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Racial Discrimination, the Courts, and Construction

A MAJOR PARADOX OF OUR TIME is that fundamental employment inequities persist even though the law relating to racial discrimination and employment has been interpreted expansively by both the Equal Employment Opportunity Commission and the judiciary. In the seven years since the effective date of Title VII of the Civil Rights Act of 1964, the judiciary has fashioned a body of case law which has theoretically placed minority group plaintiffs in a very favorable position. Although Congress has recently placed its *imprimatur* upon the remedies fashioned by the courts, on balance, these decisions have done much more than was generally conceived possible when Title VII was passed in 1964. Nevertheless, racial discrimination in employment is still widespread, especially in the building trades.

This paper is concerned with judicial efforts to combat racial discrimination in the building trades. I shall examine the judicial boundaries of discrimination through discussion of recent decisions relating to *prima facie* discrimination, segregated jobs, and all-white establishments and fictional seniority. I shall analyze the effects of the Supreme Court's landmark decision, *Griggs v. Duke Power,* in some detail. Finally, after noting the changing definition of the business necessity defense against discriminatory practice charges, I shall briefly note the anti-discrimination remedies formulated for the building trades.

What Is Discrimination?

Prima facie. Most of the law relating to the definition of discrimination has arisen under Title VII.[1] Under that statute the Circuit Courts of Appeals have unanimously held that a *prima facie* case of discrimination

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[1] However, the Civil Rights Act of 1866 has also been held to apply to employment discrimination. For one example of many cases, see *Young v. International Telephone & Telegraph Co.* 438 F.2d 757 (3rd Cir. 1971).

may be made out on the basis of statistics showing the severely disproportionate number of minorities employed in comparison with the number residing in the area,[2] and the burden shifts to the defendant to explain such a pattern. Indeed, the Eighth Circuit Court of Appeals has said that statistics may be *proof of* discrimination.[3] In the construction industry, the Ninth Circuit Court of Appeals held that even though the union's jurisdiction extends beyond an urban area where blacks are congregated, the city may be used to establish a *prima facie* case on statistics because ". . . the City has the largest population within their jurisdiction and is that area from which they would most likely draw the vast majority of workers for apprenticeship, referral and membership purposes."[4]

Even prior to such holdings, however, the courts had already begun to startle those commentators who thought that Title VII was intended to apply only from July 2, 1965, onward in the sense that it would prevent consideration of pre-1965 discriminatory conduct. The first major appeals court decision to confront this question was *Local 53, International Association of Heat and Frost Insulators v. Vogler.*[5] In *Vogler* the Fifth Circuit held that a union's policy of nepotism, while concededly nondiscriminatory *in vacuo,* was unlawful because the *effect* of such a practice—even if predicated upon a good faith economic justification[6]—was to continue into the present the past exclusion of racial minorities, since the incumbent employees were all or predominantly white.

Segregated jobs. The next step in this process involved segregated jobs or departments and seniority lines negotiated by an industrial union which fenced them in. In another Fifth Circuit decision, *Local 189, United Papermakers v. United States,*[7] Judge Wisdom, speaking for the court in a case where past discrimination was once again present, concluded that a departmental or job seniority system violated Title VII if it denied blacks seniority

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[2] *Jones v. LeeWay Motor Freight, Inc.* 431 F.2d 245 (10th Cir. 1970); *Parham v Southwestern Bell Telephone* 433 F.2d 421 (8th Cir. 1970); *U.S. v. Local 86, Iron Workers* 433 F.2d 544 (9th Cir. 1971). Cf. *U.S. v. Jacksonville Terminal Co.* 451 F.2d 418 (5th Cir. 1971); *Mabin v. Lear Siegler, Inc.* 457 F.2d 806 (6th Cir. 1972).

[3] *Parham v. Southwestern Bell Telephone Co.* supra.

[4] *U.S. v Local 86, Iron Workers* 443 F.2d 544 at 551, n. 19.

[5] *Local 153, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler* 407 F.2d 1047 (5th Cir. 1969).

[6] See the discussion of business necessity alone and the court's comment in *Dobbins v. Local 212, Elec. Workers* 292 F. Supp. 413 (S.D. Ohio 1968); on the subject of past discrimination, see generally William B. Gould, "Seniority and the Black Worker, Reflections on Quarles and Its Implications," *Texas Law Review,* XLVII (June 1969), pp. 1039–1074; William B. Gould, "Employment Security Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964," *Howard Law Journal,* XIII (Winter 1967), pp. 1–50.

[7] 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 19 (1970).

credits which might have been theirs had they had access to previously all-white jobs into which they now were permitted to transfer. Said the court:

> The defendants assert paradoxically, that even though the system conditions future employment opportunities upon a previously determined racial status the system is itself racially neutral and not in violation of Title VII. The translation of racial status to job-seniority status cannot obscure the hard, cold fact that Negroes at Crown's Mill will lose promotions which, *but for* their race, they would surely have won. Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias.

In *Local 189*-type cases, the employers and unions generally recognize that the no-transfer policy between departments or jobs previously segregated on the basis of race is unlawful. What is at issue is the basis upon which blacks are to move into previously all-white jobs, i.e., the amount of seniority to be carried with them. In the trucking industry no-transfer policies establishing barriers between city and over-the-road drivers (blacks having access to city jobs but not over-the-road ones) have been declared invalid even though the job categories existed under separate collective bargaining agreements negotiated by different unions.[8] Moreover, the Fifth Circuit[9] recently ruled that black employees placed in previously segregated departments in the railroad industry must carry their seniority with them into new bargaining units and collective agreements negotiated by unions which did not represent them previously.

These decisions left a number of issues unresolved. They provided not for the ousting of incumbent white employees, but rather for permitting blacks to fill vacancies on the basis of *all seniority* accumulated. Tied, as these decisions were to past discrimination, they did not provide for the permanent revision of union and employer practices. Once hiring discrimination ceased, the affected class was cut off as of that date, i.e., no employee hired after hiring discrimination had officially ceased could rely upon an unlawful denial of past seniority credits. Then the parties could revert to departmental or job seniority or nepotism once the incumbent group discriminated against obtained expanded employment opportunities.

All-white plants and fictional seniority. What about the all-white establishment? After all, it was quickly noted that those employers who had hired

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[8] *Jones v. LeeWay Motor Freight Co.*, supra; *Bing v. Roadway Express, Inc.* 444 F.2d 687 (5th Cir. 1971); *Witherspoon v. Mercury Freight Lines* 357 F.2d 496 (5th Cir. 1972).

[9] *U.S. v. Jacksonville Terminal Co.*, supra; *U.C. v. St. Louis-San Francisco Railway* 4 FEP Cases 853 (8th Cir. 1972).

blacks in the past (albeit for disagreeable, unrewarding jobs) were liable. But what about the situation in which blacks had been *totally* excluded? The Eighth Circuit provided a limited answer to this more typical building trades question in *U.S. v. Sheetmetal Workers Union.*[10] Here the Eighth Circuit found the affected class to consist of nonunion black tradesmen who had been excluded or discouraged from applying for jobs within the jurisdiction of the defendant craft unions. Accordingly, the referral (seniority) system was changed to permit such black workers to utilize "seniority credits" even though they had been accumulated in nonunion shops or employers not covered by the collective bargaining agreement.

The *Local 189* opinion is not necessarily at odds with *Sheetmetal Workers.* In the industrial situation, black paperworkers were given seniority credits for the time worked in all-black jobs in the same plant. In the craft situation, the same result was achieved by permitting black tradesmen to utilize seniority credits for the time spent in nonunion jobs in the same craft. Presumably blacks may rely upon time spent in comparable work even when it is not in the construction industry.[11]

However, proof concerning the time worked in all-black jobs will be much more difficult to come by in dealing with all-white industrial plants. And the court in *Local 189* seemed to deliberately exclude such situations from its holding:[12]

> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guarantee that the new employees that actually suffered exclusion at the hand of the employer in the past or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly hired Negroes would comprise preferential rather than remedial treatment.

It is important to note that in the seniority cases where violation is found, the result is that blacks are obtaining work opportunities that otherwise would have gone to whites. The courts have not indicated just how far this remedy will extend, particularly to the building trades.

In the final analysis, the question of whether or not the anti-preferential

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[10] 416 F.2d 123 (8th Cir. 1969).
[11] Cf. *U.S. v. Local 86,* supra.
[12] 416 F.2d 980 at 995 (5th Cir. 1969).

treatment of provisions of Title VII have been offended can only be determined by ascertaining whether the balance struck between black and white interests unduly chokes off the work opportunities for whites.[13] This is a theme which abounds in the cases involving quotas and preferential treatment. Moreover the holdings are arguably moving toward explicit recognition of the proposition that black applicants for apprenticeship or journeyman slots—while they must be "qualified" in some sense of the word—need not necessarily be "better qualified" or even "as qualified" as their white competitors where past discrimination has been practiced.[14]

Griggs. As I have noted, the seniority and nepotism cases are tied to the existence of past discrimination. However, the Supreme Court's landmark decision in *Griggs v. Duke Power,*[15] indicates that the bite of the employment discrimination law may cut even more deeply. This case, which has implications for the entire economy, should substantially affect construction.

In *Griggs* the question before the court related to the requirement of a high school education or the passing of a standardized general intelligence test as a condition of employment or transfer to jobs when (1) neither the education nor the test was shown to be "significantly related" to successful performance on the job; (2) both qualifications screened out Negroes at a 'substantially" higher rate than whites; (3) jobs which were fenced in by the standards had been filled only by whites as part of a past discriminatory policy. The Court held that Title VII required the removal of "artificial, arbitrary and unnecessary barriers to employment when the barriers operate" so as to discriminate. Said Chief Justice Burger for a unanimous court:

> 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.

The Court's decision can be read as predicated upon a finding of past discrimination like the seniority and nepotism cases. But the opinion's reasoning and language were much more elaborate and have implications extending beyond *Local 189* and *Vogler*:

[13] In the legislative history of Title VII, Congress was very concerned that unemployed blacks might displace incumbent whites. *Sheet Metal Workers* presents this potential for displacement in construction, where referral seniority may determine whether an employee works in the industry at all. Among the cases concerned with this balance are *U.S. v. Local 86, Iron Workers,* supra; *Local 53, Asbestos Workers v. Vogler* 407 F.2d 1047 (5th Cir. 1969); *Carter v. Gallagher* 452 F.2d 315 (8th Cir. 1972) cert. denied.

[14] See *U.S. v. Jacksonville Terminal Co.* 451 F.2d 418 (5th Cir.); *Green v. McDonnell Douglas Corp.* 4 FEP Cases 577 (8th Cir. 1972).

[15] 401 U.S. 424 (1971).

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve the equality of employment opportunities and remove barriers that have operated in the past that 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.*

Accordingly, the proscribed practices may not necessarily have to disqualify blacks at a substantially higher rate; all that needs to be shown is that they freeze prior discrimination. This has obvious implications for craft union-contractor decisions relating to the number of employees who are to be employed in the trade in a given year—or more specifically, their control over the size of apprenticeship classes. For example, a small apprenticeship class might well exclude blacks and whites equally. Yet, despite the absence of a disproportionate exclusion, the effect would be to preserve the status quo. *Griggs* indicates that unions and employers may bear a very heavy burden of justification to validate apprenticeship size where past discrimination existed. Similarly, apprenticeship program duration may be scrutinized more carefully, since program length postpones the day when blacks enjoy benefits attributable to past discrimination and may create a greater likelihood that blacks will drop out. Another facet of *Griggs*—the employer's attempt to impose new standards for promotion upon black employees that had not been applicable to white incumbents—may make apprenticeship duration suspect when it can be shown that incumbent white journeymen were not required to run the same gauntlet.

Societal discrimination. But, *Griggs* seems to go beyond the individual employer's past discrimination. This is evidenced by the Court's reliance upon the *Gaston County*[16] decision and the fact that the court's opinion cited none of the seniority cases. In *Gaston County* the defendants sought to escape the triggering mechanisms of the Voting Rights Act of 1965 by claiming that the low number of registered voters was not attributable to discrimination but rather the illiteracy of large numbers of blacks. The Court noted that Negroes in North Carolina had received a segregated and inferior education and that a defense based upon illiteracy in such circumstances would simply carry forward past discrimination. Said the *Griggs* Court: ". . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."

Accordingly, this branch of *Griggs* seems to go far beyond most of the

[16] 395 U.S. 285 (1969).

employment cases which had preceded it. It rests upon the proposition that there are certain practices which carry with them the indicia of discrimination attributable to society and not to the particular employer or union involved in the litigation. This is of utmost significance since it imposes liability upon defendants for *de facto* societal discrimination as well as for deliberate or *de jure* employer or union discrimination. Accordingly, *Griggs*, insofar as it borrows from the *Gaston County* principle, goes much beyond the school desegregation cases which have to date insisted upon a finding of *de jure* discrimination by the defendant school district or state authority. Already, in testing cases involving both public and private employers, the courts have begun to impose liability in *de facto* contexts.[17]

And the cases have begun to move far beyond testing itself. For instance, in *Gregory v. Litton Industries*,[18] a district court has held that employer reliance upon arrest records to determine the suitability of job applicants violates Title VII because a black is more likely to have an arrest record than a white and therefore such a procedure will screen out blacks disproportionately. This holding recognizes the fact that an arrest record does not necessarily mean anything—particularly in light of the practice of urban police in many major cities of arresting for investigation. Further, the Eighth Circuit Court of Appeals has extended this holding to convictions and stated that employer reliance upon convictions must generally be job-related.[19] Since some union-employer apprenticeship committees ask questions about arrests and convictions and rely upon the answers in the selection process, this line of reasoning has applicability to construction.

The decisions have not stopped here. Recently, a court declared unlawful an employer rule requiring discharge of employees who have wage garnishments.[20] Here, again, societal inequities make it probable that blacks as a group will be more likely to have their wages garnished.

It will be interesting to see what impact, if any, these decisions will have for corporate relocations from the inner city to suburban areas where the transfer affects minority group workers more adversely than white employees. Here it is clear that *the effect* of such relocations is to exclude blacks. The distinction between this and the cases noted above is that there is arguably more of a business necessity for the move to the suburbs. Yet, this question will turn upon the facts of each case.

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[17] *Castro v. Beecher* 4 FEP Cases 710 (1st Cir. 1972); *Chance v. Board of Examiners* 458 F.2d 1167 (2nd Cir. 1972); *Western Addition Community Org. v. Alioto* 4 FEP Cases 772 (N.D. Cal. 1972); *Commonwealth v. O'Neill* 4 FEP Cases 970 (E.D. Penna. 1972).

[18] 316 F. Supp. 401 (C.D. Cal. 1970).

[19] *Carter v. Gallagher*, supra.

[20] *Johnson v. Pike Corp.* 332 F. Supp. 490 (C. D. Calif. 1971).

However, this defense would have even less plausibility where craft unions and joint union-employer apprenticeship committees move their schools to the suburbs or to portions of the city remote from minority areas. The effect would be the same, i.e., to discourage minority applications and enrollments.

The Title VII cases indicate that the burden for defendant is very heavy indeed. The suburban relocation cases, when they come to the courts, will surely highlight a major aspect of this area which has not received much attention to date, i.e., the fact that many of the remedies being devised by the courts will cost employers and unions a good deal of money.

The Limitations of Title VII

Compromise affirmative action. Some of the litigation which has been reported appears to be a race between defendants to hire and promote blacks into jobs from which they have previously been excluded before the plaintiffs can bring an action to provide for past seniority credits. The presence of both Outreach programs for apprentices and negotiated hometown plans makes the construction industry no exception to this phenomenon. In the main, the defenses of employers and unions have been unsuccessful, with the following statement of the Fourth Circuit representing the majority attitude: "The law in this Circuit is that if an employee suffers the effects of past discriminatory acts, even though the employer's policy may have changed, he is entitled to relief."[21]

Two recent decisions of the Fifth Circuit support this principle. The first is *U.S. v. Hayes International Corp.*[22] Here the Court ruled that a transfer program into the predominantly white lines of progression was unduly limited because (1) it only applied to entry-level jobs although some employees were qualified for other jobs; (2) there was only one opportunity to transfer; (3) remanning and downgrading practices would continue the effects of past discrimination. Because black employees could not presently fit into higher classification jobs which the company claimed required filling with more experienced white employees, the Court required defendants to "walk the last mile" of remedying past discrimination. Similarly, in *Rowe v. General Motors Corp.*[23] the same Court disregarded the "commendable" hiring record of the General Motors Corporation at its Atlanta plant because of discrimination in the promotion and transfer from hourly jobs to salaried positions,

[21] However, in *Parham v. Southwestern Bell Telephone,* supra, the Eighth Circuit refused to issue injunctive relief where the number of blacks had increased substantially after the effective date of the statute.

[22] 456 F.2d 112 (5th Cir. 1972).

[23] 457 F.2d 348 (5th Cir. 1972).

including the firm's reliance upon subjective criteria by an all-white decision-making panel. Said Judge Brown, speaking for a unanimous court:[24]

> . . . the problem is not whether the employer has willingly—yea, even enthusiastically—taken steps to eliminate what it recognized to be traces or consequences of its prior pre-Act segregation practices. Rather, the question is whether on this record—and despite the efforts toward conscientious fulfillment—the employer still has practices which violate the Act. In this sense the question is whether the employer has done enough.

Quite obviously, strict scrutiny of subjective criteria, all-white decision makers, and whether "enough" has been done will haunt the construction unions in litigation for years to come.

Business necessity. In *Local 189* Judge Wisdom stated that policies which perpetrated past discrimination must yield "unless there is an overriding legitimate, nonracial business purpose."[25] Judge Wisdom's opinion assumes that an employer may require qualifications in the form of presently marketable employment skills and not violate the statute when no such qualified employees present themselves. *Local 189* and the Supreme Court's *Griggs* decision have articulated this factor as a business necessity.

Apparently *Local 189* has assumed that discrimination is permitted if business necessity is present. However, when considering Title VII cases the courts generally seem unaware of the fact that under the National Labor Relations Act it is possible to find a legitimate business necessity and yet still find a violation because of the overriding importance of the statutory rights involved.[26]

But even though the courts seem confused on the relevance of business necessity, two more immediate questions which they have confronted are: (1) what is the meaning of "business necessity," and (2) under what circumstances is business necessity not required?

Those courts that have confronted the issue seem to have articulated an exacting standard. For instance, the Second Circuit[27] said that "[n]ecessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals . . . if the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discrim-

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[24] Id. at 449.

[25] 416 F.2d 980 at 989 (5th Cir. 1969).

[26] *NLRB v. Erie Resistor Corp.* 271 U.S. 336 (1963).

[27] *U.S. v. Bethlehem Steel Co.* 446 F.2d 652 (2d Cir. 1971). See also *Robinson v. P. Lorillard Co.* 444 F.2d 791 (4th Cir. 1971).

inatory effects, then the present policies may not be continued." If accepted by the Supreme Court, this interpretation will introduce a concept remarkably similar if not identical to the "compelling state interest" criterion utilized in Equal Protection cases arising under the Fourteenth Amendment.[28] The effect here, as it has been in the constitutional cases, would normally require the defendant to cease the discriminatory practice.

There have been two principal problem areas applying the business necessity concept. The first is the testing area where the Court said in *Griggs* that business necessity is the "touchstone." Defendants usually maintain that the present state of testing is such that the Second and Fourth Circuits' view of business necessity will require parties to relinquish tests. While Congress sought to prohibit tests which have a discriminatory effect, it did not wish to deprive employers and unions of this selection procedure entirely and did not view the statute as requiring such a result. If defendants are always or nearly always required to use another selection procedure which is less discriminatory, the result arguably places strains upon the legislative history of Title VII.[29] But, of course, it is by no means clear that employers and unions are unable to devise tests which pass muster under the business necessity standard.

The second question relates to those cases where employers and unions have not engaged in *de jure* discrimination but where the societal *de facto* situation may have produced a present discrimination nonetheless. Here the First and Second Circuit Courts of Appeal so far have been reluctant to meet the question of whether the *de jure* business necessity requirement applies to such cases. In the *de facto* cases (for example, *Castro v. Beecher)* the courts may be more inclined to require the plaintiff to show that an alternate means of selection is less discriminatory, as opposed to requiring the defendant to show that its selection process is the least discriminatory of all available.

Building Trades Remedies

The construction industry is the prime target of government and civil rights organizations not only for the obvious reasons of visibility, high wage rates, location of many projects in the ghetto, potential growth, and racial exclusiveness, but also because it has been so obstinate in not complying with the mandates of law. Too often it has masked its intentions behind so-called "neutral" practices which do not overtly discriminate as well

[28] See, e.g., *Shapiro v. Thompson* 394 U.S. 618 (1969); *Kramer v. Union 3 School Dist.* 395 U.S. 621 (1969).

[29] See an article by Hugh S. Wilson, "A Second Look at *Griggs v. Duke Power Co.*," *Virginia Law Review*, LVIII (May, 1972), 844–874.

as through the negotiation of the much discredited "hometown plans" which purport to recruit "trainees" in addition to apprentices.[30] That branch of *Griggs* which focuses upon a finding of past discrimination will have applicability to most construction union cases even though the contemporary effort of some of the crafts outstrips what is being accomplished in much of the industrial arena. The all too prevalent attitude is well summarized by Judge Frankel's comments in a contempt proceeding affecting the Lathers:

> "The hardest" evidence in the record may be the combination of statistics and accumulated reports by witnesses showing specific cases of favoritism for whites and discrimination against blacks. But there are matters less quantifiable and less objective in appearance that give point and substance to the whole dreary picture. The attitude of witnesses, the bland show of innocence, the forgetfulness of things that ought to be remembered, the occasional revelations of explicitly racist sentiment, the refusal of one agent to sign the settlement agreement to enforce a regime of nondiscrimination because he thought it was "rammed down the union's throat by the government," the evidence of special and focused nastiness to black men in the hiring hall—such things betray a broad undercurrent of hostility to the decree and the commands of the law giving rise to it.[31]

As one might imagine, construction union and employer practices are under attack. Nonjob related tests for apprenticeship and journeyman status have been rejected.[32] The requirement that the membership vote approval of a journeyman's admission has been eliminated where the union has previously engaged in wrongdoing.[33] Under similar circumstances, the ability to rely upon subjective criteria and oral examinations have been circumscribed.[34] Moreover, *Griggs* means that reliance upon educational criteria which is not job related is unlawful.[35] Nepotism in the selection process has been equated with racial discrimination even where a token number of black members were permitted to benefit by the same rules for their own relatives.[36] The courts have required that a "first in—first out" register be kept for referral

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[30] See William B. Gould, "Blacks and the General Lockout," *New York Times*, July 17, 1971, p. 23.

[31] *U.S. v. Wood, Wire and Metal Lathers, Local 46* 328 F. Supp. 429 at 437 (S.D. N.Y. 1971). See also *Rios v. Steamfitters Local 638* 326 F. Supp. 198 (S.D. N.Y. 1971).

[32] *U.S. v. Local 86*, supra; *U.S. v. Sheet Metal Workers Union*. supra.

[33] *Local 53, Asbestos Workers v. Vogler*, supra. Cf. *U.S. v. Sheet Metal Workers Union*, supra.

[34] *U.S. v. Plumbers Local Union No. 73* 314 F. Supp. 160 (S.D. Ind. 1969). See also *Rowe v. General Motors Corp.* 457 F.2d 348 (5th Cir. 1972) discussed below. Cf. *U.S. v. Plumbers Local Union No. 638* 4 FEP Cases 1009 (S.D. N. Y. 1972).

[35] Dennis R. Yeager, "Litigation Under Title VII of the Civil Rights Act of 1964, The Construction Industry and the Problem of 'Unqualified' Minority Workers," *Georgetown Law Journal*, LIX (June, 1971), pp. 1265–1296.

[36] *U.S. v. Plumbers Union No. 73*, supra; *Local 53, Asbestos Workers v. Vogler*, supra; *U.S. v. Iron Workers, Local 1* 438 F.2d 697 (7th Cir. 1971). Cert. denied 404 U.S. 830 (1971).

from the hiring hall.[37] As noted above, seniority credits for job referrals and arbitrary membership size restrictions have been modified.

Both federal and state government have required construction contractors to adhere to goals and timetables for minority recruitment into trades in which blacks have not been represented. The most prominent, of course, is the Philadelphia Plan—the validity of which has been upheld by the courts.[38] The significance of the Philadelphia type imposed plan has been limited by the Department of Labor's adoption of the hometown plan approach. Yet, as flimsy as many of such plans are, they seem to be playing a role in the developing law. Courts are more inclined to fashion quota remedies when they are assured that there is a training mechanism which creates the likelihood that the judicially fashioned ratios may be realized.[39] Ironically, what was probably intended as an escape from the dictates of judges may prove to be a useful adjunct to the courts' rulings in the construction industry. Thus special training programs might be the appropriate remedy where employers have barred blacks from acquiring the necessary skills and experiences for becoming journeymen. For example, Judge Lindberg's remedy in *U.S. v. Local 86*[40] was an employment quota and a special training program. And the Tenth Circuit in *Jones v. LeeWay Freight* indicated that such programs might be appropriate remedies even if this involved additional costs for the employer.[41]

Recent Developments

In my opinion, there are two principal reasons for the continuing paradox of stubborn inequality in the face of important plaintiff victories in federal courts. First, until 1972 the burden of instituting time consuming, costly litigation was imposed almost exclusively upon individual plaintiffs. Unlike the National Labor Relations Board, the EEOC, which was charged with responsibility for the administration of Title VII, was not provided with cease and desist authority in 1964 and could not institute court action. (The 1972 amendments authorized the EEOC to sue defendants in federal court.) Second, until recently, both the executive and judicial branches of govern-

[37] *U.S. v. Plumbers Local Union, No. 73,* supra.

[38] *See Contractors Association of Eastern Pennsylvania v. Secretary of Labor* 442 F.2d 159 (3d Cir. 1971) Cert. denied 404 U.S. 854 (1971), as well as *James v. Ogilvie* 310 F. Supp. 661 (N.D. Ill. 1970), *Joyce v. McCrane* 320 F. Supp. 1284 (D.N.J. 1970); *Carpenters v. Conforti & Eiselle* 3 FEP Cases 1218 (D.N.J. 1971).

[39] U.S. *v. Ironworkers, Local No. 44,* Civil Action No. 6590 (Supplemental Consent Decree, May 11, 1972); *U.S. v. Local 212 IBEW,* Civil Action No. 6473 (Unreported Memorandum Decision, March 10, 1972). See particularly *U.S. v. Carpenters Local 169* 457 F.2d 210 (7th Cir. 1972).

[40] *U.S. v. Local 86,* supra.

[41] *Jones v. LeeWay Freight,* supra.

ment were exceedingly unimaginative in fashioning remedies. The traditional and most often used remedy by the state and federal employment practices commissions was either a negotiated settlement—often a soft settlement compromising the charging party's rights—or a "slap on the wrist," i.e., "go thou and sin no more." Accordingly, two of the main ingredients for the effective implementation of legislation designed to produce social and economic change were missing: (a) that an institution with the time, financial resources, and expertise be able to bring a large number of suits; and (b) that the remedies would influence defendants' future conduct and act as an incentive for them to behave properly.

To some extent, these problems may become less important as more effective remedies are fashioned. Where serious violations of Title VII are committed, the courts have prescribed minority hiring and promotion quotas.[42] Indeed, it has been held that the executive branch of government may impose goals and timetables for minority hiring upon government contractors even where there has been no finding of past discrimination.[43] Although the practical significance of such ruling is extremely limited by the unwillingness of federal and state governments to enforce these goals, where enforced they have teeth. The same can be said for decrees which provide for back pay and the payment of costs and attorneys' fees to victorious plaintiffs.[44]

Conclusion

In the construction industry the achievement of racial equality will require more than a group of court opinions. However, it is significant that anti-discrimination litigation in construction is really being tried now for the first time. While the legal process is riddled with inherent limitations, it is far too early to say that its yield will be low. On the contrary, the remedies—particularly court imposed quotas—give much more promise than anything else around. Indeed most of the breakthroughs being made in opening

[42] *U.S. v. Local 86*, supra; *Local 53, Asbestos Workers v. Vogler*, supra; *Carter v. Gallagher*, supra.

[43] *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, supra. In construction such remedies are particularly important since the National Labor Relations Act, through its special exemptions for that industry in Section 8(f), makes it easier for its unions to maintain a de facto closed shop than it is for the industrial unions to do the same. See also *Local 357, International Brotherhood of Teamsters v. NLRB* 365 U.S. 667 (1961).

[44] *Robinson v. P. Lorillard Co.*, supra (back pay); *Bowe v. Colgate-Palmolive Co.* 416 F.2d 711 (7th Cir. 1969) (back pay); *U.S. v. Local 46*, supra (back pay in contempt situation); *Clark v. American Marine Corp.* 437 F.2d 959 (5th Cir. 1971) (attorneys' fees); *Lea v. Cone Mills Corp.* 438 F.2d 86 (4th Cir. 1971) (attorneys' fees). Although the courts have not determined how far into the past back pay liability runs, the EEOC position is July 2, 1965. *U.S. v. Georgia Power Co.* 3 FEP Cases 8319 (D.C. Georgia 1971). Action filed after March 24, 1972, the date of the amendments, cannot collect for more time than two years prior to the filing of the charge with an administrative agency.

access to construction unions are still coming under the coercion of federal court orders.[45]

The 1972 amendment to Title VII, quotas, back pay, and other remedies make it more likely that the intent of the substantive law enumerated by the courts will become a reality for minority group employees at the workplace. Yet the likelihood of this happening is predicated upon the existence of an activist EEOC and the reactions of the Nixon Court. All that one can say with certainty on the eighth anniversary of Title VII is that the beginnings of a revolution in race and employment are to be found in the courts' opinions.[46]

[45] "Closed Door," *New York Times*, July 29, 1972, p. 24.

[46] For an excellent article, see Herbert Hill, "The New Judicial Perception of Employment Discrimination: Litigation Under Title VII of the Civil Rights Act of 1964," *University of Colorado Law Review*, XLIII (March, 1972), pp. 243–268.