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RELIGIOUS DISCRIMINATION AND THE ROLE OF ARBITRATION UNDER TITLE VII

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The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfactions from within, or our expectations of a better world.

—Judge Learned Hand[1]

ONE of the major thrusts of the Civil Rights Act of 1964,[2] passed by the 88th Congress of the United States after much procrastination and debate,[3] is title VII,[4] the Equal Employment Opportunity Act, which prohibits selected forms of employment discrimination.

In drafting title VII, the proponents of the Act were chiefly concerned with racial discrimination in employment.[5] In fact, the entire

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1. Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953).

2. Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975-75e, 2000a to h-6 (1964), *as amended*, 42 U.S.C. §§ 1971, 1975c, 1975e, 2000d-1, 2000d-5, 2000e, 2000e-14, 2000g (Supp. V, 1965-1969).

3. BNA OPERATIONS MANUAL, THE CIVIL RIGHTS ACT OF 1964, at 17-22 (1964) [hereinafter OPERATIONS MANUAL].

4. 42 U.S.C. §§ 2000e to -15 (1964), *as amended*, 42 U.S.C. §§ 2000e, 2000e-14 (Supp. V, 1965-1969).

5. This emphasis is evident from the language of the report of the House Committee on the Judiciary, which states:

> In varying regions of the Country there is *discrimination against some minority groups*. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens. . . . No Bill can or should lay claim to eliminating all of the causes and consequences of *racial and other types of discrimination against minorities*.
>
> It is, however, possible and necessary for Congress to enact legislation which *prohibits and provides the means of terminating the most serious types of discrimination*. This H.R. 7152, as amended, would achieve in a number of related areas. . . . It would prohibit discrimination in employment . . . .
>
> H.R. 7152, as amended, is a constitutional and desirable means of dealing with the injustices and humiliations of *racial and other discrimination* . . . .

H.R. REP. No. 914, 88th Cong., 1st Sess 18 (1963) (emphasis added). The committee's additional report states:

> The bill is a comprehensive measure, but it cannot nor should we expect it to be a panacea for all our ills. It will not end *racial turmoil*. No legislation

Civil Rights Act was written with an eye toward the elimination of the "glaring . . . discrimination against Negroes which exists throughout our nation."[6] Given this intent, it is not surprising that, during the hearings and debates preceding the passage of the Act, Congress focused its attention primarily on the race discrimination problem. The legislative history is replete with pronouncements, from friend and foe alike, concerning the impact of the proposed Act on existing patterns of racial prejudice in the United States.[7]

Despite this professed primary concern with racial discrimination, the legislative authors of title VII intended the Equal Employment Opportunity Act to be an updated version of what was known in legislative parlance as a "fair employment practices" act.[8] Historically, fair employment practices (FEP) legislation in the United States has typically declared unlawful those forms of employment discrimination that are based on an individual's race, color, religion, or national origin.[9] True to this tradition, Congress, without bothering seriously to consider or to document the problem, included *religious discrimination* as one of the employment practices proscribed by title VII.[10]

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could do this. Nor can legislation relax all the tensions of our troubled times or wipe clean the blot of *racial discrimination* from our national conscience.

But this bill can and will commit our Nation to the elimination of many of the worst manifestations of *racial prejudice*.

H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 2 (1963) (emphasis added). This additional report goes on to discuss title VII, and after citing evidence on the effects of racial discrimination in employment, the report concludes: "More positive and enduring steps must be taken, therefore, to cure this evil and before racial unrest eats irretrievably into the body of the American industrial system. In response to this need, the Judiciary Committee incorporated Title VII into H.R. 7152." *Id.* at 29.

6. H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963).

7. For example, in his message to the Congress dated Feb. 28, 1963, President Kennedy urged upon the Congress the need for a broad civil-rights enactment:

The various steps which have been undertaken or which are proposed in this message do not constitute a final answer to the problems of *race discrimination* in this country. . . . Other measures directed toward these same goals will be favorably commented on and supported, as they have in the past—and they will be signed if enacted into law.

109 CONG. REC. 3245, 3249 (1963). In this same connection, Representative Celler, who was both chairman of the House Committee on the Judiciary and also the chairman of Subcommittee No. 5, which had conducted the hearings on H.R. 7152, commented that: "Perhaps what we are really talking about is the life of a human being in the United States, whether a human being because of the color of his skin is being deprived . . . of his right to equal opportunity to earn a living . . . ." 110 CONG. REC. 1517 (1964).

8. OPERATIONS MANUAL, *supra* note 3, at 18-20.

9. *See, e.g.*, California Fair Employment Practice Act, CAL. LABOR CODE §§ 1410-13 (West 1959); Illinois Fair Employment Practices Act, ILL. REV. STAT. ch. 48, §§ 851-66 (1961); Michigan State Fair Employment Practices Act, MICH. COMP. LAWS ANN. §§ 423.301-.311 (1967); Ohio Fair Employment Practices Act, OHIO REV. CODE ANN. §§ 4112.01-99 (Page 1969).

10. 42 U.S.C. § 2000e-2 (1964). That serious documentation of religious-discrim-

In section 703 of the Act, model FEP language is used, making it an "unlawful employment practice" for "an employer," "a labor organi-

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ination problems was wanting in the Judiciary Committee considerations and in the subcommittee hearings is evidenced by the following portions of the House debates on the bill:

> MR. ABERNATHY [of Mississippi]. I notice in examining the various titles of the bill that an attempt is made to eliminate several alleged and various kinds of discrimination on the ground of race, color, religion or national origin. *Did the gentleman's committee hear any testimony on any discrimination practiced against any people of this country because of their religion?*
> MR. CELLER [of New York who was Judiciary Committee chairman and also chairman of Subcommittee No. 5, which conducted the hearings on H.R. 7152]. We had testimony concerning religion. *We did not have very much testimony of discriminations on the grounds of religion.* You will notice in one of the titles, religion is left out.
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> . . . .
>
> MR. ABERNATHY. . . . Who were the people who were being discriminated against because of religion, of what religious faith?
> MR. CELLER. *We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against.*
>
> . . . .
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> MR. ABERNATHY. Going to Title VI, the gentleman made mention of the fact that the word "religion" was removed from Title VI. Can the gentleman tell us why it is that the bill attempts only to eliminate the kind of discrimination referred to in Title VI, discrimination with regard to race, color, or national origin only, but specifically omits discrimination as to religion?
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> . . . .
>
> MR. RODINO [of New Jersey and member of Subcommittee No. 5 as well as the House Committee on the Judiciary]. Mr. Chairman, there is a specific reason why religion was left out of Title VI. There was no evidence that there was a need to include religion on the question of discrimination.
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> Various members of the clergy of the different faiths appeared before the committee and testified that religious discrimination was not a question. We attempted to meet the problems as they arose. As a result, we did not include religion.
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> . . . .
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> MR. RODINO. . . . I quote from the testimony by Father Cronin, as shown on page 2030 of the hearings. Father Cronin stated:
>
> > I don't believe that need is very pressing at this time. *There are remnants of religious discrimination in the United States, but compared to the instant problem before us, of the civil rights of the Negro Community, these are very, very minor and peripheral* and I would not have any feeling that this should be broadened; no.
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> . . . .
>
> MR. ABERNATHY. *I should like to go back to the first question I propounded. The gentleman, in answer to my question stated that the committee did take testimony that there was discrimination in this country involving religions but that no specific religion was referred to.* If the gentleman is unable to point to the page of the hearings specifying which religious faith was discriminated against, I hope that at least, in revising his remarks, he will insert in the RECORD the faith or faiths he has referred to. Will the gentleman do that?
> MR. CELLER. I shall.
>
> . . . .
>
> MR. ROOSEVELT [of California]. . . . I say to my distinguished friend who just propounded the question, that *information is in the RECORD of the hearings of the Committee on Education and Labor. There is specific reference to discrimination because of religion.* I will insert it in the RECORD in order that the gentlemen may refer to it.

110 CONG. REC. 1528-29 (1964) (emphasis added).

Thus, in the open debates of the Committee of the Whole House for consideration of H.R. 7152, it was brought out that the Committee on the Judiciary received very little, if any, evidence of religious discrimination. The testimony of Father Cronin and other clerics at the Judiciary subcommittee hearings on H.R. 7152 was specifically

zation," or "an employment agency" to "discriminate against any individual . . . because of such individual's race, color, religion, sex or national origin."[11]

Despite the scant legislative consideration, the addition of religious discrimination as an unlawful employment practice under title VII is not really surprising. The inclusion merely reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right that lies at the heart of a free society.[12] While this nation was founded on the premise of

directed at the problem of race relations, and most of the testimony on religious discrimination indicated that the latter problem was slight and diminishing. *See Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 2, at 1152-59, 1363-67, 1987-2051, 2465-75 (1963). Representative Roosevelt's references (110 CONG. REC. 1529 (1964)) to the earlier hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, offer little amplification of the problem of religious discrimination in employment. The most telling testimony given to this latter subcommittee was offered by Joseph Levin, president of the Bureau of Jewish Employment Problems. *See Hearings on Equal Employment Opportunity Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess., pt. 1, at 21-32 (1961). Levin gave evidence to show that some employment agencies were receiving and filling employers' discriminatory job orders. *Id.* at 22. Typical of the restrictive specifications on the job orders were statements such as "This is a gentile firm," "We want Christian girls," "Protestant only—no Catholics, Jews, or Orientals." *Id.* Although Levin admitted that some of his statistics were outdated (*id.* at 30), that his sample source was very limited (*id.* at 32), and that the problem had improved in recent years (*id.* at 30-31), his testimony nevertheless serves to give some documentation to the problem of religious discrimination at the hiring stage of employment. But Levin and the other persons who testified before the Special Subcommittee on Labor were uniformly convinced that racial, not religious, discrimination should be the primary concern of the proposed federal legislation. *See* the statement of Joseph Levin (*id.* at 21, 27); the statement of Will Maslow, general counsel of American Jewish Congress (*id.* at 568, 573); and the statement of Moses K. Kove, chairman of New York Anti-Defamation League (*id.* at 581). With the exception of Levin, all of the witnesses referred to by Representative Roosevelt, who appeared before the House Committee on Education and Labor, dealt primarily with hiring practices that discriminated against Jews. *Id.* at 568-95. As a matter of fact, it is not clear that these witnesses really viewed the discrimination against Jews as an example of "religious discrimination." Mr. Kove, when asked what type of federal legislation should be enacted to deal with the problem he had described—*i.e.*, discrimination against Jews—replied: "I think specifically you ought to have a fair employment practice statute . . . which would make it unlawful . . . to have any practice of discrimination against anyone on the basis of his race, his creed, *his ethnic*, his origin, and if you will, his age." *Id.* at 591 (emphasis added). It is interesting that Mr. Kove would proscribe "ethnic," but not "religious," discrimination. It is also interesting that the witnesses appearing before the Education and Labor Committee dealt only with the easy cases of alleged religious discrimination—*i.e.*, willful discriminatory hiring and promotion practices—and then mostly with respect to discrimination against Jews. No testimony was given concerning the less well-known religions such as Seventh Day Adventism, and the discussion of religious discrimination was not broadened to include problems such as work assignments that conflict with religious holidays.

11. 42 U.S.C. § 2000e-2 (1964).

12. *See generally* P. KAUPER, RELIGION AND THE CONSTITUTION (1964); Antieau, *Religious Liberty Under the Fourteenth Amendment*, 22 NOTRE DAME LAW. 271 (1947);

religious freedom,[13] it has long struggled with the legal difficulties inherent in such freedom.[14] Indeed, it has been noted that "there are few issues so likely to generate heat rather than light as the question of the proper line between the realm of the state and that of the church."[15] In the struggle to define free exercise of religion, a richly diverse cast of characters (and religions)—including an unemployed South Carolina woman;[16] a kosher butcher from Massachusetts;[17] school children from West Virginia,[18] New York,[19] and New Jersey;[20] a Staten Island landowner;[21] a Utah bigamist;[22] and a minor public official from Maryland,[23] to name but a few—have played central roles in the judicially directed effort to find the parameters of religious freedom in this country.

The first and fourteenth amendments protect the individual's religious freedom against infringement only by governmental, not private, action.[24] Therefore, the reference to religious discrimination in title VII plainly was not intended to be a restatement of the substantive constitutional right; rather, the Civil Rights Act is grounded in Congress' regulatory power under the commerce clause of the Constitution.[25] Nevertheless, in the tradition of "heat rather than

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Boudin, *Freedom of Thought and Religious Liberty Under the Constitution*, 4 LAW. GUILD REV. No 3, at 9 (1944); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Deutsch, *Concept of Freedom of Religion in American Public Law*, 44 B.U. L. REV. 287 (1964); Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217; Lake, *Freedom To Worship Curiously*, 1 U. FLA. L. REV. 203 (1948); Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968); Summers, *Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53 (1946).

13. *See, e.g.*, U.S. CONST. amend. I; M. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 6 (1957) [hereinafter KONVITZ]; C. ROSSITER, SEEDTIME OF THE REPUBLIC 36-59 (1953).

14. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Reynolds v. United States, 98 U.S. 145 (1878).

15. P. KURLAND, OF CHURCH AND STATE AND THE SUPREME COURT 2 (1961).

16. Sherbert v. Verner, 374 U.S. 398 (1963).

17. Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961).

18. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

19. Engel v. Vitale, 370 U.S. 421 (1962).

20. Everson v. Board of Educ., 330 U.S. 1 (1947).

21. Walz v. Tax Commr., 397 U.S. 664 (1970).

22. Reynolds v. United States, 98 U.S. 145 (1878).

23. Torasco v. Watkins, 367 U.S. 488 (1961).

24. Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953).

25. 110 CONG. REC. 1528 (1964) (statement of Rep. Celler). U.S. CONST. art. 1, § 8, provides in part that "the Congress shall have Power . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

light," the prohibition against religious discrimination under title VII is no less troublesome, in definition or application, than the substantive constitutional right of freedom of religion and the cases that have heretofore arisen under the first and fourteenth amendments.

Dewey v. Reynolds Metals Company[26] is a recent case that amply demonstrates the confusion that has arisen concerning the scope of title VII's proscription of religious discrimination. The legal wranglings in *Dewey* provide an excellent base point for an analysis of the problems underlying this proscription.

I. The Problem in Perspective: Dewey v. Reynolds Metals Company

Dewey is a case bristling with analytic difficulty, and it demonstrates why bewilderment, rather than enlightenment, is usually the end product of a statutory effort to protect the free exercise of religion in a secular society. More specifically, *Dewey* attempts to resolve the potentially serious tensions between an individual's asserted title VII rights and the rights and obligations that arise under a collective bargaining contract.

Dewey, an employee of Reynolds Metals Company (Reynolds or Company), had commenced his employment at the Company's Grand Rapids, Michigan, plant in 1951. He worked there continuously until September 1966, when he was discharged for his refusal to perform compulsory overtime work on Sundays or to find a qualified replacement to do so. At the time of his discharge, Dewey claimed that, as a member of the Faith Reformed Church since 1961,[27] his religious beliefs prevented him from working on Sundays and also from having someone work in his place.

While employed at the Reynolds Grand Rapids plant, Dewey was a member of the production and maintenance bargaining unit represented by Local 277 of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW or Union). In 1966, the collective bargaining agreement then in existence between the UAW and Reynolds provided that "all employees shall be obligated to perform all straight time and overtime work required of

26. 300 F. Supp. 709 (W.D. Mich. 1969), *revd.*, 429 F.2d 324 (6th Cir.), *rehearing denied*, 429 F.2d 334 (6th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3313 (U.S. Jan. 19, 1971) (No. 835). *See also* Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969).

27. It is curious to note that, prior to 1961, Dewey worked Sunday overtime without protest. Reynolds Metals Co., at 4 (June 29, 1967) (unpub. arbitration award) (Kahn, Arbitrator) [hereinafter Kahn].

them by the Company except when an employee has a substantial and justifiable reason for not working."[28] This provision had been in force since March 15, 1960. On September 20, 1965, apparently after the Union had expressed some concern about the enforcement of the compulsory overtime requirement, the Company adopted a new procedure that relieved an employee of his obligation to work overtime if he could obtain "a qualified replacement to perform the scheduled overtime."[29]

Dewey first ran afoul of the compulsory overtime provision in November 1965 when he refused to work on a Sunday, basing his refusal on his religious beliefs. Pursuant to the Company's plant rules, he received a verbal warning and was advised that a repetition could lead to more serious disciplinary action. Between January and August 14, 1966, whenever Dewey was scheduled for Sunday overtime, he was replaced by another qualified employee, one Jake Zagman.[30] However, when Dewey was scheduled for more Sunday work later in August and in September 1966, he told Zagman not to serve again as his replacement. Since, on these later occasions, Dewey did not have a "qualified replacement" to perform his scheduled Sunday work and since he refused to work himself, he was disciplined by the Company for each refusal. Finally, after the third such refusal, Dewey was discharged in September 1966.

Aggrieved by the discharge, Dewey initiated proceedings on a broad legal front to obtain vindication. First, pursuant to the contractual grievance procedure, he filed a grievance protesting his discharge,[31] which culminated in arbitration before Arbitrator Mark L. Kahn.[32] In his award, dated June 29, 1967, Kahn denied the grievance.[33] In doing so, he relied in part on a 1965 arbitration award at the same plant denying a similar grievance[34] and on the withdrawal

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28. Kahn, *supra* note 27, at 2.

29. Kahn, *supra* note 27, at 2.

30. It is uncertain from the statement of the facts in both the arbitration award and the various court decisions whether Zagman replaced Dewey at Zagman's or Dewey's initiative.

31. Dewey's grievance was presented with that of another employee, Hilbert Scholten, who also refused to work Sunday overtime because of his religious beliefs. Scholten's three-day disciplinary suspension, like Dewey's discharge, was upheld.

32. Kahn, a well-known and respected arbitrator, is not unmindful of individual employee rights. *See, e.g.*, Kahn, *Seniority Problems in Business Mergers*, 8 IND. & LAB. REL. REV. 361 (1955).

33. Kahn, *supra* note 27.

34. The 1965 award upheld a warning notice to an employee who refused to work on Sunday because of his religious beliefs. Reynolds Metals Co. (June 3, 1965) (unpub. arbitration award) (Haughton, Arbitrator).

of another such grievance by the Union in 1966.[35] Arbitrator Kahn, in sustaining the Company's position, rendered two basic holdings: first, that the "substantial and justifiable reason" exception to the agreement, while justifying an occasional refusal to work overtime based on one's religious convictions, could not be used as a basis to refuse *all* Sunday work;[36] and, second, that Dewey had an obligation under the contract "to utilize the established replacement procedure in order to minimize or perhaps avoid entirely the need to confront the Company with a refusal of Sunday work."[37]

Contemporaneously with the filing of his contract grievance, Dewey turned to the Michigan Civil Rights Commission,[38] which in December, 1966 refused to issue a complaint of religious discrimination against Reynolds. The commission ruled:

> The findings indicate that the claimant despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.
>
> The Commission has previously ruled that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent [an] intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.
>
> The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.[39]

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35. Whether the grievant or the union withdrew the grievance is unknown, but for purposes of § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1964), it makes no difference, unless the union's withdrawal constituted a breach of its duty to fair representation. Vaca v. Sipes, 386 U.S. 171 (1967). For title VII purposes, however, the difference is arguably important. *See* pt. V. *infra*.

36. Kahn, *supra* note 27, at 7.

37. Kahn, *supra* note 27, at 7.

38. The Michigan Civil Rights Commission is charged with the responsibility of enforcing the Michigan Fair Employment Practices Act, MICH. COMP. LAW ANN. §§ 423.301-.311 (1955). With respect to religious discrimination in employment, the Michigan statute provides in pertinent part:

> It shall be an unfair employment practice:
>
> (a) For any employer, because of the race, color, religion, national origin or ancestry of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment, or any matter, directly or indirectly related to employment, except where based on bona fide occupational qualification.

MICH. COMP. LAWS ANN. § 423.303(3)(a) (1967).

39. Dewey v. Reynolds Metals Co., 429 F.2d 324, 327 (6th Cir. 1970).

Rebuffed by the Michigan Civil Rights Commission, Dewey requested the United States Office of Federal Contract Compliance to review his charges of religious discrimination. That body also found Dewey's charges to be baseless.[40]

Turning to the Equal Employment Opportunity Commission (EEOC or Commission), Dewey finally found success in January 1967. Overruling the recommendations of its regional director, the EEOC found that there was probable cause to believe that Reynolds had engaged in unlawful employment practices.[41] Accordingly, the Commission authorized Dewey to bring an action in federal district court.[42]

At the time when the EEOC first considered the Dewey matter, its guidelines on religious discrimination provided that an employer should try to "accommodate" the reasonable religious needs of its employees when such accommodation could be accomplished without serious inconvenience to the conduct of the business.[43] Subsequently,

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40. 429 F.2d at 327.

41. 429 F.2d at 327.

42. Although the Equal Employment Opportunity Commission (EEOC or Commission) "authorized" the bringing of the *Dewey* action in federal district court, it should be noted that the case authority construing the enforcement procedures applicable to an alleged title VII violation does not make such "authorization" or "permission" an absolute prerequisite or condition precedent to maintaining such an action. A claimant may not maintain his suit prior to giving the EEOC the statutorily required "opportunity" to investigate and conciliate, but the weight of authority holds that this opportunity, with or without an affirmative EEOC finding of "reasonable cause" or EEOC notification of "inability to obtain voluntary compliance," will be sufficient to establish jurisdiction in a federal court. Beverly v. Lone Star Lead Constr. Co., 3 FAIR EMPL. PRAC. CAS. 74 (5th Cir. Jan. 19, 1971). Even considering the contrary authority, it is clear that something less than a Commission "authorization" is required to invoke the jurisdiction of the federal district courts to protect rights secured under title VII. *See* Dent v. St. Louis-San Francisco Ry., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Coast Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1968); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967), *revd. and remanded on other grounds*, 398 F.2d 496 (5th Cir. 1968). *But see* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Kendrick v. American Bakery Co., 69 L.R.R.M. 2012 (N.D. Ga. 1968).

43. The 1966 EEOC guidelines on religious discrimination read as follows:

(a) (1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

(3) However, the Commission believes that an employer is free under Title VII to establish a normal workweek (including paid holidays) generally ap-

in July 1967, the Commission's guidelines were substantially changed to shift to the employer "the burden of proving that undue hardship renders the required accommodations to the religious needs of the employee unreasonable."[44]

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plicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.

(b) While the question of what accommodation by the employer may reasonably be required must be decided on the pecular facts of each case, the following guidelines may prove helpful:

(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs.

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees.

EEOC Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 (1966).

44. The 1967 EEOC guidelines on religious discrimination read as follows:

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make *reasonable accommodations* to the religious needs of employees and prospective employees where such accommodations can be made *without undue hardship* on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1970) (emphasis added). Between the issuance of the June 15, 1966, guidelines and their replacement by the new guidelines on July 10, 1967, the EEOC General Counsel issued the following interpretative opinions regarding religious discrimination questions: an employment practice that discriminates against atheistic beliefs violates title

After the EEOC had made its finding of probable cause in the *Dewey* case, and after the issuance of the unfavorable award by Arbitrator Kahn in June 1967, Dewey filed suit in the United States District Court for the Western District of Michigan, alleging that Reynolds was guilty of religious discrimination under title VII. The court, in a series of three decisions,[45] dismissed Reynolds' contrary contentions and ruled in Dewey's favor. These three decisions, plus the two rendered on the appeal to the United States Court of Appeals for the Sixth Circuit,[46] aptly demonstrate the legal difficulties raised by a requirement that a secular business institution adjust its operations in order to accommodate the varying religious needs of its workers. Moreover, these decisions illustrate the conflict between the guarantee of individual rights under title VII and the subjugation of these asserted rights in the collective bargaining context.

In its first ruling in the case, the district court denied Reynolds' motion to dismiss.[47] In support of its motion, Reynolds had argued that, by filing a grievance under the contractual grievance procedure, Dewey had made a final and binding election of remedies. Rejecting this contention, the court emphasized that the issues treated by the arbitrator were wholly different from those raised in a title VII suit.[48] The court noted that the arbitrator had properly limited himself to the contract and had never touched the issues raised under either the Civil Rights Act or the first amendment.[49] The district court also

VII since the United States Constitution embraces religious liberty, includes the concept of "freedom from belief" as well as "freedom of belief" (Opinion Letter of EEOC General Counsel, Aug. 2, 1966, in BNA LAB. POLICY & PRAC. 401:3013 (1966)); the requirement that employers treat all religions with "substantial uniformity" in granting absences from work due to religious holidays does not prescribe precise mathematical accuracy, and, thus, an employer does not violate title VII by giving Jewish employees one or two religious holidays with pay while giving Christian employees none, when the latter do receive certain legal holidays with pay that are also Christian holidays (Opinion Letter of EEOC General Counsel, Oct. 3, 1966, in BNA LAB. POLICY & PRAC. 401:3026 (1966)); an employer violates title VII by not allowing substantially the same amount of time off with substantially equivalent compensation when Jewish employees are granted six paid religious holidays, but Christian employees are allowed only one (Opinion Letter of EEOC General Counsel, July 25, 1966, in BNA LAB. POLICY & PRAC. 401:3010 (1966)); and an employer does not violate title VII by discharging and refusing to rehire employees for failure to join a union in a plant covered by a lawful union shop agreement, even though an employee claims that joining a labor union would be contrary to his religious beliefs (Opinion Letter of EEOC Acting General Counsel, Jan. 26, 1967, in BNA LAB. POLICY & PRAC. 401:3033 (1967)).

45. *See* notes 47, 52, & 58 *infra.*

46. 429 F.2d 324 (6th Cir.), *rehearing denied,* 429 F.2d 334 (6th Cir. 1970). *See* notes 61-72 *infra.*

47. Dewey v. Reynolds Metals Co., 291 F. Supp. 786 (W.D. Mich. 1968).

48. 291 F. Supp. at 789.

49. The district court never fully discussed how the first amendment is relevant in

reasoned that Dewey "should not be penalized for first proceeding with his contractual remedies through the arbitration process, as preferred and indeed mandated by federal labor law."[50] The court buttressed this latter conclusion by reasoning that, since the arbitration proceeding was not purely private but served also as a substitute for traditional judicial remedies, the first amendment was applicable; the court held, therefore, that "[t]he right in question, freedom to exercise one's religion, is too precious to require plaintiff to accept an arbitrator's decision regarding it."[51]

In its second decision,[52] the district court found that the Company had clearly discriminated against Dewey. In reaching this result, the court placed principal reliance on two sources: first, the United States Supreme Court's decision in *Sherbert v. Verner*,[53] striking down as unconstitutional South Carolina's scheme of unemployment compensation because it denied benefits to a Seventh Day Adventist who had refused as a matter of religious principle to work on Saturday; and, second, the more recent 1967 EEOC guidelines requiring an employer to make reasonable accommodations to the religious needs of its employees unless such accommodations impose an "undue hardship" on the employer.[54] The court ruled that Reynolds had discriminated against Dewey because its compulsory overtime requirement had the effect of forcing Dewey to choose between his religion and his job; this discriminatory impact, the court reasoned, violated the Supreme Court's holding in *Sherbert*. Moreover, the court held that Reynolds had not carried its burden of proof under the EEOC guidelines; that is, that Reynolds' evidence that ten years ago it had experienced some difficulty in scheduling production on Sunday was not sufficient to demonstrate a current business "hardship." In addition, the court emphasized that the Company rule that allowed Dewey to find a qualified replacement was an insufficient accommodation, since a fundamental part of

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the context of private employment and in the absence of governmental action; the Sixth Circuit was no more helpful in its off-handed dismissal of any first amendment considerations because of the lack of state action. 429 F.2d at 329. *But cf.* Linscott v. Miller Falls Co., 316 F. Supp. 1369 (D. Mass. 1970). In any event, the district court's reliance on the first amendment in the arbitration context, 291 F. Supp. at 789-90, has serious implications—such as the incorporation of constitutional guarantees into arbitration—that certainly are not adequately dealt with in its opinion. *Cf.* Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. (n.s.) 141 (1970).

50. 291 F. Supp. at 789.

51. 291 F. Supp. at 790.

52. Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich 1969).

53. 374 U.S. 398 (1963).

54. *See* note 44 *supra*.

Dewey's religious beliefs prohibited him from asking anyone else to work on Sunday.[55]

The fashioning of proper relief posed some difficulty for the court, because it recognized that the 1966 EEOC guidelines,[56] which were in effect at the time when Reynolds discharged Dewey, prescribed a scheme for reasonable accommodation that was far less stringent than the 1967 guidelines relied on by the court. In effect, the court suggested, without so stating, that Reynolds' conduct was not an unlawful employment practice under the 1966 guidelines. The court therefore ruled that, while reinstatement was appropriate, back pay would be accorded Dewey only for the period of his discharge subsequent to August 1, 1967, when Reynolds should have had notice of the new guidelines.[57] Furthermore, by failing to strike down the compulsory overtime provision, the court left it to the parties to work out a reasonable accommodation for the future.

In its third decision in the case,[58] the district court refused to stay Dewey's reinstatement, although it stayed the money judgment, and ruled, again adversely to Reynolds, that good faith on the part of the employer is not a viable defense to a suit brought under title VII.[59] It found that Reynolds had engaged in an unlawful employment practice by intentionally discharging Dewey for his refusal to work Sunday and to find a replacement.[60]

On appeal, the United States Court of Appeals for the Sixth Circuit, in a two-to-one decision, reversed.[61] The Sixth Circuit found *Sherbert* inapplicable because it involved state action, whereas this case involved private action.[62] It also found inapposite the 1967 EEOC guidelines relied on by the district court, ruling that the 1966 guidelines, in effect at the time of Dewey's discharge, were con-

55. Dewey claimed that asking someone else to work on Sunday was as much a sin as was working himself. 300 F. Supp. at 715.

56. *See* note 43 *supra*.

57. 300 F. Supp. at 715 n.1. The present guidelines became effective July 10, 1967. The court never explained, however, why an award for back pay of the entire period could not have been ordered on the basis of *Sherbert v. Verner*, which the court relied on along with the guidelines. Perhaps the district court's reliance on *Sherbert* was more apparent than real.

58. Dewey v. Reynolds Metals Co., 304 F. Supp. 1116 (W.D. Mich. 1969).

59. 304 F. Supp. at 1121. *See* 42 U.S.C. § 2000e-5(g) (1964). *Cf.* Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

60. 304 F. Supp. at 1121. The district court's treatment of the issue of intent was less than satisfying. Implicit from the court's sparse discussion is the adoption of the intent standard that is applied under the NLRA, which is the common-law test of natural and foreseeable consequences. *See* Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

61. 429 F.2d 324 (6th Cir. 1970).

62. 429 F.2d at 329.

trolling.[63] The court held that, in any event, the Company rule that permitted Dewey to find a replacement was a reasonable accommodation to Dewey's religious beliefs even under the new guidelines and thus Reynolds was under no present duty to alter its rules.[64] The court also disagreed with, and expressed grave concern about, the district court's finding that the Company had *intentionally* engaged in an unlawful employment practice, especially in light of the fact that the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator, and the regional director of the EEOC had all opined that Reynolds had not discriminated against Dewey.[65] The Sixth Circuit also amplified its dissatisfaction with the trial court's ruling on the intent issue by referring to the fact that the district court had based its decision, in large part, on the ex post facto application of the new EEOC guidelines.[66]

In addressing itself to the issue of discrimination, the court of appeals declared that title VII did not ban neutral actions by an employer, such as the compulsory overtime requirement in issue in *Dewey*. The court ruled that the ban extended only to those actions taken with the intent of denying employment opportunity because of the enumerated proscribed criteria. In this regard the court said:

> The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees. The violation consisted not only of his refusing to work on Sundays, but also his refusing to arrange for a replacement, which was an alternate procedure. He did arrange for five replacements, but later refused even to do this, claiming that it was a sin. He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.
>
> To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations.[67]

63. 429 F.2d at 329.
64. 429 F.2d at 331.
65. 429 F.2d at 331.
66. 429 F.2d at 330.
67. 429 F.2d at 330.

On the issue of election of remedies, the Sixth Circuit ruled that Dewey had made a final and binding election of remedies by taking his grievance to arbitration.[68] Finding it anomalous that, under the Steelworkers Trilogy,[69] the employer would be unable to relitigate the discrimination question if the arbitrator had ruled against it, the court ruled: "Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them."[70]

On rehearing, the court of appeals again split two to one in reversing the district court decision.[71] Emphasizing that the Act does not require accommodation, the majority reiterated its opinion that title VII prohibits only discrimination by design, rather than by effect, and that under this standard the compulsory-overtime provision of the contract discriminated "against no one."[72] On the issue of election of remedies, the majority noted two recent Fifth Circuit cases[73] that were at odds with its previous decision, but nevertheless refused to reverse itself on the question.

Dewey thus brings into sharp focus some of the serious legal questions that are necessarily involved in the enforcement of the title VII prohibition of religious discrimination in employment. What follows is an examination of the most important of these difficulties.

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68. 429 F.2d at 331-32.

69. The Steelworkers Trilogy consists of three cases decided by the Supreme Court in 1960, which defined the scope of arbitration of labor contract disputes: Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

70. 429 F.2d at 331. Judge Combs, dissenting from the Sixth Circuit's decision, emphasized the deference to be shown an administrative agency's interpretation of the act it administers and noted that the prior EEOC guidelines also required an "accommodation," albeit far less demanding than the accommodation mandated by the 1967 guidelines. 429 F.2d at 333. Reiterating that Dewey's religious beliefs precluded his finding a replacement to work on Sunday, and finding no evidence offered by Reynolds to indicate undue hardship, Judge Combs reasoned that Dewey's discharge violated title VII. 429 F.2d at 333-34. He also disagreed with that portion of the majority opinion that ruled on the issue of election of remedies, noting that Dewey's rights under the contract and under title VII were separate and distinct; he noted that the Court of Appeals for the Seventh Circuit, in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), had ruled that a plaintiff could utilize dual prosecutions so long as the windfall of duplicate relief was not allowed. 429 F.2d at 334.

71. 429 F.2d at 334. In the interim, Judge Combs had resigned from the federal bench to run for Governor of Kentucky; Judge McCree replaced Judge Combs on the panel. Judge McCree dissented from the denial of rehearing. 429 F.2d at 337.

72. 429 F.2d at 336.

73. Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).

II. The Definition of Religion

One problem that both courts avoided in *Dewey* was the definition of the term "religion." The district court found that there was "no dispute as to the sincerity" of Dewey's religious beliefs,[74] and this finding was not overturned on appeal. The court's finding is significant not because it was determinative in *Dewey*, but rather because it raises the question whether an employer could ever launch a successful attack on the "religious" character of an asserted religion or on the sincerity of an individual's professed religious beliefs. If religion is indeed to be defined with reference to an individual's "views of his relations to his Creator,"[75] then there is no purely objective standard available to judge the existence of the thing against which discrimination is prohibited. Since religion under the law may involve nothing more than a "deeply and sincerely"[76] held belief, which may be "purely ethical or moral in source and content,"[77] the mere *assertion* of belief will serve as prima facie evidence of its genuineness. Unless the employer can point to some previous specific and overt behavior that is patently inconsistent with the individual's professed beliefs, it is questionable whether he can successfully challenge the employee's sincerity. Even overt conduct may be insufficient, because consistency of conduct cannot be the test of sincerity of belief since, under the law, the individual "must accommodate [his] idiosyncrasies, religious as well as secular, to the compromises necessary in communal life."[78]

The cornerstone to any discussion of law and religion may be found in the often-quoted words of Justice Miller: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[79] Justice Jackson, in *West Virginia State Board of Education v. Barnette*,[80] put forward this same proposition in his highly stylized prose: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

74. 300 F. Supp. at 711.
75. Davis v. Beason, 133 U.S. 333, 342 (1890).
76. Welsh v. United States, 398 U.S. 333, 340 (1970).
77. Welsh v. United States, 398 U.S. 333, 340 (1970).
78. Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953).
79. Watson v. Jones, 80 U.S. 679, 728 (1871).
80. 319 U.S. 624 (1943).

therein."[81] Freedom of religion, Justice Douglas emphasized in *United States v. Ballard*,[82]

> embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths .... Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[83]

Given these judicial pronouncements, it is not surprising that the Supreme Court has declared that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."[84]

Built on the establishment and free exercise clauses of the first amendment, this broad laissez-faire definition of religion is a reflection not only of the tolerance accorded differing beliefs in this country, but of the virtual impossibility of distinguishing between sincere and insincere religious beliefs. Based more on faith than on reason, all religion, by definition, is somewhat irrational. For this reason, erratic and inconsistent courses of action are meaningless in testing the sincerity of one's religious beliefs; hence, the "reasonable man," that amorphous, all-purpose source of guidance, is no help. Perhaps no case better illustrates the irrationality of sincere religious belief than *Dewey* itself.[85] Prior to his conversion in 1961 to the Faith Reformed Church, Dewey worked Sunday overtime without objection. Afterward, however, he perceived Sunday work as sinful and stubbornly refused to perform it. Dewey did, however, allow Zagman to replace him five times, until he came to view this substitution as a sin also and told Zagman not to serve as his replacement. It is exasperating to ask how Zagman's replacement of Dewey was religiously acceptable on August 14, 1966, but not so two weeks later. Although Dewey's actions appear to brim with irrationality, they are no more unreasonable than the practices of adherents of other religious sects. For example, how can one rationally explain the practice of many persons of the Jewish faith who maintain kosher homes, but who

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81. 319 U.S. at 642.
82. 322 U.S. 78 (1944).
83. 322 U.S. at 86-87.
84. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).
85. *Dewey* is discussed in pt. I. *supra*.

eat nonkosher food regularly at restaurants? Each has, after all, but one stomach.

In short, since religion is based on a sometimes irrational faith, consistency of belief cannot serve as a litmus paper test of conviction or hypocrisy. The sincerity of one's religious beliefs simply cannot be measured by mere mortals. As one commentator has aptly put it:

> How sincere in his religious beliefs is a person who, while professing belief in the immortality of his soul and in rewards and punishments in the next world seemingly spends his time doing nothing but accumulating the things you can't take with you, or a preacher who in the same breath will say that God is love and that sinners are in the hands of an angry God? Who can weigh and measure the quantity and quality in professions of religious faith?[86]

Moreover, religious sincerity and religious verity are not separate and distinct; examination of the former must inevitably lead to scrutiny of the latter.[87] Indeed, it seems somewhat fatuous to talk, as do the EEOC guidelines,[88] of reasonable accommodation without first asking against whose standards the accommodation should be measured. Applying its own standard of reasonableness, the Sixth Circuit Court of Appeals felt, and not without some justification, that the scheme utilized by Reynolds that allowed employees to find a replacement for Sunday overtime was more than reasonable. On the other hand, as the district court quite properly pointed out, under Dewey's religious scruples, which viewed allowing another person to work in one's place as a sin equivalent to doing the work oneself, Reynolds' accommodation was anything but reasonable.

The difficulty the courts have in judging the sincerity of an individual's religious beliefs, and their consequent general refusal to do so, is compounded by the expansive definition recently accorded the term "religion" by the Supreme Court in a somewhat different context. In *Welsh v. United States*,[89] the Court was confronted with the definition of "religious" under section 6(j) of the Military and Selective Service Act of 1967, which provides for the exemption of conscientious objectors from the draft.[90] Quoting its earlier holding in *United States v. Seeger*[91] that traditional or parochial concepts of religion—including belief in a Supreme Being—result in too narrow a defini-

86. KONVITZ, *supra* note 13, at 101.

87. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 93, 95 (1944) (Justice Jackson, dissenting).

88. *See* note 44 *supra*.

89. 398 U.S. 333 (1970).

90. 50 U.S.C. App. § 456(j) (Supp. V, 1965-1969).

91. 380 U.S. 163 (1965).

tion, the Court in *Welsh* reiterated the *Seeger* definition of the term "religious": "The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[92] The Court then clarified this definition by stating that

> [m]ost of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.[93]

Although the Supreme Court in *Welsh* limited the scope of the religious exemption to exclude those persons "whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency,"[94] the Court's statutory interpretation nevertheless gave such a broad definition to "religion" that it may have opened a Pandora's box of analogous definitional problems under title VII with respect to religion. It is true that *Welsh*, in dealing with the conscientious-objector exemption from the draft, applies a statutory scheme that is entirely different than the Civil Rights Act. However, it is significant that both *Welsh* and *Dewey* deal with federal legislative schemes that, in effect, add flesh to the bare bones of the first amendment. In each case the statute seeks to guarantee protection for religious beliefs—protection against the draft requirement in *Welsh* and protection against employment discrimination in *Dewey*. Since the definition of "religious" or "religion" is crucial to an explanation of the scope of the statutory protections under both the Military and Selective Service Act and title VII, it would not be

92. 398 U.S. at 339.
93. 398 U.S. at 340.
94. 398 U.S. at 342-43.

surprising to find the broad *Welsh* definition adopted in future title VII cases.

For title VII purposes, the comprehensive definition of religion in *Welsh* is no doubt quite proper;[95] however, a total incorporation of the broad *Welsh* definition of religion with no concomitant restriction in the statutory construction of "discrimination" or "intent" would produce some horrendous results in religious-discrimination cases under title VII. For example, an employee could well feel that going bowling every Wednesday night is central to his existence and well-being, and that for him not to do so would constitute a sin. Is he required to work overtime Wednesday nights? Absurd? Yes, but is this example any more absurd than Dewey's belief? What if, instead of praying every Wednesday night, an employee believes that working overtime in itself is sinful; or an employee shows up for work only on those days when he doesn't hear the "call"? More realistically, must an employer, under title VII, allow a Moslem employee to pray the five times a day required by his faith? What if we call the employee's action a slowdown instead of prayer? This short series of hypotheticals, while at first blush rather nonsensical, is not so unrealistic. To many, Robert Dewey might appear to be an exception. But given a sufficiently expansive definition of religion and the utter futility of challenging the sincerity of an individual's religious beliefs, there will be countless Robert Deweys in this diverse country.[96]

Arbitrator Kahn indicated in his decision that he was troubled by these problems. He observed:

> It is worth noting, perhaps, that Article IX, Section 3 [of the collective bargaining agreement], applies explicitly to "all straight time and overtime work." Suppose that an employee decided to join a religious organization with a Wednesday Sabbath, and that he thereafter refused to work on Wednesdays. It would be obvious, I think, that the Company could properly find this employee in vio-

95. That title VII meant to incorporate a broad definition of religion is beyond dispute. This conclusion is supported by the legislative history, which indicates that an amendment to exempt atheists from the protection of title VII was defeated. *See* 110 CONG. REC. 6568, 7217 (1964). *See also* Opinion Letter of EEOC General Counsel, Aug. 2, 1966, in BNA LAB. POLICY & PRAC. 401:3013 (1966); Note, *Title VII—Religious Discrimination in Employment—Is "Effect on Individual Religious Belief" Discrimination Based on Religion Under the Civil Rights Act of 1964?*, 16 WAYNE L. REV. 327, 333 (1969).

96. *See, e.g.*, A.C. Rochat Co., 163 N.L.R.B. 421 (1967), in which bargaining with a union was claimed to contravene the religious beliefs of an employer. *Cf.* Church of Scientology v. Richardson, 39 U.S.L.W. 2402, 2403 (9th Cir. Jan. 11, 1971) (holding that an instrument allegedly essential to the practice of Scientology could be barred from importation upon administrative determination as a misbranded device without evaluation of the "truth or falsity of any related 'religious' claims").

> lation of Rule 11; yet, the language of this Agreement makes no distinction for this purpose between straight time and overtime work assignments.[97]

On rehearing, the Sixth Circuit also alluded to this and other unorthodox religious practices and ruled: "The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees."[98]

In sum, the necessarily broad definition of religion has a serious impact on the sweep and possible effect of asserted title VII rights. In defining the scope of those rights, this expansive and malleable definition of religion cannot be ignored. Indeed, it serves to buttress the argument, to which we next turn, that the definition of "discrimination" under title VII should be narrow and encompass only intentional discrimination, rather than be the broader one of reasonable accommodation or the still broader one of discrimination by effect.

III. Definition of Discrimination

One of the central problems faced in *Dewey* was the definition of religious discrimination under title VII. At least three such definitions are possible. First, title VII could be interpreted to prohibit only intentional and willful acts of discrimination—that is, discrimination by intent—such as an employer's refusal to hire Jews or Catholics because of their religion. Second, it would be possible to construe title VII as prohibiting an employer action or rule that is otherwise neutral on its face, such as a requirement that *all* workers must work on Sunday, if the action is not uniform in its impact on employees holding differing religious beliefs—in other words, discrimination by effect. Third, title VII could be construed as incorporating the more recent 1967 EEOC guidelines, which adopt the discrimination-by-effect standard, but which allow for exculpation (1) if the employer has made an effort reasonably to accommodate the religious needs of the employee, or (2) if an accommodation cannot be made without undue hardship to the employer.

In *Dewey*, the Sixth Circuit on rehearing unmistakably limited title VII's proscription to the intentional religious-discrimination standard. Although the court toyed with the reasonable-accommodation theory in its first opinion, only to conclude, contrary to the district court, that Reynolds had made such an accommodation,[99] its

97. Kahn, *supra* note 27, at 7.

98. 429 F.2d at 335.

99. 429 F.2d at 331.

second decision rejects any such requirement.[100] The district court, on the other hand, adopted both the EEOC standard of accommodation and, by badly straining *Sherbert v. Verner*, the discrimination-by-effect standard.[101] Thus, the series of opinions in *Dewey* brings into focus the conflicting definitions of discrimination and illustrates the scope that can be given to each. In order to resolve this conflict, it is useful to look at the sources from which the proper definition of discrimination can be gleaned.

A. *The Legislative History*

The most readily available source is, of course, the Act itself. At first blush, however, title VII provides little help. Section 703(a)[102] prohibits discrimination "because" of the categories there enumerated. What "because" means surely is open to dispute. Was Dewey discharged because he refused to work Sundays or because of his religious beliefs? Or because Reynolds refused to make a reasonable accommodation? Or because of all three? The word "because" is simply too ambiguous to provide guidance.

Considerably more helpful are sections 703(h) and 706(g). The former section declares that an employer is not guilty of unlawful discrimination under the Act if he provides for different terms and conditions of employment for his employees working at different locations, "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin."[103] The latter section allows for remedial relief in title VII cases if it is found that the employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice."[104] Both sections seem to be directed only at discrimination by intent. Indeed, this conclusion seems to be buttressed by some of the legislative history of the Act.

The legislative history is admittedly sparse on this point, but interpretative statements made by proponents of the Act give some clues to the meaning of discrimination under title VII. For example, some comments by Senator Hubert Humphrey—one of the principal architects of the 1964 Civil Rights Act—lend support to the more restrictive definition of "discrimination":

> A new subsection 703(h) has been added, providing that it is not

100. 429 F.2d at 335.
101. 300 F. Supp. at 713-15.
102. 42 U.S.C. § 2000e-2(a)(1) (1964).
103. 42 U.S.C. § 2000e-2(h) (1964).
104. 42 U.S.C. § 2000e-5(g) (1964).

> an unlawful employment practice for an employer to maintain different terms, conditions, or privileges of employment either in different locations or pursuant to a seniority, merit, or other incentive system, provided the differences are not the result of an intention to discriminate on grounds of race, religion, or national origin. 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. Thus this provision makes clear that it is only discrimination on account of race, color, religion, sex, or national origin, that is forbidden by the title. This change does not narrow application of the title, but merely clarifies its present intent and effect.[105]

In regard to section 706(g), he added:

> Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or national origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. *The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate.*[106]

If by "inadvertent or accidental discriminations" Senator Humphrey had in mind neutral employer acts that are nondiscriminatory in application but discriminatory in effect, then his statements do indeed give credence to the view that "discrimination" under title VII means only discrimination by intent.

Further support for this narrow definition of discrimination can be found in the views expressed by Senators Joseph Clark and Clifford Case, the floor managers of the Civil Rights Act. In their interpretative memorandum concerning title VII, they noted, *inter alia*:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex

105. 110 CONG. REC. 12,723 (1964).

106. 110 CONG. REC. 12,723-24 (1964) (emphasis added).

> and national origin. Any other criterion or qualification for employment is not affected by this title.[107]

Under this narrow view, Reynolds surely did not discriminate against Dewey, since it applied its compulsory overtime requirement and replacement scheme evenhandedly. Indeed, under the Clark-Case standard, Reynolds, by accommodating Dewey's religious beliefs as it was required to do under the EEOC guidelines, would arguably be guilty of an unlawful employment practice under title VII, for such an accommodation would seemingly constitute favored treatment.

This narrow definition of discrimination is also sustained by a memorandum prepared by the Justice Department in reply to Senator Lister Hill's argument that title VII would undermine seniority systems. This memorandum noted:

> Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title.[108]

In distinguishing between a system that is based on the equal application of a rule—for example, seniority—and one that relies on the prohibited categories—for example, requiring all Negroes to be laid off first—the Justice Department's memorandum is clearly premised on the narrow definition of discrimination.

B. *The Problem of Race Discrimination*

While the legislative history of title VII appears to support the narrow view of discrimination—and it surely does not give explicit support to the broader discrimination-by-effect view—the courts have nevertheless been reluctant to embrace the former definition, probably because of the difficult and subtle problems posed by racial, rather than religious, discrimination under the Act.[109] Even before

107. 110 CONG. REC. 7213 (1964).

108. 110 CONG. REC. 7207 (1964).

109. On March 8, 1971, as this Article was going to print, the Supreme Court rendered its first significant interpretation of title VII in Griggs v. Duke Power Co., 39 U.S.L.W. 4317 (U.S. March 8, 1971). In *Griggs* the Court was faced with a case involving the present effects of past willful race discrimination against black workers. After the employer abandoned his policy of overt discrimination, he initiated a new policy that required a high-school diploma and completion of intelligence tests for all jobs from which blacks had previously been excluded. In holding these requirements to be in violation of title VII, the Court ruled:

> The objective of Congress in the enactment of Title VII is plain from the language

the passage of the Civil Rights Act of 1964, the federal courts attempted to curb racial bigotry by finding discrimination in cases in which a requirement that was nondiscriminatory on its face led in practice to a discriminatory result. The decision of the Fifth Circuit Court of Appeals in *Meredith v. Fair*[110] is a good example of this approach. *Meredith* involved a requirement at the University of Mississippi that, in order to be admitted to the university, an applicant was required to furnish the names of six university alumni who could attest to the applicant's good character. On its face such a requirement appears nondiscriminatory; but since there were no Negro graduates of the university, it was virtually impossible for a Negro applicant to have six alumni attest to his good character. Consequently, the requirement was found to be discriminatory.

Given the historical patterns and traditions of racism in the United States, and in light of the strong congressional mandate embodied in the Civil Rights Act to eliminate the "glaring . . . discrimination against Negroes,"[111] it is not surprising that some federal courts have adopted the broad definition of discrimination in title VII cases.[112] But this judicial approach may be unnecessary, a possibility that can be demonstrated again with reference to *Meredith*. While *Meredith* seems to support the broad discrimination-by-effect definition, it may actually be a better example of the narrow discrimination-by-intent view. The rule being challenged in *Meredith* was innocuous on its face, but the court recognized that the rule was deliberately established for the purpose of discriminating against Negroes.[113] Thus, it can be legitimately asserted that the case really involved intentional discrimination; it would be a good example of discrimination by effect only if the court had assumed that the University of Mississippi had established the alumni rule without intending to discriminate.

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of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

39 U.S.L.W. at 4319.

110. 298 F.2d 696 (5th Cir. 1962).

111. H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963).

112. *See, e.g.*, United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir. 1970); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969).

113. 298 F.2d at 701.

That assumption, however, would surely have been contrary to fact.

The point of this analysis is to suggest that the courts need not adhere to a broad definition of discrimination in race cases under title VII because the desired results may be satisfactorily achieved under the more limited heading of discrimination by intent. In other words, in the race cases, a finding of an unlawful employment practice based on the present effects of past acts of willful discrimination[114] should be classified as discrimination by intent, not by effect;[115] the discriminatory effects in such cases are premised, in the first instance, on an intent or design to treat Negroes differently from whites. Either definition scheme will lead to the same result in cases of racial discrimination, but the adoption of a standard of discrimination by intent will produce entirely different results in religious-discrimination cases than will a standard of discrimination by effect.

C. *The Role of the EEOC in Fashioning a Definition of Discrimination*

In grappling with the problem of defining religious discrimination under title VII, another source of guidance is, of course, the EEOC. As the Supreme Court has noted, "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."[116]

Although the EEOC is surely a source of guidance in construing title VII, there are two compelling reasons here to suggest that the role of the Commission, in fashioning a definition of "discrimination," should be somewhat circumscribed. One of these reasons was suggested long ago by the Supreme Court:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*[117]

Thus, in a case such as *Dewey*, the weight of judicial deference to be

114. *See* Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

115. This point is amplified in the text accompanying notes 175-83 *infra*.

116. Udall v. Tallman, 380 U.S. 1, 16 (1965). *Accord*, Phillips v. Martin Marietta Corp., 39 U.S.L.W. 4160, 4161 (U.S. Jan. 25, 1971) (Justice Marshall, concurring in the per curiam decision); Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190, 205 (1966).

117. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added).

accorded the Commission's judgment is a function of the thoroughness, validity, and consistency in the EEOC reasoning. In *Dewey* there were two sets of EEOC guidelines for religious discrimination that seriously conflicted with one another: the earlier 1966 guidelines that limited the proscription to intentional discrimination and arguably did not require accommodation in a *Dewey*-type situation;[118] and the more recent 1967 guidelines that broadened the impact of the former guidelines to require accommodation in such circumstances.[119] Given this reversal of position by the EEOC, there is a serious question whether the EEOC's judgment lacks "consistency with earlier and later pronouncements."[120] Moreover, as will be shown,[121] the EEOC has been inconsistent in applying its accommodation formulation: it has treated a charge of religious discrimination differently when the charge is based on the application of a union shop provision than when based on other provisions of a collective bargaining contract, such as the compulsory overtime provision in issue in *Dewey*.

The second reason suggesting that the role of the EEOC should be circumscribed here is the statutory scheme of enforcement under title VII. Under the Act, the EEOC has no enforcement power;[122] moreover, under its own interpretation of the statute, the Commission is without power to prevent a party from bringing a court action if the party himself rejects the settlement reached between the EEOC and the employer.[123] The Commission's view is in accord with court decisions[124] that have emphasized that "under Title VII, the charging party and suing plaintiff acts as a private attorney general"[125] and that the primary responsibility for the adjudication of rights under title VII rests with the courts, not with the Commission.[126] This view also comports with the legislative history of the Act, which indicates

118. 31 Fed. Reg. 8370 (1966), set forth in note 43 *supra*. *See* text accompanying note 132 *infra*.

119. 29 C.F.R. § 1605.1 (1970), set forth in note 44 *supra*. *See* text accompanying notes 133-39 *infra*.

120. *See* text accompanying note 117 *supra*.

121. *See* text accompanying notes 142-46 *infra*.

122. The United States Senate recently voted to give the EEOC the power to issue cease-and-desist orders in order to enforce title VII. Equal Employment Opportunity Enforcement Act of 1970, S. 2453, 91st Cong., 2d Sess. (1970). However, the House version of the bill stalled in the Rules Committee and did not clear the House before expiration of the 91st Congress. Proponents of the legislation thus will have to begin again and win both Senate and House passage in the new Congress.

123. Letter from the EEOC Director of Compliance to U.S. Gypsum Co., June 19, 1967, cited in Cox v. United States Gypsum Co., 284 F. Supp. 74, 84 (N.D. Ind. 1968).

124. *See, e.g.*, Flowers v. Local 6, Laborers, 431 F.2d 205 (7th Cir. 1970).

125. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969).

126. Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).

that Congress did not intend to place "the Commission in the Court House door."[127]

Given this lack of enforcement power and the inconsistent behavior of the EEOC, perhaps it is not surprising to find that the Commission, which filed an amicus brief to the Sixth Circuit in support of Dewey's petition for a rehearing, implicitly urged the court to ignore its guidelines.[128] Recognizing that the 1966 guidelines, not the more stringent 1967 guidelines relied on by the district court, were in effect when *Dewey* was discharged,[129] the EEOC attempted in its brief to soft-pedal the significance of the district court's ex post facto application of the later 1967 guidelines, arguing that

> [t]he timing of the Commission interpretations is irrelevant, since as the Court of Appeals for the Third Circuit stated in *Fekete v. U.S. Steel*, 2 FEP Cases at p. 543:
>
> > But in this role of investigator and conciliator, the Commission is not the final arbiter of an individual's grievance.
> >
> > . . . .
>
> Although the Court is to accord great weight to the Commission's interpretation of the statute . . . it may not deprive the plaintiff of relief from the unlawful employment practice by turning to a defunct Commission guideline.[130]

In circumstances such as these, when the EEOC itself has argued that its guidelines should be ignored, the courts should show grudging, if any, deference to the Commission's judgment.

Since the courts may decide that, despite the preceding arguments, the Commission does have a purposeful role to play in construing religious discrimination under the Act, it may be useful here to review some of the EEOC interpretations concerning the obligations of an employer under title VII. The Commission's first religious guidelines, issued June 15, 1966,[131] required an employer to make only very limited accommodation for his employees' religious be-

127. Cox v. United States Gypsum Co., 284 F. Supp. 74, 84 (N.D. Ind. 1968). The district court in *United States Gypsum* derived its "Court House door" phrase from a comment by Senator Javits that illustrated that the EEOC was not intended to be the only party with standing to sue under title VII: "The Commission may find the claim invalid; yet the complainant still can sue, and so may the Attorney General, if he finds reasonable cause for doing so. In short the Commission does not hold the key to the courtroom door." 110 CONG. REC. 13,697 (1964), quoted in 284 F. Supp. at 83.

128. Brief for EEOC as Amicus Curiae at 10-11, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970).

129. Under the Act, an employer is relieved from liability under title VII for the alleged commission of an unlawful employment practice if he "pleads and proves that the act of omission complained of was in good faith, in conformity with and in reliance on any written interpretation or opinion of the commission." 42 U.S.C. § 2000e-12(b)(1) (1964).

130. Brief for EEOC as Amicus Curiae at 10-11, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970).

131. 31 Fed. Reg. 8370 (1966). *See* note 43 *supra*.

liefs, and required none at all if the result would be either serious inconvenience to the employer or disproportionate allocation of unfavorable work. Moreover, the 1966 guidelines stated that an employer could prescribe a work week applicable to all employees, even though such a schedule did not operate with uniformity in its effect upon the religious beliefs of all employees. Of greatest importance in the *Dewey* situation, the guidelines provided:

> (3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.[132]

At the time of Dewey's conversion the compulsory overtime requirement was part of the collective bargaining agreement; therefore, under the Commission's 1966 guidelines, Reynolds was not guilty of discrimination.

Under the new guidelines, effective July 10, 1967,[133] the reasonable-accommodation provision is far more stringent; an employer can avoid the requirement that he make reasonable accommodation only by carrying the burden of proving undue hardship. Employers have been able to meet this burden only in truly compelling cases—for example, when the job required availability on a seven-day-a-week, round-the-clock basis,[134] or when a short harvesting season necessitated attendance every day for six weeks.[135] In more pedestrian cases—for example, when an Orthodox Jew[136] or a member of the Radio Church of God[137] wanted to leave work early on Friday nights, or when an employee was absent several Saturdays because of his religious beliefs[138]—the Commission has found that the employer had not met its burden of proving undue hardship. In fact, in the last case, the Commission used rather sweeping language in defining discrimination. It ruled: "[W]hile a rule may apply equally to all employees, it may well have unequal impact on them. . . . A rule which forces a person to choose between his religion and his job limits that person's exercise of his religion and is thereby discriminatory in its effect."[139]

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132. 31 Fed. Reg. 8370 (1966). *See* note 43 *supra.*
133. 29 C.F.R. § 1605.1 (1970). *See* note 44 *supra.*
134. EEOC Dec. No. 70773, 2 FAIR EMPL. PRAC. CAS. 686 (May 7, 1970).
135. EEOC Dec. No. 7099, 2 FAIR EMPL. PRAC. CAS. 227 (1969).
136. EEOC Dec. No. 70716, 2 FAIR EMPL. PRAC. CAS. 684 (April 23, 1970).
137. EEOC Dec. No. 70670, 2 FAIR EMPL. PRAC. CAS. 586 (March 30, 1970).
138. EEOC Dec. No. 70580, 2 FAIR EMPL. PRAC. CAS. 516 (March 2, 1970).
139. 2 FAIR EMPL. PRAC. CAS. at 516.

D. *The Impact of the EEOC Definition of Discrimination*

Before moving on, it might be useful to consider the impact and breadth of the Commission's rules. Assume that an employer operates a seven-day-a-week operation, that he has entered into a collective bargaining contract with a union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the EEOC guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? Or suppose a job applicant informs his prospective employer that he cannot work Sundays, a day that he would be expected to work because of his lack of seniority. Does the employer discriminate by not offering the applicant a job? Again, in the absence of "undue hardship"—which is nearly impossible to demonstrate if the work force is large enough—the employer would be guilty of discrimination unless he gave the job applicant a non-Sunday shift, something to which the applicant would not be entitled but for his religious beliefs. Compare this problem with that of an employee who wants to take a few weeks off for a pilgrimage or one who refuses to work Sunday overtime, as Dewey did.

The thrust of this argument is that the reasonable-accommodation formulation imposes a priority of the religious over the secular. Freedom of religion necessarily includes the freedom not to believe, as well as the freedom to believe.[140] Who is to say that the desire to stay home Sunday and do nothing is any less worthy of protection than is the need to attend church that same day? But the EEOC's standard clearly chooses the one over the other. In so doing, it misconceives not only title VII but the delicate balance between the free exercise of religion and the operation of a secular society.[141]

140. The first amendment guaranty of religious freedom has been recognized as extending protection to members of secular society against governmental action that is invoked "because of their faith, or lack of it." Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

141. *Cf.* Reynolds v. United States, 98 U.S. 145 (1878).

It is curious, however, that the Commission has not applied its reasonable-accommodation standard uniformly to all provisions of a collective bargaining contract. In fact, the Commission has opined from the outset that an employer who, pursuant to a union shop provision, requires an employee to join a union contrary to the employee's religious beliefs does not discriminate against that employee by discharging him for refusing to join the union.[142] The Commission's General Counsel has taken the position that, since the National Labor Relations Act (NLRA) specifically permits union shop agreements without providing for religious exemptions,[143] a discharge for failure to join a union does not constitute discrimination under title VII.[144] The EEOC has never satisfactorily explained, however, why a union shop provision should be treated differently from any other provision in a collective bargaining contract—for example, a compulsory overtime provision. Granted, the NLRA specifically allows a union shop agreement, but section 8(d)[145] of the same Act has been construed to permit union and employer agreements on compulsory overtime; indeed, an employer violates the Act if he refuses to bargain over such a clause.[146] If there is a distinction between the two types of provisions, it is one without a difference.

Union shop provisions have, of course, been upheld under both the Railway Labor Act[147] and the NLRA[148] as not infringing the first amendment rights of employees who refused to join, and were later discharged, because of their religious scruples. These decisions have recently received implied support from the Supreme Court's denial of certiorari in *Russell v. Catherwood*,[149] a case in which a New York appellate court disallowed unemployment compensation eligibility

142. The Commission adopted this position prior to the promulgation of any guidelines. *See* Opinion of the EEOC General Counsel, G.C. 641-65, Dec. 29, 1965, in BNA LAB. POLICY & PRAC. 401:1006 (1967). The Commission's position remained unchanged after the 1966 guidelines were formulated. *See* Opinion Letter of EEOC Acting General Counsel, Jan. 26, 1967, in BNA LAB. POLICY & PRAC. 401:3033 (1967).

143. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

144. Opinion Letter of EEOC Acting General Counsel, Jan. 26, 1967, in BNA LAB. POLICY & PRAC. 401:3033 (1967).

145. 29 U.S.C. § 158(d) (1964).

146. *See, e.g.*, NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953).

147. *See, e.g.*, Gray v. Gulf, M. & O.R.R., 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3298 (U.S. Jan. 12, 1971); Wicks v. Southern Pacific Co., 231 F.2d 130 (9th Cir. 1956); Otten v. Baltimore & O.R.R., 205 F.2d 58 (2d Cir. 1953).

148. Linscott v. Millers Falls Co., 316 F. Supp. 1369 (D. Mass. 1970).

149. 33 App. Div. 2d 592, 304 N.Y.S.2d 415, *cert. denied*, 399 U.S. 936 (1970). *See also* Stimpel v. California State Personnel Bd., 6 Cal. App. 3d 206, 85 Cal. Rptr. 797, *cert. denied*, 400 U.S. 952 (1970).

for an individual who refused to accept jobs that would require him to join a union.[150]

In the context of its reasonable-accommodation requirement, the Commission would do well to consider the remarks of Judge Learned Hand in a union shop case, *Otten v. Baltimore & Ohio Railroad*.[151] In rejecting a first amendment attack on the constitutionality of a union shop provision under the Railway Labor Act, he said:

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicil entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.[152]

In sum, the current EEOC guidelines are contradictory, both in terms of present application and in light of the prior guidelines; furthermore, they appear to be premised on a fundamentally distorted conception of the proper place of religion in a secular society.

E. *Legal Precedent and Constitutional Considerations*

A more helpful aid in fashioning a definition of discrimination may be the judicial precedents that have been formulated under the first amendment, under title VII, and under state FEP laws. Of central import in this connection is *Sherbert v. Verner*.[153] The Sixth Circuit, in its review of *Dewey*, was not terribly helpful in its treatment of the applicability of *Sherbert* since it dismissed the case with the comment that it "involved state, and not private action."[154] The comment is correct, but it sheds no light on the parameters set forth

150. Justice Douglas and Chief Justice Burger dissented to the denial of certiorari on the grounds that the case raised serious first amendment difficulties. 399 U.S. at 936.

151. 205 F.2d 58 (2d Cir. 1953).

152. 205 F.2d at 61. In Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1373 (D. Mass. 1970), the district court noted that

> [a] purely private employer has a common law freedom to dismiss at will an employee who has no contrary contract. . . . While that freedom has been curbed by statutes such as the NLR Act and the Civil Rights Act of July 2, 1964 . . . no federal statute . . . precludes [an employer] from acting pursuant to a union shop contract (which has no avowed or covert purpose to discriminate on religious, racial, or like prohibited ground) to dismiss an employee for nonpayment of union dues. Nor does the First Amendment apply to a wholly private employer's act to terminate, pursuant to the common law, employment of one of his workers.

153. 374 U.S. 398 (1963).

154. 429 F.2d at 329.

in *Sherbert* of permissible state interference with religious beliefs, or on how the rationale may affect the somewhat parallel problem in *Dewey* under title VII.

Sherbert involved South Carolina's refusal, on the ground that she was unavailable for work, to give unemployment compensation benefits to a Seventh Day Adventist who declined to work on Saturday. While the Supreme Court often used rather broad language in its opinion striking down this phase of South Carolina's scheme of unemployment compensation, it clearly held that if a legislative scheme could be justified by a compelling state interest within the state's police power, then any incidental burden on the free exercise of religion would not render the scheme unconstitutional. The Court, however, found no such compelling state interest present in *Sherbert*. It distinguished the cases involving Sunday closing laws, which impose an additional burden on Orthodox Jews and Seventh Day Adventists, on the grounds that there was a compelling state interest in those cases. The Court held:

> In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown, supra.* The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants] . . . religious beliefs more expensive." 366 U.S. at 605, 81 S. Ct., at 1147. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.[155]

Sherbert, of course, can be read as lending support to the EEOC's guidelines if "compelling state interest" can be equated with "undue hardship." For several reasons, however, such an argument is open to criticism. First, the equation simply does not balance. The relationship of government and the individual under the first amendment is wholly different than the employment relationship, especially when a collective bargaining agreement operates alongside title VII. The first amendment has long been the bulwark of individual rights, and

155. 374 U.S. at 408-09.

the Court has viewed group values to be less compelling than those asserted by individuals. Thus, if a crowd dislikes what a speaker is saying, it is the responsibility of the police not to quiet the speaker, but to calm the crowd.[156] Similarly, what is viewed as obscene by a jury has frequently been held to be constitutionally protected.[157]

On the other hand, in the context of collective bargaining under our national labor policy as embodied in the NLRA, the Court has emphasized the subjugation of the interests of the individual to those of the group—the union.[158] Thus, in the absence of hostility or unfair representation, a union can deprive an individual of his seniority rights[159] or settle a grievance adversely to an individual employee,[160] even though the individual objects. In the collective bargaining setting, it makes little sense to require a compelling interest to uphold an evenhandedly applied contractual provision against a claim of uneven impact on an employee's religious beliefs since such a rule would obviously impair the effectiveness of the recognized statutory bargaining representative.[161]

Indeed, in the context of a collective bargaining contract, evenhanded administration may well serve as the sort of compelling interest required by *Sherbert*. This rationale has served as the basis of the awards of arbitrators who have been confronted with individual employee claims of religious discrimination resulting from the uneven impact of contractual provisions. As one arbitrator has said:

> This Arbitrator is most sympathetic with anyone in these days who adheres sincerely and devoutly to the tenets of a truly religious belief. But he is also fully mindful of the chaos which would follow the application of the principle that any employee can determine for himself, for reasons sufficient to him, whether he will regularly not work on a work day which management has the right to schedule. The Arbitrator therefore can find no adequate basis for finding that the contract-granted right of the Company to require Saturday work from X— was not reasonable.[162]

156. *See* City of Chicago v. Gregory, 394 U.S. 111 (1969).

157. *See* Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964), and cases cited therein.

158. Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). *See also* Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. (n.s.) 141 (1970).

159. Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

160. Vaca v. Sipes, 386 U.S. 171 (1967).

161. The need for uniformity in the application of the law of labor relations was emphasized by the Supreme Court in Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), in which the Court declared that, under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1964), law is to be uniform throughout the country in both the federal and state systems.

162. Combustion Engineering, Inc., 49 Lab. Arb. 204, 206 (1967).

Another arbitrator has noted:

> What Shaw is asking for is a unique kind of treatment applicable to him and not to others who may have different, but equally valid, reasons for avoiding their work schedules. To adopt a special rule excepting Shaw from working his work schedule would be unfair to all other employees, and discriminatory against them. Shaw himself must realize that if a new rule was made to accommodate each and every religious conviction, the plant's work schedules would soon be reduced to a haphazard and chaotic state.[163]

In *Andrews v. O'Grady*,[164] this same theme emerges. There, a New York City bus driver, who was a Seventh Day Adventist, charged that his first amendment rights were violated when the New York Transit System fired him for his refusal to work on Saturday. In upholding his discharge, the New York court noted:

> There can be no doubt, from long experience, that the seniority rules to which petitioner has refused to conform are the only fair way to assure that every man is treated on a nondiscriminatory basis with respect to work assignments. These time-honored rules are, therefore, most essential to the efficient and safe operation of the city transportation system.[165]

Many of these same considerations also underlie the refusal of courts and the National Labor Relations Board to overturn union shop provisions on religious grounds[166] and their rejection of religious belief as a defense to an unfair labor practice charge under the NLRA.[167]

Sherbert, then, is inapposite, not only because the relationship of government to the individual in the first amendment setting is different than the relationship between the individual and the group in the collective bargaining context; but also because the evenhanded application of a collective bargaining contract is of crucial significance. This latter viewpoint has been adopted by numerous labor arbitrators, and, as the Supreme Court has often indicated, their judgment should not be ignored.[168] Finally, it should be noted that the Court in *Sherbert*, in its discussion of the Sunday-

163. John Morrell & Co., 17 Lab. Arb. 280, 282 (1951). *See also* Singer Co., 48 Lab. Arb. 1343 (1967).

164. 44 Misc. 2d 28, 252 N.Y.S.2d 814 (Sup. Ct. 1964).

165. 44 Misc. 2d at 33, 252 N.Y.S.2d at 819.

166. *See* notes 152-53 *supra* and accompanying text.

167. *See, e.g.*, A.C. Rochat Co., 163 N.L.R.B. 421 (1967).

168. Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

closing-law case, indicated that once a compelling state interest was shown, the state was not required to make an accommodation to any member of the affected class.[169] Similarly, in the context of alleged religious discrimination under title VII, given the need for uniform application of contractual provisions, no finding of discrimination should be made nor accommodation required unless it is shown that the contract clause in question was intentionally designed to achieve the prohibited discrimination. Otherwise, the "accommodation" itself will establish a pattern of discrimination that favors and exempts certain religious believers from their obligations to perform under admittedly lawful contract provisions.[170]

Another line of cases that deserves mention in grappling with the definition of discrimination involves alleged racial discrimination in the application of hiring practices and seniority systems.[171] Read broadly, these cases arguably establish "effect" as the key to the working definition of discrimination. A closer examination of these cases, however, reveals that, while the seniority system or referral system in question might currently be racially neutral, its present discriminatory effect, despite evenhanded administration, is the product of past racial discrimination in the most blatant subjective form. The United States Court of Appeals for the Sixth Circuit has recently recognized this problem in *United States v. International Brotherhood of Electrical Workers, Local 38*,[172] in which it held:

> When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices.
>
> Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964. This could result from adoption of devices such as a limitation of new apprentices to relatives of the all-white membership of a union, Int'l Ass'n of Heat & Frost Insulators & Asbestos Wkrs., Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969), or limitation of membership to persons who had previous work experience under union contract, while such experience was racially limited to whites, United Papermakers

169. 374 U.S. at 408-09.

170. *Cf.* Linscott v. Millers Falls Co., 316 F. Supp. 1369 (D. Mass. 1970). *See generally* P. KURLAND, OF CHURCH AND STATE AND THE SUPREME COURT 26 (1961).

171. *See, e.g.*, United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir. 1970); Local 189 Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See also* Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *revd.*, 39 U.S.L.W. 4317 (U.S. March 8, 1971). *See* note 109 *supra*.

172. 428 F.2d 144 (6th Cir. 1970).

& Paperworkers, Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969) . . . .[173]

The finding of discrimination in these cases, therefore, is premised on the fact that at one time discrimination by design was present and that such discrimination is carried forward to the present by practices that appear racially neutral.[174]

Given this special situation in the racial-discrimination cases, it is not at all anomalous that the Sixth Circuit seems to define discrimination more narrowly in *Dewey* than in *International Brotherhood of Electrical Workers, Local 38*. Actually, it can be argued that the court adheres to the view of discrimination by intent in both cases, but that in *International Brotherhood of Electrical Workers, Local 38* the court recognizes that discrimination by intent, once committed, cannot be corrected by the mere declaration of a defendant—employer or union—that it will mend its ways in the future. Rather, the court finds that willful discrimination previously practiced must be destroyed "root and branch,"[175] and applies this standard to "sophisticated as well as simple minded modes of discrimination."[176]

In addition to the legal precedent discussed above, there are numerous cases arising under state FEP laws that also lend support to the narrow definition of discrimination.[177] A good recent example is *In re Eastern Greyhound Lines Division of Greyhound Lines, Incorporated v. New York State Division of Human Rights*.[178] In that case, a bearded Orthodox Muslim was not hired for a job as a baggage handler because the employer had a rule against its employees wearing beards. The job applicant claimed discrimination, arguing that wearing a beard was decreed by his religion. Rejecting his claim, the New York Court of Appeals declared that religious

173. 428 F.2d at 149-50.

174. *See, e.g.*, Griggs v. Duke Power Co., 39 U.S.L.W. 4317 (U.S. March 8, 1971).

175. Green v. County School Bd., 391 U.S. 430, 438 (1968).

176. Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960).

177. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. v. California FEPC, 7 RACE REL. L. REP. 164 (Los Angeles Super. Ct. 1962); IBEW, Local 35 v. Commn. on Civil Rights, 140 Conn. 537, 102 A.2d 366 (1953); Strong v. Massachusetts Commn. Against Discrimination, 351 Mass. 554, 222 N.E.2d 885 (1967); Andrews v. O'Grady, 44 Misc. 2d 28, 252 N.Y.S.2d 814 (Sup. Ct. 1964); *In re* Council v. Donovan, 40 Misc. 2d 744, 750, 244 N.Y.S.2d 199, 205 (Sup. Ct. 1963). Several commentators have also taken the narrower interpretation. One commentator has stated: "In order to prove that an employer has unlawfully discriminated against either a job applicant or an employee, it *must be shown that he relied on one of the forbidden criteria in making a personnel selection.*" Mittenthal, *The Michigan Fair Employment Practices Act*, 35 MICH. ST. B.J. No. 5, at 47 (1956) (emphasis added). *See also* Note, *An American Legal Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 110 (1949).

178. 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322, *affg.* 34 App. Div. 2d 916, 311 N.Y.S.2d 465 (1970).

discrimination could not be equated with an employer's failure to accommodate since the two are entirely different concepts; and that, therefore, the employer was not required to make an exception to its established personnel policies in order to accommodate the religious practices of a potential employee. It concluded:

> Policy resting on a desire to promote business by greater public support could justify the exclusion by an employer of beards and have no possible religious connotation. Such a rule, so motivated, as it affected employment, would not come within the bar of the statute unless it be shown, that which is not shown here: the employment decision was in fact actuated by discrimination against creed.[179]

This decision seems correct, at least with respect to its disposition of the charge of religious discrimination. No evidence indicated that the employer did not like Orthodox Muslims; rather, its standing rule against employees' wearing beards cut across racial and religious grounds.

In sum, the legislative history of title VII, arbitration rulings, and court decisions would appear to support the narrow definition of discrimination—that is, that only intentional discrimination is proscribed. In taking this position, however, due recognition should be accorded the compelling concern of the draftsmen of title VII with racial discrimination. As has been noted,[180] the Civil Rights Act of 1964 was drafted with an eye toward eliminating some of the severe patterns of race discrimination in the United States. In order to effect this primary goal, it could be argued that the courts should be inventive in their application of the proscriptions against race discrimination. Judicial inventiveness in this area, albeit sometimes analytically troublesome, may surely be defended on policy grounds. However, as pointed out above, it is unnecessary for the courts to move beyond the proscription of intentional discrimination in order to give full effect to the strong statutory policy against race discrimination in employment.[181]

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179. 27 N.Y.2d at 282, 265 N.E.2d at 746-47, 317 N.Y.S.2d at 325.

180. *See* notes 5-7 *supra* and accompanying text.

181. *Compare* discussion in pt. III. B. *supra with* the decision in Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970). In race discrimination cases, the EEOC has consistently argued that if a rule, otherwise neutral on its face, has a disproportionate impact on a protected *group (e.g.*, Negroes), then the rule should be found unlawful under title VII. *Gregory*, in effect, adopts this broad definition of intent under title VII. *See also* FEP Dec. No. 71332, 2 FAIR EMPL. PRAC. CAS. 1016 (1970), in which it was held that there was reasonable cause to believe that an employer violated title VII by its refusal to hire an unwed Negro woman. (In the county where the employer did business, 80% of the reported illegitimate babies were born to nonwhites and 29% of the population was Negro.)

Even if the proper definition of discrimination for the other categories of title VII—sex, race, and national origin—is arguably a broad one,[182] the definition of "religious discrimination," especially when coupled with the broad definition of "religion," should be narrow. This distinction is justified because the social impact of religious discrimination is far less grave, as the legislative history of title VII surely indicates,[183] than is the impact of racial discrimination. Moreover, and most significant in this respect, the individual has free choice in the pursuit of religion, but is unalterably born of a certain race, sex, and ancestry.

IV. The Meaning of Intent

Even if the hurdle of the definition of discrimination has been cleared, our inquiry is not ended. For if putting a fixed meaning on discrimination is difficult, defining "intent" is no less so.

The conclusion reached above, that discrimination by intent and not discrimination by effect should be the proper test under title VII, leaves open the meaning of "intent." In its strictest sense, discrimination *by intent* is a willful act consciously performed for the specific purpose and design of achieving the forbidden result.[184] At the other extreme, "intent" may be defined with reference to the "natural and foreseeable consequences" test.[185] Since it is not easy to search the human soul and ascertain individual motivation, the courts, especially in the labor field, have long ruled that a person will be held to intend the natural and foreseeable consequences of his acts.[186] Indeed, this rationale has seemingly been applied in some of the court

This definition of discrimination is at best uniquely applicable in race and sex cases, in which the group is easily identifiable. However, in a case involving alleged religious discrimination, this definition breaks down because religion, unlike race and sex, is not self-defining. Race is normally defined with reference to black (Negro), white (Caucasian), yellow (Oriental), and red (Indian) population groups in the United States, and sex means the male or female groups; however, religion, as shown in pt. II. *supra*, is virtually without meaningful definition, especially if nonbelievers fall within the scope of religion. The EEOC rule with respect to "disproportionate impact" (*see* text accompanying note 139 *supra*) could arguably have some application in a religion case, if, for example, the facts were similar to those above and 80% of the reported illegitimate babies were born to Catholics and 29% of the sample community were also Catholic. The possibility of such a fact situation occurring is slight, however.

182. *Compare* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) *with* United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir. 1970).

183. *See* notes 5, 7, & 10 *supra*.

184. Local 189, Papermakers v. United States, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

185. Teamsters Local 357 v. NLRB, 365 U.S. 667, 675 (1961); NLRB v. Darling & Co., 420 F.2d 63, 66 (7th Cir. 1970).

186. *See, e.g.*, Radio Officers Union v. NLRB, 347 U.S. 17, 45 (1954).

decisions that have grappled with the meaning of intent under title VII.[187] This standard, however, is a fairly elastic one, and it could be used effectively to enlarge the definition of discrimination well beyond its narrow parameters. For example, the natural and probable consequence of a rule that requires employees to work Sundays is to force those who have religious scruples against Sunday work either to be fired or to give up their religious convictions. By applying the natural-and-foreseeable-consequences test, it could thus be said that such a rule has its origins in an *intent* to discriminate against one's religious beliefs. In such an instance, the requirement that discrimination be intentional would be essentially meaningless, because the meaning of intent would be all-inclusive.

It has been suggested in some title VII cases that this latter definition of intent may be properly limited by the test of business necessity—that is, a neutral policy that foreseeably results in disparate treatment may nevertheless be valid if it is necessary for the safe and efficient operations of the business.[188] In the context of religious discrimination under title VII, and more particularly in light of *Dewey*, four observations can be made about the validity of such a business necessity test.

First, as courts and arbitrators have recognized,[189] the uniform application of company rules or contractual provisions, such as seniority, may well be necessary for the safe and efficient operation of a business. Second, as with the expanded definition of discrimination noted earlier,[190] the business necessity test has been developed to justify practices that, while neutral on their face, perpetuate past

187. *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970); Local 189, Papermakers v. United States, 416 F.2d 980, 997 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970); Dobbins v. IBEW, Local 212, 292 F. Supp. 413, 448 (S.D. Ohio 1968). *But cf.* Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

188. *See, e.g.*, Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The court defined the business necessity test as follows: "When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination, unless the incidents are limited to those that safety and efficiency require." 416 F.2d at 994. Under this test the court held:

> Our main conclusions may be summarized as follows: (1) Crown's job seniority system carries forward the discriminatory effects integral to the company's former employment practices. (2) The safe and efficient operation of the Bogalusa mill does not depend upon maintenance of the job seniority system. (3) To the extent that Crown's and the white union insisted upon carrying forward exclusion of a racially-determined class, *without business necessity*, they committed, with the requisite intent, in the statutory sense, an unfair employment practice as defined by Title VII.

416 F.2d at 997. This view was recently adopted by the Supreme Court in the racial-discrimination context in Griggs v. Duke Power Co., 39 U.S.L.W. 4317, 4319 (U.S. March 8, 1971).

189. *See* text accompanying notes 162-67 *supra*.

190. *See* pts. III. B. & III. E. *supra*.

discrimination.[191] It is not difficult to understand why courts view with some skepticism practices that were premised in the first instance on willful discrimination in the plainest sense; and, as a consequence, why courts would require some stringent test of business necessity to demonstrate that such practices are now free from racial taint. If it could be demonstrated that a current company practice perpetuates past acts of willful religious discrimination, then the business necessity test would surely be appropriate in the religious- as well as the racial-discrimination cases under title VII; but, in the absence of such past discrimination, it surely is too stringent.

This conclusion is supported by a third observation about the business necessity test. By its very nature, a collective bargaining contract represents a long series of compromises. To be sure, there are issues that result in complete victory for one side and complete capitulation for the other; but on the whole, the process of collective bargaining is one of give and take between company and union. Moreover, on the union side at least, the demands put forth and settlements made also represent compromises among political factions within the bargaining unit itself—between the young and the old, the skilled and the unskilled, those who work nights and those who work days. In such a setting, the test of business necessity might be an impossible one to administer. Given this vital role of compromise, it is not surprising that the Supreme Court has allowed unions a "wide range of reasonableness," both at the negotiating table and in the administration of a grievance procedure.[192]

For example, assume that some seniority system is necessary for the safe and efficient operation of a business; but there are innumerable possible kinds of seniority systems—job, department, and plant, to name but three. The particular seniority system in any one plant may well be a reflection of the political ebb and flow within a union over long periods of time, an indication of the ability of that particular union to impose its demands on the employer, or the result of the priority given such a demand by the union. Suppose that one particular system of seniority means that a Seventh Day Adventist or an Orthodox Jew would have to work on Saturdays, while another system would not require Saturday work. Since the first such seniority system could not pass a business necessity test, would that mean that it would have to be discarded for the second? To compound the

191. This problem is exhaustively analyzed in the opinion by Judge Wisdom in Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

192. Vaca v. Sipes, 386 U.S. 171, 188-95 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

problem, suppose that the first seniority system adversely affects Seventh Day Adventists and Orthodox Jews, while the second (requiring Sunday but not Saturday work) affects employees like Dewey who belong to the Faith Reformed Church. Must the company discard both seniority systems? Or should the legality of either seniority system depend on a comparison of the number of Orthodox Jews and Faith Reformed Church members working at the plant at the time the system was adopted? Of course, examples such as these can be cited ad infinitum, because the definition of discrimination is a functional variant of the definition of religion and, as has been shown,[193] there is no meaningful definitional limit to the scope of "religion." Thus, under the business necessity test, *any* seniority system could be found to be discriminatory, depending only upon the religious beliefs of the employee population at any given time.

Finally, in the context of religious discrimination, the business necessity test appears to be a poorly veiled duplicate of the EEOC requirement of reasonable accommodation; this latter test, with its grant of exculpation for "undue hardship," is surely not the law under title VII.[194]

Since the rejection of the business necessity test still leaves no viable definition of intent, it may be useful to examine constitutional-law considerations. In cases arising under the equal protection clause of the fourteenth amendment, the rule has long been established that, as long as a statute is based on *rational and legitimate considerations*, even though its impact is uneven, it is constitutional.[195] The Supreme Court, in *Dandridge v. Williams*,[196] recently gave renewed support to this reasonable-basis test in the area of social and economic regulation. In that case, the Court reviewed a Maryland statute that limited welfare aid to eligible families depending on the number of children in the family. Although the statute had an uneven impact on larger families, the Court ruled that it was constitutional because it had a rational basis:

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made

193. *See* pt. II. *supra.*

194. *See* pt. III. D. *supra.*

195. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Railway Express Agency v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 (1913); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The rational-basis test must be distinguished from the compelling-state-interest test that was followed by the Supreme Court in *Sherbert*. *See* text accompanying notes 153-61 *supra*. As noted above (*see* text accompanying notes 155-56 *supra*), the compelling-state-interest test is the apparent forerunner of the EEOC undue-hardship test, and therefore is subject to serious criticism in the context of the enforcement of the religious-discrimination proscription under title VII.

196. 397 U.S. 471 (1970).

> by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because it results in some inequality."[197]
>
> . . . .
>
> It is enough that the State's action be rationally based and free from invidious discrimination.[198]

Excluding the title VII cases involving acts of willful discrimination[199] and those cases concerned with the present effects of prior acts of willful discrimination[200]—in which a business necessity test may be more appropriate—the constitutional test of "reasonableness" is a salutary one for the purpose of defining intent under the statute. Hence, a neutral rule that may have an unequal impact on certain employees because of their religious beliefs should, if supported by legitimate and reasonable considerations, overcome a charge of discrimination by intent.

Thus, in a *Dewey*-type case, if the employer can demonstrate that the act complained of was taken pursuant to a neutral contract provision that has a rational basis, then there should be a presumption of innocence and the burden of proof should be on the plaintiff to overcome the presumption with more specific evidence of the proscribed intent. In the context of *Dewey*, since the employer's rule requiring Sunday overtime and its evenhanded administration of this requirement were both based on legitimate and rational considerations, it is easy to see how they pass muster under title VII. On the other hand, rules that limit the weight a woman is allowed to lift[201] irrespective of a particular woman's ability, and rules that limit a Negro's opportunity for work[202] or advancement[203] must surely fall.

V. Election of Remedies Under Title VII: The Emerging Conflict Between Judicial and Arbitration Forums in Employment Discrimination Cases

The interaction between public- and private-dispute settlement devices is nothing new in the field of labor law.[204] In light of this past

197. 397 U.S. at 485, quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

198. 397 U.S. at 487.

199. For example, an employer adopts a plant rule that explicitly excludes all Catholics from certain high-paying jobs within the plant.

200. For example, a departmental seniority system is continued in operation in a plant that formerly and for many years imposed racially segregated seniority lines, freezing black workers into the less desirable jobs in certain departments. This was the type of situation in which the Supreme Court applied the business necessity test in Griggs v. Duke Power Co., 39 U.S.L.W. 4317 (U.S. March 8, 1971).

201. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

202. United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968).

203. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

204. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

experience, the diversity of opinion in *Dewey* on the question of election of remedies between title VII and arbitration is somewhat surprising. However, the split between the court of appeals and the district court in *Dewey* is in reality but a reflection of the conflicting opinions among many courts that have recently grappled with this issue.[205]

At the outset, it is important to emphasize what the disagreement does not concern. It appears to be settled that there is no strict ab initio election-of-remedies requirement forcing an employee to make an irrevocable choice at the outset between pursuing his remedies under a collective bargaining contract grievance and arbitration procedure and pursuing his title VII remedies. The district court in *Bowe v. Colgate-Palmolive Company*[206] is the only court to date that has put a plaintiff to such an ab initio choice. Thus, the plaintiff there was deemed to have waived his right to arbitration on the contract by electing to bring a title VII action in federal court.[207] The Seventh Circuit Court of Appeals, however, reversed the district court on this issue, holding that

> [i]t was error not to permit the plaintiffs to utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs.[208]

Even in those jurisdictions that take the position that a binding election of remedies may occur after a grievance has been finally adjudicated in arbitration or settled at an intermediate stage, the courts do not require the charging party initially to make a binding choice—as between arbitration or title VII—that will preclude a subsequent decision to pursue the alternative course.[209]

The most compelling argument against the ab initio election rule is that, in general, the employee makes no informed choice. It is natural for an employee, especially a union member, to lodge quickly a grievance when he feels he has become the victim of his

205. *See, e.g.*, Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Corey v. Avco Corp., 2 FAIR EMPL. PRAC. CAS. 738 (Conn. Super. Ct. May 28, 1970). *See also* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); Newman v. Avco Corp., 313 F. Supp. 1069 (M.D. Tenn. 1970); Washington v. Aerojet Gen. Corp., 282 F. Supp. 517 (C.D. Cal. 1968); Edwards v. North American Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968).

206. 272 F. Supp. 332, 339 (S.D. Ind. 1967).

207. 272 F. Supp. at 339-40.

208. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969).

209. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); Newman v. Avco Corp., 313 F. Supp. 1069 (M.D. Tenn. 1970); Washington v. Aerojet Gen. Corp., 282 F. Supp. 517 (C.D. Cal. 1968); Edwards v. North American Rockwell Corp, 291 F. Supp. 199 (C.D. Cal. 1968).

employer's discrimination. The grievance procedure is usually initiated and often carried through several steps without the grievant having the advice of counsel. The aggrieved employee may not even be aware that he could proceed by filing a charge with the EEOC or state FEP commission; when he becomes aware of that alternative, it would certainly be an unfair surprise for the employee to learn that he has already lost the opportunity by promptly filing a grievance. This unfairness is especially manifest if the grievance procedure contains strict and prompt time limitations, so that an employee will, as a matter of course, seek first to preserve his rights under the agreement. Thus, many courts have, with sound justification, refused to put the employee to an immediate choice of remedies.[210]

The real conflict arises, however, over whether a court should deem a plaintiff to have made an election of remedies precluding maintenance of a title VII action when he has pursued his contractual remedies to a final determination. The Sixth Circuit Court of Appeals in *Dewey*, acting in accord with several lower federal and state courts,[211] has taken the position that once an employee has pursued his claim to arbitration, he has made a final and binding election of remedies.[212] On the other side, the Court of Appeals for the Fifth Circuit, in *Hutchings v. United States Industries, Incorporated*,[213] and the Seventh Circuit, in *Bowe v. Colgate-Palmolive Company*,[214] have held that an arbitration award or settlement at an intermediate stage of the grievance procedure does not operate as a bar to a title VII suit.

In general, the decisions of the Fifth and Seventh Circuits manifest these courts' distrust of the ability of a private process "essentially tailored to the needs of the contracting parties" to vindicate the public policies embodied in title VII.[215] These courts rely on the premise that "determination under a contract grievance-arbitration process will involve rights and remedies separate and distinct from those involved in judicial proceedings under title VII."[216] Although there is concurrent jurisdiction in the court and the arbitration process, it is directly analogous to the concurrent jurisdiction of the arbitrator and the National Labor Relations Board (NLRB or Board);

210. *See* cases cited in note 209 *supra*.

211. Newman v. Avco Corp., 313 F. Supp. 1069 (M.D. Tenn. 1970); Edwards v. North American Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968); Washington v. Aerojet Gen. Corp., 282 F. Supp. 517 (C.D. Cal. 1968); Corey v. Avco Corp., 2 FAIR EMPL. PRAC. CAS. 738 (Conn. Super. Ct. May 28, 1970).

212. 429 F.2d at 332.

213. 428 F.2d 303 (5th Cir. 1970).

214. 416 F.2d 711 (7th Cir. 1969).

215. 428 F.2d at 311-12; 416 F.2d at 175.

216. Hutchings v. United States Indus., Inc., 428 F.2d 303, 311 (5th Cir. 1970).

since the NLRB is not bound under a doctrine of election of remedies or res judicata to accept an arbitral determination affecting rights and duties under the NLRA,[217] neither should the court accept an arbitrator's decision on title VII rights as conclusive. On the contrary, the Fifth and Seventh Circuit Courts of Appeals argue that there are persuasive reasons why courts should treat the arbitrator's decision as less than binding.[218]

As has been observed,[219] the enforcement of title VII has not been charged to an administrative agency that is comparable to the NLRB, which has broad powers to enforce the NLRA. The EEOC has no enforcement power; its power is limited to the investigation and conciliation of unlawful employment practice charges of employees claiming discrimination. If the EEOC finds reasonable cause to believe that the employee's charges are true, it attempts to alleviate the discriminatory practice through the informal measures of conference, conciliation, and persuasion.[220] Failing in this role, the EEOC grants the aggrieved employee permission to sue, or, in appropriate cases, the Attorney General initiates suit.[221] The Fifth and Seventh Circuits appear to be operating on the assumption that Congress failed to grant enforcement powers to the EEOC and instead reposed them in the courts because it felt that such an important and explosive area of public policy was best implemented by the expertise of the federal judiciary. Somehow these courts feel that to delegate to the arbitration process the power to make final and binding determinations of title VII rights would be to derogate from their own responsibility.

Specifically, one hazard the courts see is that some arbitrators limit themselves exclusively to contractual considerations and, as a result, accord title VII and constitutional claims insufficient attention.[222] Although it is far from a unanimous view, many arbitrators see themselves as creatures of the contract, whose sole function is to interpret and to apply the provisions of the collective bargaining agreement rather than to act as agents of government with the authority and power to effect public policy.[223] For these arbitrators, the contract is the source and limit of their authority; to have recourse to an external standard in order to restrict or to nullify contract terms would be to exceed the boundaries of that authority.

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217. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

218. 428 F.2d at 313-14; 416 F.2d at 175.

219. *See* notes 122-27 *supra* and accompanying text.

220. 42 U.S.C. § 2000e-5(a) (1964).

221. 42 U.S.C. § 2000e-5(e) (1964).

222. *See, e.g.*, Pitman-Moore Div., 49 Lab. Arb. 709 (1967).

223. *Compare* United Airlines, Inc., 48 Lab. Arb. 727 (1967) *with* Simoniz Co., 70-1 CCH LAB. ARB. AWARDS ¶ 8024 (1969).

If there is an irreconcilable conflict between title VII and the terms of an agreement, the possible treatment outlined above justly warrants the fears of the courts. Professor Bernard Meltzer believes that, in the case of such conflict, it is the arbitrator's duty to abide by the contract and ignore the law.[224] His view, of course, serves to highlight the problem inherent in the strict enforcement of the election-of-remedies rule adopted by the Sixth Circuit in *Dewey*. Implementation of the Meltzer view by the many arbitrators who share it,[225] coupled with a binding election-of-remedies rule, would indeed pose a serious threat to title VII rights.

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224. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557 (1967). For an excellent discussion summarizing the divergent views of arbitrators on this subject, see Sovern, *When Should Arbitrators Follow Federal Law*, in THE EXPANDING ROLE OF NEUTRALS 29 (A. Somers ed. 1970).

225. In arbitration cases that involve alleged acts of employment discrimination that are cognizable under both a contract grievance procedure and under title VII, arbitrators hold widely divergent views concerning the extent to which public-policy considerations should affect the outcome of the contract grievance dispute. In the "typical" employment discrimination case, the arbitrator handles the issue of discriminaton in the context of the collective agreement and makes no reference to related state or federal laws. *See, e.g.*, Lockheed Georgia Co., 54 Lab. Arb. 769 (1970); Eastex, Inc., 70-2 CCH LAB. ARB. AWARDS ¶ 8636 (1970); Dewey-Portland Cement Co., 43 Lab. Arb. 165 (1964). A preponderance of the cases in which the application of title VII or some state law is raised by one side or the other seems to support the rule that an arbitrator has no business interpreting or applying a public statute in a contract grievance dispute. *See, e.g.*, Western Airlines, Inc., 54 Lab. Arb. 600 (1970); United Airlines, Inc., 48 Lab. Arb. 727 (1967); Pitman-Moore Div., 49 Lab. Arb. 709 (1967); Eaton Mfg. Co., 47 Lab. Arb. 1045 (1966); Stanley Works, 39 Lab. Arb. 374 (1962); Bethlehem Steel Co., 24 Lab. Arb. 699 (1955); Douglas & Lomason Co., 23 Lab. Arb. 812 (1954); Allegheny Ludlum Steel Corp., 23 Lab. Arb. 606 (1954); Morton Salt Co., 21 Lab. Arb. 797 (1953); International Harvester Co., 17 Lab. Arb. 29 (1951). The most common exception to this majority view is the rule that the arbitrator should not order the company or union to do something that is *clearly* unlawful. For example, if a state law prohibits female employees from working in jobs that require the lifting of more than twenty-five pounds, the arbitrator will not order the company to promote a female candidate to the job in dispute, even if she is the senior qualified employee. Canton Provision Co., 52 Lab. Arb. 942 (1969). Under this view, the contract is said to be modified by the applicable statute. *See, e.g.*, Sylvania Elec. Prods., Inc., 54 Lab. Arb. 320 (1969); Capital Mfg. Co., 50 Lab. Arb. 669 (1968); Great Atl. & Pac. Tea Co., 49 Lab. Arb. 1186 (1967); Ingraham Co., 48 Lab. Arb. 884 (1966); Schaefer Supermarkets, Inc., 46 Lab. Arb. 115 (1966). Another common exception to the majority view is found when the parties have, by submission, conferred jurisdiction upon the arbitrator to decide the contract issue in the light of applicable federal or state law. *See, e.g.*, Super Valu Stores, Inc., 52 Lab. Arb. 112 (1968); Morton Salt Co., 21 Lab. Arb. 797 (1953). Some arbitrators have extended the majority view by holding that if the parties have intentionally adopted a contract clause pursuant to an existing statute, with the object of incorporating the body of public law into the contract, then the arbitrator may properly refer to the applicable statute and any regulations or decisions thereunder in attempting to ascertain the meaning of the contract clause in issue. *See, e.g.*, Dayton Tire & Rubber Co., 55 Lab. Arb. 357 (1970); Weyerhauser Co., 54 Lab. Arb. 857 (1970); Manchester Gas Co., 53 Lab. Arb. 329 (1969); Weirton Steel Co., 50 Lab. Arb. 795 (1968).

The new and, thus far, minority view in employment discrimination cases holds that collective bargaining agreements include by reference all public law applicable thereto; hence, the arbitrator should apply constitutional, statutory, and common law to aid in the resolution of any grievance dispute. *See, e.g.*, Avco Corp., 54 Lab. Arb. 165 (1970); Simoniz Co., 70-1 CCH LAB. ARB. AWARDS ¶ 8024 (1969); Weirton Steel Co., 50 Lab. Arb. 795 (1968); Hough Mfg. Corp., 51 Lab. Arb. 785 (1968). Under this new

Even when harmonizing the law and contractual intent is possible, not all arbitrators feel it incumbent on themselves to do so. The viewpoint of these arbitrators, however, conceives arbitration as too narrow a process. Arbitration agreements do not exist in a vacuum, but subsist in a world in which the law plays a significant part. Parties bargain against a background of rules and understand that these rules shall temper and color their contract. Therefore, sensible and responsible interpretation of the contract may at times require consideration of the surrounding body of law.[226] The Supreme Court, in *United Steelworkers v. Enterprise Wheel & Car Corporation*,[227] acknowledged the propriety of the arbitrator's drawing on surrounding law "for guidance," although an award based solely upon enacted legislation would exceed his jurisdiction. In *Hutchings*, the Seventh Circuit said, "We do not mean to imply that employer obligations having their origin in Title VII are not to be incorporated into the arbitral process. When possible they should be."[228] Nevertheless, what ought to be is not always coextensive with what is, and, when some arbitrators are not taking real cognizance of the law, the courts are understandably reluctant to hold that all arbitral awards apparently covering a title VII issue preclude the grievant's title VII remedies.

Even if an arbitrator does look to title VII in the course of ascertaining the contractual intent, there is a legitimate fear that he will lack the expertise to deal adequately with the statutory requirements. For example, in *Bowe*, the plaintiff claimed that the employer was guilty of sex discrimination in restricting female employees to jobs that did not require lifting more than thirty-five pounds. A state law imposed a thirty-five-pound weight-lifting restriction on women. It cannot reasonably be expected that all arbitrators will possess the expertise to decide whether the employer's reliance on a state statute comports with the demands of title VII.[229] Indeed, the district court succumbed to the argument, which the Seventh Circuit

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view, some arbitrators have even gone so far as to rule on the issue of federal pre-emption when federal and state statutes were seemingly in conflict. The most frequently recurring pre-emption problem has involved the clash between state laws that impose certain restrictions on the use of female labor and title VII, which proscribes "sex discrimination." *See, e.g.*, Avco Corp., 54 Lab. Arb. 165 (1970); Simoniz Co., 70-1 CCH LAB. ARB. AWARDS ¶ 8024 (1969) (federal law supersedes state laws); General Fireproofing Co., 48 Lab. Arb. 819 (1967) (title VII does not pre-empt state statutes).

226. Stanley Works, 39 Lab. Arb. 374, 378 (1962).

227. 363 U.S. 593, 597 (1960).

228. 428 F.2d at 313.

229. *Compare* Super Valu Stores, Inc., 52 Lab. Arb. 112 (1968) *with* Illinois Bell Tel. Co. v. Grabiec, 2 FAIR EMPL. PRAC. CAS. 945 (S.D. Ill. Sept. 9, 1970) *and* Jones Metal Prods. Co. v. Walker, 2 FAIR EMPL. PRAC. CAS. 1113 (Ohio Ct. C.P. Nov. 19, 1970).

held to be erroneous,[230] that state laws setting weight-lifting restrictions on women were not affected by title VII.[231] If the district court misconceived the requirements of title VII's antidiscrimination provisions, confidence can hardly be unhesitatingly reposed in the ability of arbitrators—many of whom are not lawyers—correctly to interpret the broad general language of title VII, which is susceptible to varied interpretations, or to make their way through the intricacies of the EEOC guidelines.

In addition to the above arguments, there are some further practical considerations that militate against the election-of-remedies doctrine that was followed by the Sixth Circuit in *Dewey*. As suggested earlier,[232] the collective bargaining process is a uniquely tripartite arrangement, involving the rights and responsibilities of the individual employee, the union, and the employer. The rights of the individual, vis-à-vis the rights of the majority of the employees represented by the union, may of necessity be compromised—especially with respect to the processing of grievances under a collective agreement, in which case the Supreme Court has consistently granted a "wide range of reasonableness" to unions in handling individual employee complaints.[233] A union has discretion, within the bounds of "fair representation" and "good faith," to drop, settle, or appeal to arbitration an individual's grievance, even though the rights of the individual may be sacrificed for the good of the majority.[234] In *Vaca v. Sipes*,[235] the Supreme Court emphasized that a union could properly settle a grievance short of arbitration, notwithstanding the fact that a court, upon hearing the merits of the claim, might sustain the individual's complaint:

> For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.[236]

Since the union may lawfully decide to drop a grievance short

230. 416 F.2d at 716.

231. 272 F. Supp. at 364.

232. *See* text accompanying notes 158-61 *supra*.

233. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

234. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).

235. 386 U.S. 171 (1967).

236. 386 U.S. at 192-93.

of arbitration for reasons that may be wholly irrelevant to the merits of the claim being advanced by the individual,[237] it certainly would not be reasonable to foreclose the title VII remedy to an aggrieved employee whose grievance has been settled to his detriment. The basic fallacy in the approach taken by the Sixth Circuit in *Dewey*, in adopting the election-of-remedies rule, is the assumption that the individual, rather than the union, determines the ultimate course of the grievance complaint. The collective bargaining process is premised on *majority* rule, whereas title VII sets forth certain statutory protections for the *individual* who is a member of a proscribed *minority*. Given this difference, a union's decision with respect to the processing of a contract claim should not be determinative of statutory rights.

In this same vein, other problems may be postulated. Suppose, for example, that the aggrieved individual initially urges the union to process his charge of discrimination under the contract against the company; but subsequently, after the grievance has been filed but before it has been appealed to arbitration, the employee decides that he would prefer to pursue his title VII remedy. If the union thereafter determines to appeal the case to arbitration under a contract clause that gives the union the sole authority to appeal,[238] is the employee to be precluded from advancing his claim under title VII?

Further, suppose that the employee is unwilling to cooperate with the union in its presentation of the arbitration case; or suppose that the union, by the manner in which it presents the evidence, "suggests" to the arbitrator that it considers the case to be a weak one.[239] Should the employee, under these circumstances, subsequently be foreclosed from filing suit under title VII?

It would certainly seem that the above considerations weigh heavily against any rule that would prohibit an employee from bringing suit under title VII merely because the allegation of discrimination has been raised under a contract grievance procedure.

237. *See generally* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, 14 LAB. L.J. 1052 (1963); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81; Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962); Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421 (1963).

238. *See, e.g.*, Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).

239. *See generally* R. FLEMING, THE LABOR ARBITRATION PROCESS 107-33 (1965); Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 361, 403 (1962).

In fact, the question should not be posed under the heading of "election of remedies"; rather, the issue really concerns the extent to which a court in a title VII suit should give deference to an arbitrator's award under a collective bargaining contract.[240]

While a strict election-of-remedies rule is wholly undesirable, neither would it serve any useful purpose for the courts freely to permit an employee in a title VII suit to relitigate an issue after it has been decided against him by an arbitrator. To condone relitigation in all cases could easily threaten to undermine the efficacy of the arbitration process. The vitality of arbitration depends, in no small measure, upon its final and binding quality. This vitality would be adversely affected if, for example, an employee were permitted to relitigate a charge of discrimination under title VII after he had voluntarily pursued his contract remedy, after he was given rigorous and fair representation by the union, and after the contract antidiscrimination proscription was found to parallel that of title VII.[241]

Distilled to its essentials, the position of the Fifth and Seventh Circuits is that, although the national labor policy favoring resolution of industrial disputes by arbitration may argue in favor of an election-of-remedies doctrine, the strong public policy against discrimination according to race, sex, or religion will not permit it. As has been shown, this judgment has considerable appeal in certain cases. When the arbitrator pays no heed to title VII considerations, or when for some reason his award does blatant violence to the purposes and policies of the Act, holding the plaintiff to an election of remedies may well be undesirable. On the other hand, uniformly permitting employees to have access to the courts after arbitration when the issue arbitrated is identical to the one the court must decide in a title VII suit is subversive of the arbitration process, extraordinarily burdensome on the defendant, and conducive to wastefully repetitious litigation.

If the conflict is viewed abstractly as a clash between the policy favoring the private settlement of industrial disputes by arbitration and the policy condemning racial, religious, sexual, and ethnic discrimination, there can be no doubt that the latter supersedes the former. But that viewpoint is outrageously simplistic. First, the importance of arbitration in the national labor policy is too fundamental for the arbitral process to be so summarily undermined. Moreover, the resolution of discrimination claims by private and

240. *See generally* Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191-96 (1968).

241. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324, 332, 337 (6th Cir. 1970).

even informal measures is directly in accord with the congressional intent in enacting title VII. As the Fifth Circuit stated in *Hutchings*:

> Title VII outlaws certain forms of discrimination of employment. An important method for the fulfillment of congressional purpose is the utilization of private grievance-arbitration procedures. This comports not only with the national labor policy favoring arbitration as the means for the final adjustment of labor disputes, e.g., The Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 397 U.S. 235 (1970) . . . but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary compliance with the Act than through court orders.[242]

Finally and most significantly, simply because there is concurrent jurisdiction between the arbitral and statutory processes does not mean there is general disharmony between national policies. As has been stated, there is more often concordance than clash.[243]

Consequently, showing some deference to arbitration seems no less appropriate as a solution here than it is when the jurisdiction of the arbitrator and the NLRB overlap. In such circumstances, the Board has adopted a policy of deferring to arbitration under the so-called *Spielberg* doctrine.[244] Under that rule, the Board refuses to exercise its pre-emptory jurisdiction to set aside arbitration awards dealing with unfair labor practice charges, provided the arbitration proceedings "have been fair and regular, all parties [have] agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and policies of the Act."[245] A doctrine analogous to that formulated in *Spielberg* might constitute the best solution to the problems presented by the concurrent jurisdiction of the grievance procedure and the courts in title VII cases.

The possibility of such a solution was acknowledged in *Hutchings*, in which the court said, "we leave for the future the question whether a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases."[246] That the time is ripe for consideration of such a procedure is indicated by the court's remark that it was only because of the "state of the record" that it passed over the question.[247]

While the *Spielberg* approach seems well suited for adoption in

242. 428 F.2d at 313.

243. *See* note 204 *supra* and accompanying text.

244. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). *See also* Joseph Schlitz Brewing Co., 175 N.L.R.B. 23 (1969).

245. 112 N.L.R.B. at 1082.

246. 428 F.2d at 314 n.10.

247. 428 F.2d at 314 n.10.

title VII cases, there may be additional safeguards that should be added to the rule in order to make it truly functional. *Spielberg* arose under the NLRA, which is premised on the notion of majority rule and exclusive representation by the designated bargaining agent,[248] whereas title VII is concerned primarily with protecting the rights of individuals who are in certain specified minority categories. Therefore, to ensure the full statutory protections intended, the courts in title VII suits should only give deference to an arbitrator's award when the following conditions have been satisfied:

(1) the arbitration hearing has been fair and regular;

(2) the union, employer, and employee would otherwise be bound by the decision of the arbitrator under the applicable collective bargaining contract;

(3) the employee has voluntarily participated in the arbitration proceeding—that is, the employee has not resisted the union's efforts in his behalf;

(4) the employee has been apprised by the union that a decision by the arbitrator adverse to his claim may subsequently foreclose relief under title VII;

(5) the employee has been fairly and adequately represented;

(6) the arbitrator has found that the contract proscribes discrimination as defined by title VII;

(7) the arbitrator has considered and fully decided the charge of discrimination under the applicable antidiscrimination contract clause;

(8) the employee has been given the option of using his own counsel to present his case to the arbitrator; and

(9) the arbitrator's decision is not clearly repugnant to the purposes and policies of title VII.[249]

On the other hand, there should be no deference given to a contractual arbitration procedure if:

(1) the alleged charge of discrimination has not been appealed to arbitration; or

(2) the grievance has been settled without the employee's consent; or

(3) the arbitrator holds against the employee but either (i)

248. J.I. Case Co. v. NLRB, 321 U.S. 321 (1944).

249. Thus, for example, if the courts have recognized the present effects of past willful acts as constituting "discrimination by intent" under title VII (*see, e.g.*, Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir. 1970)), then an arbitrator's contrary rule should not be respected.

does so for reasons other than the alleged discrimination or (ii) gives no reason or justification for his award;[250] or

(4) the employer is unable to show that the employee's claim of discrimination has been *fully* and fairly litigated in the arbitration hearing.

If these standards were given uniform recognition by the courts under a "deferral rule," they would adequately serve to protect the aggrieved individual under title VII and, at the same time, to protect the sanctity and binding quality of the collective bargaining arbitration process.

Given this type of a deferral doctrine, the question arises who will formulate and administer it. In theory, nothing should prevent the courts from doing so; but, as a practical matter, the threshold investigation required could too easily turn into a full-blown trial on the merits—precisely what is sought to be avoided. Moreover, unless the Supreme Court lays down the criteria under which a plaintiff's suit will be barred out of deference to arbitration, there is likely to be undesirable variance among the circuits.

The logical body to formulate a deferral rule is obviously the EEOC. Yet, under the present statutory scheme of title VII, such action by the EEOC would be unlikely. Section 706(e) of the Act provides that the Commission "shall" send the aggrieved party a letter permitting him to bring suit within thirty days if "the Commission has been unable to obtain voluntary compliance with this title."[251] One might argue that the Commission could, under the standards proposed above, consider an arbitration award to be a voluntary compliance and thus selectively limit the party's ability to sue by not issuing a suit letter in appropriate cases. However, the Commission views its statutory powers as inadequate to prevent a party from bringing an action if the party himself rejects the settlement.[252] Moreover, it has been held that the scheme of title VII does not prevent a private party from bringing suit if the party does not agree with the settlement agreed upon by the EEOC and the employer.[253] This result comports with the failure of Congress to grant enforcement power to the EEOC and with the legislative history of the Act, which indicates that it was not the intention of Congress to

250. "Arbitrators have no obligation to the Court to give their reasons for an award" (Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)), and therefore the employee should not be precluded from "relitigation" on his statutory claim if the arbitrator does not make it clear that the title VII issue has been resolved.

251. 42 U.S.C. § 2000e-5(e) (1964).

252. *See* text accompanying note 123 *supra.*

253. *See* notes 124-26 *supra* and accompanying text.

place the Commission in the courthouse door.[254] Consequently, as matters now stand, the Commission would be unable to bar an aggrieved employee from bringing an action in federal court by ruling that an arbitration award is conclusive of his rights. The Commission has indicated a willingness to defer consideration of charges lodged with it, pending arbitration up to the statutory time limits;[255] but, obviously, this type of delay would be of no consequence if the arbitration award were issued within the time limits but was unsatisfactory to the charging party. On the other hand, if the EEOC were granted cease-and-desist powers, it would then be the logical agency to create deferral rules.

State FEP commissions that have enforcement powers are perhaps in a better position than the EEOC to defer selectively to arbitration awards, but section 706(b) of the Civil Rights Act requires in most cases that the EEOC defer action on the charge to the state or local agencies for only sixty days.[256] Hence, despite the existence of an arbitration award that the state FEP commission could treat as conclusive, such a state procedure would in no way foreclose the possibility of a title VII suit.

Therefore, until the Supreme Court renders a decision in this area, the whole question of election of remedies and the effect of title VII on the arbitration process will be unresolved.

VI. Conclusion

The prohibitions against discrimination in employment, and specifically the ban on religious discrimination, embodied in title VII of the Civil Rights Act of 1964 comprise a noble venture. The temptation in implementing that venture, of course, is to paint with broad strokes. But the delicate relationship between the religious and the secular calls for a precision of analysis in the title VII field which, if the legal wranglings in *Dewey* are any example, has been seriously wanting to date.

To say that the definition of discrimination is one of effect is surely to prove too much, and the notion of accommodation is no less troublesome. Such formulas may turn a few to religious conversion; however, they will also undoubtedly have disruptive effects on the uniform administration of collective bargaining contracts. Even assuming these problems to be less grave than here portrayed, still it

254. *See* note 127 *supra*.

255. Opinion Letter of EEOC General Counsel, Oct. 20, 1966, in BNA Lab. Policy & Prac. 401:3028 (1966).

256. 42 U.S.C. § 2000e-5(b) (1964). This section also provides that the sixty-day period shall be extended to 120 days during the first year after the effective date of the state or local FEP law.

is difficult to fathom the apparent subjugation of the secular to the religious by the rule of accommodation formulated by the EEOC[257] in conjunction with religious-discrimination cases under title VII. The EEOC rule is a curious departure from the traditional view that "we must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life . . . ."[258]

Equally disturbing is the enunciation of the election-of-remedies doctrine by the Sixth Circuit in *Dewey*[259] in its aborted attempt to glean the proper perspective for the arbitration process in the handling of title VII claims. While some deferral rule may indeed be warranted under certain circumstances[260] in order to strike a workable balance between the role of the arbitrators and the courts in the adjudication of title VII claims, surely *Dewey*—in which the issue of the alleged title VII claim was never really litigated in arbitration[261] —was not the proper setting for resort to this principle of law. Furthermore, there is the more troublesome question, which was ignored by the Sixth Circuit, whether arbitrators *should* be entrusted with the final and binding adjudication of alleged title VII claims, especially when no legal safeguards presently exist to protect individual claimants who may be adversely affected by the invocation of the election-of-remedies doctrine.

VII. Postscript

On January 18, 1971, the Supreme Court granted certiorari in *Dewey v. Reynolds Metals Company*.[262] The two questions presented to the Court for final determination are: (1) Does an employer engage in religious discrimination in violation of section 703(a)(1) of the 1964 Civil Rights Act if he refuses to make reasonable accommodations to an employee's religious observance of a weekly day of rest? (2) Is an employee who has sought arbitration of his claim for wrongful discharge under a labor agreement barred from bringing a Civil Rights Act suit arising out of the same discharge?[263]

257 *See* note 44 *supra*.

258. Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953). *See also* Stimpel v. California State Personnel Bd., 6 Cal. App. 3d 206, 85 Cal. Rptr. 797, *cert. denied*, 400 U.S. 952 (1970).

259. 429 F.2d at 331-32.

260. *See* notes 246-50 *supra* and accompanying text.

261. 291 F. Supp. at 789.

262. 39 U.S.L.W. 3313 (U.S. Jan. 19, 1971) (No. 835).

263. 39 U.S.L.W. 3250 (U.S. Oct. 12, 1970) (No. 835).