether the quality was sufficient, it is passed forward. With or without racial issues, the possibility of discrimination is built into such a personalized system because (a) defects are frequently not hard to find if one looks, and (b) since the checker often remedies the defect, evidence of the extent of the defect—or whether there actually had been a defect at all—disappears in the remedy procedure. Given the red-neck feeling of some who see their way of life attacked by "niggers," integrity flies out the shop window. If there are those who kill and maim a man simply because he is a Negro, think how many more there are who, to protect white purity, will cheat. The statute encourages such conduct.

Should the employer intend to comply with the spirit of the law but his checkers decide unilaterally to abuse the system, the remedy is unclear, even were one to overcome the serious problems of proof in this kind of case. Since he has not intentionally engaged in an unlawful employment practice,[84] it is questionable that a court could issue an order directed to an employer. Whether an order to the checkers themselves could be issued is also doubtful, because Title VII applies only to employers,[85] labor organizations,[86] employment agencies[87] and labor-management committees.[88] If, however, the employer refused to discharge such checkers for cause where the proof was reasonably clear, the acts of such employees may be considered his by ratification. Whether he would discharge such employees in the face of a possible strike raises additional hazards. Unhappily the statute often acts as an arrow pointing the way to those who wish to abuse the law.

VII. Work in Different Locations Exception

Before we take leave of the first clause in section 703(h), one other phrase should be evaluated, namely, that which permits compensation "differences" to employees who work in different locations, provided that such differences are not the result of an intention to

[84] § 706(g).
[85] § 703(a).
[86] § 703(c).
[87] § 703(b).
[88] § 703(d).

discriminate on the basis of race.[39] As with the other exceptions embodied in the clause, this exception is subject to the same suggestions discussed above. In explaining the import of this exception to the Senate, the then Senator Humphrey said, "For example, if an employer has two plants in different locations, and one of the plants employs substantially more Negroes than the other, it is not unlawful discrimination if the pay, conditions, or facilities are better at one plant than at the other unless it is shown that the employer was intending to discriminate for or against one of the racial groups."[40]

Let us assume that the same plants in the past had fully segregated work forces, with one manned by an all-Negro work force receiving inferior pay and working conditions and the other manned by an all-white work force having advantageous conditions. To comply with Title VII, the employer announces that henceforth the two plants will no longer be segregated as a matter of policy. Anyone may apply to either plant for a job. At the previously all-white plant, wages and working conditions will, of course, continue to be higher because of the past history. Since both plants are at full employment, few changes in personnel will be made: the plants will remain, one all-Negro and one all-white. Absent a sudden large turnover at the all-white plant, the results of the discrimination of the past will continue. Nor should anyone be surprised when whites do not apply to the formerly all-Negro plant (still all-Negro at lower rates). In addition, Negroes will be discouraged from applying for any vacancies at the formerly all-white plant. As can well be imagined, there are ways of making certain this discouragement will not take place inside the plant. The statute's effectiveness will thereby be destroyed.

How far this exception will extend is open to question. Suppose, for instance, that different rates of pay and conditions of work existed in "different" locations within the same general plant area. This is not an unusual condition in some plants, and we can expect efforts to extend the exception to such situations. Also, new plants will inevitably be built in the future, some of which will be built in locations not likely to attract Negroes, where better working conditions may exist. It will be urged that, after all, an employer has the right to locate where he desires. Proving discrimination in such a circumstance will be very difficult.

Very little of this need have caused trouble. But, by writing these exceptions into the statute, Congress and the Administration invited their use and their abuse. In most cases there will be no justification for different working conditions in different locations except for the history of the racial factor.

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[39] § 703(h). For text, see note 22 supra.

[40] 110 Cong. Rec. 12723 (1964).

VIII. Professionally Developed Ability Test Exception

One of the more interesting obstacles to enforcement of Title VII is the provision which permits an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin."[41] Senator Tower proposed this exception "out of concern for the ramifications of the Motorola-Illinois FEPC case."[42] Specifying just what concerned him, the Senator added: "Let me only say that it is indicated by the Motorola case that an Equal Employment Opportunities Commission operating under title VII of the civil rights bill might attempt to regulate the use of tests by employers."[43] No stretching of one's imagination is needed to gather Senator Tower's purpose; he was going to foreclose this possibility, and assure employers the right to use such tests.[44]

Despite deficiencies in the *Motorola* test, it apparently is a professionally developed ability test within the meaning of the Tower amendment. A reputable industrial psychologist has said: "Although Test 10 may meet the specifications of the Tower Amendment, very few psychologists competent in test construction and use would defend it."[45] Unfortunately, therefore, it would appear that an incompetent test (or worse) prepared by a professional psychologist comes within the professionally developed ability test exception.

General intelligence tests such as the *Motorola* test may easily be designed to be discriminatory against culturally deprived groups, such as the Negro, and yet superficially appear to be fair. What court, when faced by a barrage of expert testimony on both sides of the question, will be able to decide the intent of the giver of the test or, perhaps, even his competence to design a test that will be culturally neutral?

Standard intelligence tests have come under increasing criticism recently as a result of their failure to make allowances for socio-economic differences.[46] Realizing these difficulties in preparing tests, psychologists have attempted to formulate culture-free or culture-fair tests.

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[41] § 703(h). For text, see note 22 supra.

[42] 110 Cong. Rec. 11251 (1964). For an extended discussion of the *Motorola* decision, see Kovarsky, The Harlequinesque Motorola Decision and its Implications, p. 535 infra.

[43] Ibid.

[44] The amendment as originally introduced was defeated. 110 Cong. Rec. 13505 (1964). However, a subsequent reworded version was passed and constitutes the present provision. 110 Cong. Rec. 13724 (1964).

[45] Address by Dr. George K. Bennett, Where Does Testing Stand Today, National Personnel Conference, Oct. 19, 1965 (distributed by the American Bankers Association: The News Bureau).

[46] Hess, Controlling Cultural Influence In Mental Testing: An Experimental Test, 49 J. of Ed. Research 53 (1955).

One of the earliest attempts was made by Dr. Raymond B. Catell,[47] but it proved unsuccessful.[48] In their review of the psychological studies published between 1943 and 1958 involving a comparison of Negroes and whites in the United States, Dreger and Miller conclude: "The search for a culture-free test is illusory."[49] Therefore, as of this stage in the development of psychological testing, general intelligence tests, drawn up largely by educated middle class whites, are not fair to Negroes.

The statute states that the exception does not apply where the test is "designed, intended, or used to discriminate." If general intelligence tests are inherently discriminatory, it may be argued that any use of such tests does not protect the employer since they are "used to discriminate." A Negro, therefore, denied employment because of a poor score on such a test could successfully sue if he could summon the needed expert testimony and convince the court. On the other hand, to reconcile the exception's language and psychological expertise with the statute's legislative history, we may find the courts leaning to an interpretation which makes "used" a part of a tri-partite redundant phrase: "designed, intended, or used." Under such an interpretation, it would be necessary to show not only that the test had a discriminatory effect, but, in addition, that the discriminatory effect was *intended*.

The concern which this exception generates could easily have been avoided. In its effort to pass a law (almost any law), and to quiet those who were complaining about *Motorola*, Congress seemingly used unnecessary words which will inevitably lead to additional litigation, and will act as a guide for those seeking to maintain discrimination. We may suppose that had these words been completely excluded from the statute, the right of the employer to utilize any rational means to determine the kind of employees it wants would not have been denied. In such circumstances the only issue would be whether or not the selection process involved discrimination. All that the additional words add is confusion, because we become concerned with the words and meaning of the phrase and not the process of selecting employees on a non-discriminatory basis.

No one should deny an employer the right to have very high, low or mediocre standards in the selection of his employees. The dilemma, of course, develops in trying to fathom out honorably high standards from artificially high *irrelevant* standards designed to exclude Negroes and other deprived minority people. For example, one major employer

[47] Cattell, A Culture Free Intelligence Test, 31 J. of Ed. Psych. 161 (1940).

[48] Marquart & Bailey, An Evaluation of the Culture Free Test of Intelligence, 86 J. of Genetic Psych. 353 (1955).

[49] Dreger & Miller, Comparative Psychological Studies of Negroes and Whites in the United States, 57 Psych. Bull. 361, 368 (1960).

in New York State requires a high school diploma for all its employees, even those doing menial tasks.[50] Other employers have very difficult entrance exams. The effect in these cases is to exclude Negroes; is it also the intent? How important is the intent, or rather, how important is it to *know* the intent of the employer?[51]

Senator Tower quoted the Director of the National Merit Scholarship Corporation as saying, "Thus, if the Civil Rights Bill were interpreted as outlawing tests which are affected by cultural deprivation, employers would be effectively prevented from selecting employees on the basis of ability."[52] But, when the effect of such tests is to exclude Negroes, should not that be all we need to know? Since the ostensible purpose of Title VII is to create by operation of law an atmosphere in which any other member of a minority group that is discriminated against, is able to obtain equal employment opportunity, why is intent any part of this process? Is not *result* the only relevant factor? For example, where the Klan is strong among the employees of a plant and the employer is forced to continue discrimination against his will, the employer cannot be said to have a wrongful intent. Nevertheless, the lack of employment opportunity is no less existent. The important element is to create the opportunity for Negroes to work, and not to devise a medical instrument to determine the color of a man's heart. Should we see a situation in which few, if any, Negroes are working, we must correct it by appropriate orders.

The better solution would have been to omit the phrases that we have examined in this section. Where an employer demands the right to use a test, Dr. George K. Bennett, president of the Psychological Corporation, suggests as the preferred solution that the test be directed to specific, job-related abilities (as demanding as necessary) rather than general abilities.[53] Such a suggestion at least eliminates the problems of inherent bias present in general intelligence tests while at the same time permits employers to select employees on the basis of job-related ability. Some solutions being used at the present time in solving

[50] Niagara Mohawk Power Company Incorporated.

[51] Mr. Justice Holmes said:

> If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.

Holmes, The Common Law 110 (1946).

[52] 110 Cong. Rec. 11251 (1964).

[53] Bennett, supra note 45. Dr. Kenneth Clark would seem to agree. Union's Test Called Bar to Negroes, N.Y. Herald Tribune, April 13, 1965.

the problem involve either dropping aptitude testing (with or without substituting a job-related ability test) or continuing aptitude tests but allowing Negroes to pass with lower scores than whites,[54] although the latter method might involve a violation of section 703(a)(1).[55] Whatever merits such answers have, they may raise questions that are equally difficult. Let us not pretend that anything less than a combination of fair education and pre-employment training is adequate. Once accomplishing this, job-related tests may be a rational way out of the problem we have made for ourselves.

Two other interpretive problems concerning this exception remain. The first concerns the placement of this exception within the statute. Although the legislative history would appear clearly to demonstrate that this provision refers to pre-employment testing, all the other exceptions embodied in section 703(h) refer to post-employment circumstances. Since the exception does not specify, the statute will in all likelihood be interpreted as applying to both pre- and post-employment testing. No requirement to train employees or to fill in the gap caused by the poor education given Negroes is placed upon the employer. Therefore, the problems of post-employment testing will generally be the same unless the employer is so foolish as to have in-service training for whites only.

The second problem is that at no point does the statute develop a definition of who is the appropriate professional in this area:[56] Is it the psychologist, the educator, the industrial engineer or merely anyone who sets himself up as a management consultant and has a college degree? Perhaps it is the social worker who specializes in guidance counselling. On the other hand, maybe it is the employer who knows what kind of employee he wants or does not want. Each of these has different points of view and we may have a preliminary legal argument involving appropriate "professional jurisdiction" in order to determine the applicability of any test. Jurisdictional arguments in labor problems and government agencies have an ancient history in the United States and there is no reason why professions cannot participate. Then, too, we may also end up with the Commission, or perhaps a court, giving its own test and comparing it with that of the employer to determine the fairness of the employer's test—all this because both "intent" and "result" are the defining features of discrimination.

[54] Labor Letter, Wall Street Journal, Oct. 26, 1965, p. 1, col. 5 (Eastern ed.).

[55] Section 703(a)(1) states: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire . . . any individual . . . because of such individual's race, color. . . ."

[56] It is interesting to note that the Arizona Equal Employment Practices Act, Ariz. Stat. Ann., ch. 9, art. 4, § 41-1463(3) (1965), which appears to be modeled upon the federal statute, excludes the words "professionally developed" from its exception for tests.

In summary, it is not unfair to state that the professionally developed ability test exception is a mass of ambiguities, due partly to poor drafting, partly to the refusal of the Legislature to investigate sufficiently the complex problems created by ability and aptitude testing, and partly (one hesitates to suggest) to something less than legislative good will.

IX. Racial Imbalance Qualification

Nothing in Title VII shall "*require* an employer, employment agency, labor organization or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion or sex or national origin of such individual or group on account of an imbalance that may exist. . . ."[57] (Emphasis supplied.) Explaining this provision to the Senate, Senator Humphrey claimed: "This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning."[58] Some doubt exists as to the accuracy of this bit of legislative history. Before the subsection was added to Title VII as part of the Dirksen-Humphrey compromises, Senators Clark and Chase, the floor managers of Title VII, had said: "[A]ny deliberate attempt to maintain a racial balance whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race."[59] If the statutory provision stated that correcting a racial imbalance was forbidden, then the two above-quoted statements would be consistent. But the law says that correcting a racial imbalance is not "required"; instead, it says that such a course of action is "permitted." Where, as here, there appears a clear and irreconcilable conflict in the legislative history, as a matter of statutory interpretation the plain meaning of the statute should prevail.[60]

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[57] § 703(j). The entire provision reads:
Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

[58] 110 Cong. Rec. 12723 (1964).

[59] 110 Cong. Rec. 7213 (1964) (Interpretive Memorandum of Title VII).

[60] Greenwood v. United States, 350 U.S. 366, 374 (1956).

A strong argument for accepting the literal meaning of the statutory provision can also be made in terms of policy considerations. This argument has been clearly and forcefully stated by Kovarsky: "Negroes traditionally excluded from jobs deemed more economically or socially desirable, will be unable to dent the white employment in large numbers unless the employer or union insists upon achieving some sort of racial balance between Negro and white employees."[61] Informal racial balancing appears to be necessary to render Title VII effective.

Presumably, as the language stands, undertakings may be entered into which permit special efforts to bring employment of Negroes up to a higher figure. Advertising in Negro newspapers, appealing to employment agencies that specialize in supplying Negro employees, and spreading word of mouth in Negro areas, are all permissible for the purpose of improving the racial balance. So long as it can be shown that whites were not deprived of employment by virtue of their race, efforts to increase Negro employment would appear to be legal under the law. Accepting Negro employees with lower ability test scores than whites may be permissible if whites were not thereby denied employment.

Since correcting racial imbalance is permitted, though not required, under section 703(j), the effect of section 703(a)(i), which makes it illegal to refuse to hire anyone because of his color (namely white) in order to correct past errors is unclear. The courts will struggle with this, but I suspect they will reconcile the two sections so long as their interpretation does not conflict with section 703(a)(i). That is, it will be satisfactory to recruit Negroes voluntarily so long as a white is not refused employment as a result of this policy. No language in the statute prevents someone from being hired because of his race; the statute merely makes it illegal to refuse to hire because of his race. Whether the writers of the statute were fully aware of the significance of the negative phrasing, which seems to come from the National Labor Relations Act,[62] is questionable, but, read in this light, correcting racial imbalance is permissible so long as whites are not refused jobs.

On the other hand, suppose an employer has been hiring or the union or employment agency has been referring employees in a manner that shows discriminatory acts. In fashioning a remedy to correct the wrong, presumably the employer and/or the union may be restrained from such practices. But may they be directed in the process of correction to advertise in a Negro-oriented newspaper, radio station or employment agency; or would that be requiring an employer to grant

[61] Kovarsky, Apprentice Training Programs and Racial Discrimination, 50 Iowa L. Rev. 755, 773 (1965).

[62] See National Labor Relations Act § 2, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152 (1964).

preferential treatment? I would think that this would not be preferential treatment if it were used by the employer merely to attract Negroes to apply for work and not to deny anyone else the right to apply.

Finally, whichever way the courts go in solving the posited dilemma, this subsection "does not add to or detract from the probative force which evidence of racial imbalance may have in a given case."[63] As has been noted before, an intention to discriminate can best be ascertained from the results of the discrimination. Therefore, if one sees an exaggerated case of racial imbalance, one has some evidence of an intention to discriminate whether or not correction of racial imbalance is allowed.

X. Communist Party Membership Exception

Whether Communists should be allowed to support themselves has been the subject of national debate for some years. To some extent our various security programs made a stab at this by denying employment to Communists in sensitive jobs, but once more the debate is open. To one who has seen how often, and how loosely, the term "Communist" is used in many parts of the country (often to describe one who is anti-communism and anti-discrimination), the statutory language comes with little grace. Since "unlawful employment practice" under this title does not apply to any action taken with respect to a Communist,[64] a person may be fired for reasons having nothing to do with his being a Communist or a member of an organization required to register. The law merely outlaws Communists from its protection, regardless of the reason for their discharge.

How one proves one is not a Communist is not as simple as it sounds. Proving the negative has always had its difficulties, and it will be no less difficult here. Granting employers the right to make this decision can do nothing less than lead to gross injustice, for, even if the employer is wrong, one's name is blackened, one's morale is destroyed and one's job is mislaid. Assuming that the employer may conceivably be right in his judgment, if the position has security implications, the Industrial Personnel Access Authorization Field Board can handle the problem under procedures that bear some, albeit unusual, relationship

[63] Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 77 (1964).

[64] § 703(f). The complete text reads:

> As used in this title, the phrase 'unlawful employment practice' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

to due process—at least one has a hearing. If the position has no security implications, why should one's political belief be the employer's business at all, particularly since we know "Communist" is often a euphemism for liberal anti-discriminationist and has been so for many years. Were the Commission or the court, as the case may be, to ignore what seems to be the clear intent of the language and inquire into the true motives of the employer, we would be entrapped in a useless maze helpful to no one, least of all the United States.

In some respects the next subsection[65] is worse, largely because of very bad draftsmanship. Its apparent intent is to permit an employer to refuse to hire someone who cannot *obtain* security clearance should it be required. The statute is phrased, however, in terms of the employer not being required to hire someone who does not *have* such clearance. Since there may have been no previous opportunity to seek this clearance, particularly among Negroes who have been denied work, security or otherwise, we run into another opportunity to deny employment—allegedly for security, but in reality for racial reasons.

XI. Exemption for States as Employers

The Civil Rights Act does not apply to the state as an employer.[66] This exception is one of the greatest mistakes of the statute, because southern states are among the most discriminatory employers. Perhaps because the states are accessible as defendants in federal courts and, as public agencies, are amenable to the fourteenth amendment equal protection of the law clause, their inclusion was thought unnecessary. Nevertheless, requiring individuals to resort only to the courts and fight step by step, with all the expense involved, is dreadfully unfair. To illustrate, not many days ago the sheriff of Madison Parish, Louisiana, declared, in response to a demand that he hire a Negro deputy, that henceforth all deputies must have college degrees. The question of a Negro's right to hold such a position will now have to go through the courts in a never-ending, aggravating battle before it is won, if

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[65] § 703(g). The text reads:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any person from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States . . . and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

[66] § 701(b)(1). For text, see note 1 supra.

ever—all because of the statutory exception. Alternatively, instead of seeking employment as police, teachers and clericals as a matter of right, Negroes—as they did in Natchez—must take to the streets, create a clamor over this injustice, spend time in jail, and then hopefully obtain some correction.

XII. Conclusion

The late President Kennedy, in his message to Congress requesting passage of the Civil Rights Act, said: "Racial discrimination in employment is especially injurious both to its victims and to the national economy. It results in a great waste of human resources and creates serious community problems. It is, moreover, inconsistent with the democratic principle that no man should be denied employment commensurate with his abilities because of his race or creed or ancestry."[67]

Title VII seeks to effectuate this "democratic principle." This is a noble and praiseworthy goal. Yet it may well be said that this goal might have been more efficaciously achieved had the statute not been burdened with the exceptions and qualifications discussed in this article. It is our hope that the courts will not allow these provisions to render this goal beyond the reach of Title VII.

[67] 109 Cong. Rec. 3248 (1963).