RACIAL EQUALITY IN JOBS AND UNIONS, COLLECTIVE BARGAINING, AND THE BURGER COURT†

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Makin' a road
For the rich old white men
To sweep over in their big cars
And leave me standin' here.

Langston Hughes[1]

I. INTRODUCTION

IN the foreseeable future, the Supreme Court of the United States will be called upon to resolve many disputes resulting from the existence of racial inequality in the collective bargaining process and from the lack of full integration in union leadership. Those disputes will arise primarily because black workers are now challenging employers' and unions' practices which have hitherto been thought to be protected under the rubric of free collective bargaining.

No one can deny that there is a new-found willingness among black workers to challenge previously accepted practices. Yet some courts seem unaware of that developing militancy. The recent decision of the Court of Appeals for the District of Columbia Circuit in *United Packinghouse, Food and Allied Workers v. NLRB*,[2] provides an example. In that case, the court, speaking through Judge Skelly Wright, held that an employer's "invidious discrimination on account of race or national origin,"[3] was impermissible under the National Labor Relations Act (NLRA). Judge Wright observed that such discrimination has a twofold effect: it leads to apathy on the part of those who are discriminated against, and it results in an "unjustified clash of interests"[4] between black workers and white workers and thereby considerably reduces the effectiveness of the bargain-

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1. *Florida Road Workers*, in MODERN AMERICAN POETRY 594 (L. Untermeyer ed. 1950).

2. 70 L.R.R.M. 2489 (D.C. Cir. Feb. 7) 1, *cert. denied*, 38 U.S.L.W. 3173 (U.S. Nov. 10, 1969). On remand from the court of appeals, the NLRB ordered a rehearing. Farmers' Cooperative Compress, 72 L.R.R.M. 1251 (Oct. 9, 1969).

3. 70 L.R.R.M. at 2497.

4. 70 L.R.R.M. at 2495.

ing unit. Undoubtedly, some will object to the result reached in that case on the ground that the NLRA was not intended to be a fair employment practices statute.[5] But there is another significant flaw in the opinion. That flaw is the attempt to equate the effects of racial inequality in public education—effects that existed in the situation in *Brown v. Board of Education*[6]—with the effects of racial discrimination in employment. Such an equation is not at all in step with current events. Thus, Judge Skelly Wright's conclusion, in *Packinghouse Workers* that "racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination"[7] is arguably anachronistic.

The problem with such an observation is that it comes at a time when the black worker is anything but docile. Indeed, employers and unions in such metropolitan areas as Detroit and Chicago are well aware of the new militancy of Negro employees who are frustrated by what they regard as discriminatory or poor working conditions and by the failure of the almost lily-white union leadership to correct those conditions.

The explosiveness of the situation can be seen not only in the frustrations of the black workers, but also in the increasingly organized hostility of those white workers who are just a rung above the Negro on the economic ladder, and who constitute what is probably the most alienated group in our society today. Moreover, the measures which have been taken to assist the cause of racial equality in employment, and which appear threatening to the white workers, have been ineffective to eliminate the practices which arouse the blacks. Indeed, Congress has thus far failed to provide

5. This argument first appeared with respect to the question whether a failure of a union to fulfill its duty of fair representation of its members constitutes an unfair labor practice. But despite the strong objections of Chairman McCulloch and Member Fanning, a majority of the National Labor Relations Board have never been troubled either by the argument presented in the text or by the absence of legislative history supporting the conclusion that a breach of the duty of fair representation constitutes an unfair labor practice; and they have come to that conclusion. *See* United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). But there are two differences between the duty found by Judge Wright in *Packinghouse Workers* and the duty of fair representation. First, when Congress passed the 1947 amendments to the NLRA, it was presumably aware that the Supreme Court had devised a judicial doctrine of fair representation. Second, the duty of fair representation is a logical corollary to the principle of the union as exclusive bargaining representative. Hence, there is a stronger argument for sustaining the administratively fashioned duty of fair representation than there is for upholding Judge Wright's attempt to make racial discrimination an unfair labor practice for an employer.

6. 347 U.S. 483 (1954).

7. 70 L.R.R.M. at 2495.

the appropriations and the enforcement authority which are necessary if the Equal Employment Opportunity Commission (EEOC) is to enhance the likelihood that racial equality in jobs will become a reality for blacks. As EEOC Chairman Brown recently said, "[t]he only thing we can do if we find discrimination is to sit down with the employer or with the union and negotiate or conciliate the particular case. . . . It is almost impossible for us to do the job that has to be done unless and until we get cease-and-desist powers."[8] Thus, the net effect of the remedial steps that have been taken has been to increase the frustrations of both groups. While increased hostility on the part of white workers may be an inevitable side-effect of curing racially discriminatory employment practices, the situation would be considerably less explosive if the cure could eliminate the frustrations of at least the black workers.

When the rules of the collective bargaining game were being created and developed under the NLRA, discrimination in employment was still being openly engaged in; in fact, Congress did not address itself to the problem until 1964.[9] But when Congress did enact title VII of the Civil Rights Act of 1964[10] (title VII), and when it voted appropriations for the Executive Order which the Act took cognizance of,[11] it operated under the assumption that in a substantial number of instances black workers were not being dealt with fairly in the collective bargaining process. Had it not thought so, the detailed debate[12] and the comprehensive legislation would have been unnecessary. Accordingly, if the national labor law is to reflect current congressional views of collective bargaining activities insofar as race is concerned, then the NLRA, and the assumptions and practices which have developed under it, must be accommodated to the objectives of civil rights legislation. But until the principle of equality for black and white workers is effectuated in the labor-

8. N.Y. Times, July 21, 1969, at 30, col. 1. However, Chairman Brown's views on the matter have apparently changed. *See* N.Y. Times, Aug. 9, 1969, at 1, col. 5. *See also* JOBS AND CIVIL RIGHTS (Prepared for the U.S. Civil Rights Commission by the Brookings Institution, 1969).

9. Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-(h) (1964), *as amended*, 42 U.S.C. §§ 2000(d)-1(e), -1(g) (Supp. IV, 1965-1968).

10. Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1964).

11. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 comp.), *as amended*, Exec. Order No. 11,162, 3 C.F.R. 215 (1964-1965 comp.). The Civil Rights Act of 1964 recognized this order in § 709(d), 42 U.S.C. § 2000e-8(d) (1964). Executive Order No. 10,925 has been superceded by Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.), *as amended*, Exec. Order No. 11,375, 3 C.F.R. 320 (1967 comp.), 42 U.S.C. § 2000e (Supp. IV, 1965-1968).

12. *See, e.g.*, 110 CONG. REC. 11,719 (1964) (remarks of Senator Tower); 110 CONG. REC. 12,595 (1964) (remarks of Senator Clark). *See generally* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963); S. REP. No. 872, 88th Cong., 2d Sess. (1964).

management context, it is the duty of the courts, operating under both the NLRA and title VII, to root out the past practices and to fashion remedies which mirror the more recently developed policy against discrimination.

The Supreme Court has taken such action in many similar areas. It has demonstrated an unflagging hostility to racial discrimination in voting, education, selection of juries, and housing. With respect to voting, the Court has held that eligibility requirements which were not applied to whites when discrimination was previously practiced must be set aside in order to root out the remnants of past inequality.[13] The Court's inclination to read civil rights statutes and constitutional guarantees of equality expansively is also typified by its treatment of the Voting Rights Act of 1965 in *Allen v. State Board of Elections*.[14] In that case, the legislature had enacted laws which altered the previously existing election procedures in three ways: they changed the basis of county elections from district-wide voting to at-large voting; they provided that some county officials were to be appointed rather than elected; and they created more difficulties for potential third party candidates than had previously existed. Despite damaging indications in the legislative history of the Act, the Court held that these laws had to be submitted for approval either to the Attorney General of the United States or to the District Court for the District of Columbia, since they constituted a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting,"[15] as contemplated by the Voting Rights Act. The Court stated: "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[16]

In education, the Court has announced that the test for compliance with the fourteenth amendment is whether the school board's desegregation plan *in fact* accomplishes the stated objective—integration of the races.[17] Thus, in order to devise an effective

13. Louisiana v. United States, 380 U.S. 145, 154 (1965).

14. 393 U.S. 544 (1969).

15. 42 U.S.C. § 1973c (Supp. IV, 1965-1968).

16. 393 U.S. at 565.

17. Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Monroe v. Board of Commrs., 391 U.S. 450 (1968). The Court's most recent decision on school desegregation is Alexander v. Holmes County Bd. of Educ., 90 S. Ct. 14 (1969), in which the Court found that *Brown*'s requirement of desegregation with "all deliberate speed" was no longer constitutionally permissible. 90 S. Ct. at 15-16. The Court then ordered the school districts involved in the case to begin desegregation "immediately."

remedy in this area, race must be consciously taken into account.[18] Discrimination in the jury system has been measured to some extent, although perhaps not as much as it should be, by statistics.[19] Finally, with respect to housing, the Court recently held in *Jones v. Alfred H. Mayer Company*[20] that the Civil Rights Act of 1866 prohibits racial discrimination in housing, and it indicated that the Constitution is especially concerned with remedying the vestiges of slavery for the American Negro.[21]

But the Warren Court never had the opportunity to interpret the provisions of title VII or to accommodate the NLRA to the legally recognized problems faced by racial minorities.[22] Indeed, the Court's last holding of major significance in this area was *Steele v. Louisville & Nashville Railway Company*[23] which is a quarter of a century old and thus antedates Chief Justice Warren's appointment by almost ten years. Therefore, for better or worse, it is the Burger Court which will have the chance to shape the law of employment discrimination. That Court will be faced with few

18. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir.), *affd. with modifications on rehearing*, 380 F.2d 385 (5th Cir. 1966) (en banc), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967). *But see* Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1603-04 (1969).

19. Swain v. Alabama, 380 U.S. 202 (1965); Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Aikins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935).

20. 392 U.S. 409 (1968). *See* Larson, *The New Law of Race Relations*, 1969 Wis. L. REV. 470. *Compare* Dobbins v. Local 212, IBEW, 69 L.R.R.M. 2313 (S.D. Ohio 1968), *with* Waters v. Wisconsin Steel Works of Intl. Harvester Co., 71 L.R.R.M. 2886 (N.D. Ill. July 14, 1969), and Harrison v. American Can Co., 2 FAIR EMPL. PRAC. CAS. 1 (S.D. Ala. July 8, 1969), on the applicability of *Jones* to racial discrimination in employment. *See also* Gould, *The Emerging Law Against Racial Discrimination in Employment*, 64 NW. U. L. REV. 359, 376-78 (1969).

21. 392 U.S. at 437-44.

22. *See generally* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).

23. 323 U.S. 192 (1944). In that case, the Court held that the Railway Labor Act imposed on a union acting as the exclusive bargaining agent for a class of employees the duty to represent all employees without discrimination because of their race. This has become known as the doctrine of fair representation. *See* text accompanying notes 33-34 *infra*. Of course, there have been a number of fair representation cases decided by the Court subsequent to *Steele* in both a racial and a nonracial context, and some of them were decided by the Warren Court. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Conley v. Gibson, 355 U.S. 41 (1957); Syres v. Oil Workers, 350 U.S. 892 (1956); Ford v. Huffman, 345 U.S. 330 (1953); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944). *See generally* St. Antoine, *Judicial Valour and the Warren Court's Labor Decisions*, 67 MICH. L. REV. 317 (1968), on the role of the Warren Court and labor law.

problems, if any, which will be more important than the question of the precise limitations on discriminatory employment practices. On those decisions will hinge the ability of Negro workers to compete economically with whites and to educate their children effectively. If the decisions interpret civil rights law expansively, the cost pressures of the black protest will be imposed upon employers; and the business community may perforce become more interested in correcting the many other ailments of the ghetto.

In dealing with the problems of employment discrimination, the Burger Court will have to face several new and major issues. This Article is concerned with two of the most important of those issues. The first is whether the present requirement that workers seek redress of their grievances through the exclusive representation of the union is applicable to victims of racial discrimination; and if not, what other remedies should be available to those workers. The second is whether quotas and ratios based on race are permissible; and if so, whether it is required that they be used to integrate union leadership after a merger of two previously segregated unions. While the main focus of this Article is on these problems, it will also deal briefly with the effect of the Supreme Court's decision in *Gaston County v. United States*[24] on remedies for existing discriminatory employment practices resulting from past segregation.

II. The Failure of the Union as Exclusive Bargaining Representative in Discrimination Cases and Possible Remedies

Both the NLRA[25] and the Railway Labor Act[26] provide that a union selected by a majority of the workers within a particular craft or industrial unit is the exclusive bargaining agent for each worker in that unit, whether or not he is a member of the elected union. In interpreting those statutory provisions, the Supreme Court has held that individual employment contracts can be contravened by the union's exclusive authority, and that an employer is prohibited by statute from negotiating with individual employees rather than with the exclusive agent.[27] The neat orderliness of those principles, coupled with a faith in the benefits of the arbi-

24. 395 U.S. 285 (1969).

25. 29 U.S.C. § 159(a) (1964).

26. 45 U.S.C. § 152(fourth) (1964).

27. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

28. United Steelworkers v. Warrior & Gulf Nav. Corp., 363 U.S. 574 (1960); United

tration process,[28] convinced the Warren Court that proceeding to arbitration is the union's prerogative unless the union has engaged in bad faith conduct,[29] and that an individual worker cannot obtain a judicial hearing of a complaint until he has exhausted any negotiated grievance-arbitration machinery which is applicable to his situation.[30] Moreover, since resort to the judiciary for the adjudication of contract claims would undermine arbitration, the employee in most instances cannot have his case reviewed on the merits.[31] These principles of law, however, were articulated in a nonracial context, and they should, ideally, have no adverse impact on the interests of workers of minority races.

In *Steele v. Louisville & Nashville Railway Company*,[32] the Supreme Court imposed on unions a duty of fair representation.[33] In that case, the Court held that a union acting as the exclusive bargaining representative of a craft or class of employees has the obligation to represent all employees in the craft without discrimination on the basis of their race, and that the courts have jurisdiction to protect the minority of the craft or class from a violation of that obligation.[34] Nevertheless, history has shown that the procedures requiring workers to seek redress solely through the exclusive representative have been inadequate to solve the problems of victims of racial discrimination.[35] Accordingly, in some situations involving racial discrimination against a worker, the Court has abandoned its ordinary rules and has allowed the worker to go directly to court without first proceeding through the union. Thus, the courts have agreed that when a worker alleges racial discrimination, but not a contractual violation, exhaustion of the grievance-arbitration machinery is not required.[36] When both are alleged, however, it

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

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

30. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

31. Vaca v. Sipes, 386 U.S. 171, 185-86 (1968). It is not entirely clear, however, whether the Court is addressing itself to union exhaustion or to employee exhaustion when it speaks of exhaustion of contractual remedies and indicates that a worker may bring suit against an employer despite the absence of exhaustion in the event that the union has breached its duty of fair representation. The requirement is probably union exhaustion.

32. 323 U.S. 192 (1944).

33. *See* note 23 *supra* and accompanying text.

34. 323 U.S. at 199.

35. *See* text accompanying notes 40-42 *infra*.

36. *See* United States v. Georgia Power Co., 71 L.R.R.M. 2784 (N.D. Ga. May 16, 1969); Dent v. St. Louis—San Francisco Ry., 265 F. Supp. 56 (N.D. Ala. 1969), *revd. on other grounds*, 406 F.2d 339 (5th Cir. 1969); King v. Georgia Power Co., 69 L.R.R.M.

is much more doubtful that bypassing the union's procedures will be permitted.[37] Nonetheless, in *Glover v. St. Louis–San Francisco Railway*,[38] a case presenting allegations of both racial discrimination and contract violation, the Court unanimously held that exhaustion is not required when the reactions of union officials plainly indicate that the processing of grievances through machinery controlled by the union and the employer would be a futile act. In that case, which concerned a dispute over seniority and promotions, the Court relied heavily upon the demonstrated failure of the union to respond when the plaintiffs had "called upon" it to seek redress. As of this date, the question whether a mere *allegation* of racial discrimination and contract violation, without the union hostility demonstrated in *Glover*, permits a plaintiff to bypass privately negotiated arbitration procedures has not been answered.[39]

The significance of *Glover* and the need for an extension of the doctrine expressed in that case can best be seen by reference to the enactment of title VII of the Civil Rights Act of 1964. Title VII implicitly recognized both the ineffectiveness of the *Steele* doctrine of fair representation[40] and the unwillingness of labor and management to take affirmative action against discrimination. By enacting that statute, Congress determined that, despite the plaudits which American unions and employers had given one another for good race relations, and despite the supposed "bulwark" provided by *Steele* and the duty of fair representation,[41] legislation was necessary. Yet although some commentators have praised both the craft and the industrial unions for their progress after the enactment

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2094 (N.D. Ga. 1968); Reese v. Atlantic Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), *revd.*, 2 FAIR EMPL. PRAC. CAS. 121 (7th Cir. Sept. 26, 1969).

37. *See* Waters v. Wisconsin Steel Works of Intl. Harvester Co., 71 L.R.R.M. 2886 (N.D. Ill. July 14, 1969); *cf.* NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968); Brady v. Trans-World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

38. 393 U.S. 324 (1969).

39. *See* note 37 *supra*. In Waters v. Wisconsin Steel Works of Intl. Harvester Co., 71 L.R.R.M. 2886 (N.D. Ill. July 14, 1969), *Glover* was distinguished because there was no showing of futility.

40. *See* text accompanying notes 33-34 *supra*.

In essence, this is the analysis initially set forth in Gould, *Non-Governmental Remedies in Employment Discrimination*, in ABA INSTITUTE PROC. ON EQUAL EMPLOYMENT OPPORTUNITY LAW (1969) [reprinted in 20 SYRACUSE L. REV. 865 (1969)]. That basic theme applies to various aspects of the existing industrial relations system. *See* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Gould, *Black Power in the Unions: The Impact upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969).

41. *See* Vaca v. Sipes, 386 U.S. 171 (1968), in which the Warren Court made this exaggerated claim.

of title VII,[42] that progress has, on the whole, been quite insignificant. Developments during the five years since the passage of the Act do not support any greater confidence in the handling of racial issues at the bargaining table than that expressed by Congress in 1964. The rise of the black militant, whose logic is sometimes unsteady and irrational, is evidence of the distance between the white leaders of organized labor and the young Negro rank-and-file which is not afraid to challenge authority. Thus, it appears that the present procedures for handling the grievances of black workers—procedures requiring that those workers proceed through their union—are inadequate.

In some cases, the use of the *Glover* decision will be able to cure that inadequacy. Such cases are those in which the conflict between the collective agreement and the law clearly demonstrates that arbitration through the union would be inappropriate and useless.[43] But in situations in which the futility of using established arbitration procedures is not clear, other solutions must be sought. One possible solution involves an extension of the *Glover* decision to exempt *all* cases involving racial discrimination from the exhaustion doctrine.

But if *Glover* is not so extended, then some other type of protection for the Negro worker, who is less than confident about how the parties to the bargaining agreement will dispose of his claim, is necessary if the exhaustion doctrine is to be upheld as fair. In formulating that protection, it is imperative that the minority group worker himself become involved in the adjudication of his grievances, and that he have, if he wishes, the assistance of a representative who has his trust and confidence, such as a civil rights organization or a black worker's committee. Even if *Glover* is extended, so that the exhaustion requirement becomes totally inapplicable to racial discrimination cases, some kind of third party involvement should still be available to black workers. That conclusion is supported by three considerations. First, the other principal avenues for relief—those established by title VII—are heavily congested because of a lack of appropriations and because of the

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42. *See, e.g.*, F. RAY MARSHALL & V. BIGGS, EQUAL APPRENTICESHIP OPPORTUNITIES: THE NATURE OF THE ISSUE AND THE NEW YORK EXPERIENCE (1968). *Compare id., with* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968); Gould, *The Negro Revolution and Trade Unionism*, 114 CONG. REC. 24872 (1968); O'Hanlon, *The Case Against the Unions*, FORTUNE, Jan. 1968, at 170. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY REPORT NO. 1 (1967).

43. *Cf.* United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Goodyear Tire & Rubber Co., 45 Lab. Arb. 240 (1965).

statutory defects alluded to by Chairman Brown.[44] Second, while the grievant may allege racial discrimination, the heart of the issue may be white insensitivity about the conditions of employment which are not cognizable either as a violation of a no-discrimination clause or as a statutory violation. Third, the availability of third party intervention would eliminate any need for resort to the courts, and it would thus make possible the use of arbitrators who, as the Court so clearly indicated in the *Steelworkers* trilogy,[45] have a good deal of expertise to bring to bear on plant grievances of all kinds.

Thus far, the courts have not looked with favor on the principle of third party intervention and have viewed it as an unnecessary intrusion on a stable collective relationship. The leading case in this area is *Acuff v. United Paperworkers*[46] which did not involve consideration of race. In that case, the United States Court of Appeals for the Fifth Circuit held that wildcat strikers had no right to separate representation in an arbitration proceeding because there was no evidence of bad faith on the part of the union. The court reasoned that since the union has almost plenary authority to decide whether a grievance is to be pursued to the highest step of the conflict-resolution ladder,[47] it should also be able to control every phase of the grievance procedure, including the question of participation in the hearing.

There is, however, some question as to the continuing validity of the *Acuff* decision, for it is at least arguable that the tendency of the Warren Court toward adulation for union-negotiated grievance machinery will not be the pattern of the Burger Court. Furthermore, *Vaca v. Sipes*[48]—which initially set the stringent standards for establishing a violation of the fair representation duty,[49] and thus laid the foundation for *Acuff*—is hardly a balanced opinion. More important, the logic of *Vaca* does not require the result reached in *Acuff*. Indeed, *Vaca*'s reasoning that the union has broad discretion to decide whether to go to arbitration does not compel, as the court in *Acuff* apparently thought it did, the conclusion that the union has absolute control over the grievance procedure. If the court's reasoning in *Acuff* were sound, it would follow that when-

44. *See* text accompanying note 8 *supra*.

45. *See* note 28 *supra*.

46. 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969). Justice Black was of the opinion that certiorari should have been granted. *See* Fleming, *Some Problems of Due Process and the Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Wirtz, *Due Process of Arbitration*, in PROC. OF THE 11TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, THE ARBITRATOR AND THE PARTIES 1 (1958).

47. *See* text accompanying notes 29-30 *supra*.

48. 386 U.S. 171 (1967).

ever an employee has a grievance, the union could fashion that grievance into whatever form it desired—even one to which the employee was unalterably opposed. Finally, in *Humphrey v. Moore*,[50] Justice White seriously discussed the possible need for third party representation and thereby gave credence to the notion that its availability is a necessary element in the duty of fair representation.[51]

However, the Court can devise effective arbitral remedies for racial discrimination in employment without rejecting either *Vaca* or *Acuff*. That fact is clear from the approach taken by Justice Douglas in *Textile Workers Union v. Lincoln Mills*:[52]

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. *Other problems will lie in the penumbra of expressed statutory mandate. Some will lack expressed statutory sanction but will be solved by looking at the policy of legislation and the fashioning of remedies that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.*[53]

Certainly the labor and management practices which gave rise to title VII's prohibitions against racial discrimination make proposals for representation of workers by third parties compatible with the Court's instructions in *Lincoln Mills*, since civil rights legislation dealing with employment practices must be regarded as part of the substantive law to which the Court referred. In addition, the nation has a special obligation to Negro workers—an obligation which results from the existence of slavery and from the systematic discrimination that followed it.[54] Thus, some form of third party involvement is a minimum protection for the black worker who desires it and whose grievance alleges both racial discrimination and contract violation. Such a procedure is hardly at variance with the principle of exclusivity or with the objective of uniformity, since it incorporates the dissidents within the union-employer structure rather than forcing them out of that structure.

49. Those standards are discussed in text accompanying notes 29-31 *supra*.

50. 375 U.S. 335 (1964).

51. 375 U.S. at 349.

52. 353 U.S. 448 (1957).

53. 353 U.S. at 457 (emphasis added).

54. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Comment, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1295 (1969). With respect to industrial relations, see Gould, *Labor Arbitration Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Gould, *Black Power in the Union: The Impact upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969).

It is therefore much more consistent with the uniformity principle than is the procedure allowed in *Glover,* which permits the circumvention of the private machinery.

Third party intervention would be particularly important when "disadvantaged" workers are hired, because the employment of such persons is likely to lead to disputes over the discharges and disciplinary measures that result from absenteeism and poor work habits. Such disputes will probably be common in these circumstances, because a tradition of inferior housing, poor environment, and inadequate education frequently makes adjustment difficult for the newly hired black worker, particularly if he has never held a long-term job. Moreover, the lack of free or inexpensive transportation for the worker to his job-site increases the likelihood that he will miss numerous days of work.[55] Although a dual standard of discipline for blacks and whites is a possible solution to the problems which arise in this area, it is not a satisfactory one. The resentment of the white worker who is given a two-day suspension for excessive tardiness, while his black counterpart goes unpunished, would know no bounds.[56] Although that factor normally should not be taken into account in civil rights controversies[57]—even those in the employment area[58]—any management operating under such a system is likely to have severe morale problems. Furthermore, it would not be economically desirable to require employers to ignore absenteeism and poor work habits. Indeed, it would be extremely difficult for a company which is in competition with other businesses for a profit to tolerate practices which impair productivity.[59] Thus, a dual standard of discipline would probably be an ineffective method for dealing with the adjustment problems of a new disadvantaged worker.

A preventive approach is another solution. Under it, labor and management would provide temporary help during the period of adjustment for the employee who has not previously been exposed to the discipline of the work place. But for that solution to be effec-

55. The problem of overly expensive transportation to work has been a point of dispute for some time in the Detroit area.

56. *See* St. Antoine, *Litigation and Meditation Under Title VII of the Civil Rights Act of 1964,* in ABA INSTITUTE PROC. ON EQUAL EMPLOYMENT OPPORTUNITY LAW (1969).

57. *Cf.* Brown v. Board of Educ., 349 U.S. 300 (1955).

58. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958).

59. Unfortunately, the situation under discussion here cannot be equated with the refusal of Orthodox Jews and Seventh Day Adventists to work at certain times, because in those cases the minority is small and thus the harm to the employer is slight. To the contrary, in the area of programs to hire the disadvantaged, the hope is that the minority will become a sizeable one.

tive, unions and employers must be willing to teach new employees how to tell time, how to read bus stop signs, and so on; and they must also be willing, perhaps, to provide free or inexpensive transportation to work. These efforts require both a substantial expenditure of time and money and a great deal of willingness on the part of labor and management, and neither is to be anticipated. Indeed, the infrequency with which such assistance has been provided was pointed out by Saul Wallen:

> [S]ome unions have been willing to negotiate special probationary arrangements to apply to their company's hard-core employment problems. But this has been far from universal. No data are available and one can only speculate on the extent to which rigid agreement provisions, drawn for typical labor market conditions, have thwarted the recruitment and training of the special population that makes up the hard-core unemployed.[60]

Since no solution appears to be easy, then, the difficult practical problems involved in hiring disadvantaged workers are likely to lead to discharges and disciplinary measures. Those measures, in turn, lead to complex disputes which cannot, or will not, be solved either by employers or by unions. Thus, third party representation—the "triangular relationship," as one court referred to it[61]—is necessary for the resolution of such disputes.

III. The Permissibility of Quotas Based on Race and Their Use in Integrating Union Leadership

Nearly twenty years have passed since the Supreme Court unanimously decided in *Hughes v. Superior Court*,[62] that the California courts could enjoin civil rights picketing which was aimed at the alleged practice of job discrimination and which was designed to result in the hiring of Negroes in proportion to the Negro patronage of the picketed establishment. Justice Frankfurter, who wrote the opinion, was careful to qualify the Court's holding by emphasizing that the injunction was permissible only in light of California's good judicial record in dealing with racial discrimination in employment.[63] The *Hughes* opinion contains many defects, but its primary effect was to inhibit race consciousness in

60. Wallen, *Industrial Relations Problems of Employing the Disadvantaged*, Proc. of the 22d Annual Meeting, National Academy of Arbitrators (1969).

61. United States v. Hayes Intl. Corp., 70 L.R.R.M. 2926 (N.D. Ala. 1968), *revd. on other* grounds, 2 Fair Empl. Prac. Cas. 67 (5th Cir. Aug. 19, 1969).

62. 339 U.S. 460 (1950).

63. 339 U.S. at 463-64.

devising remedies for employment discrimination and to encourage the labeling of all such attempts as forbidden "quotas." That situation is changing now. Outside the labor area, the most notable recent instance of a policy reversal is *United States v. Montgomery County Board of Education.*[64] In that case, a unanimous Court, speaking through Justice Black, held that the use of a "ratio" of white to Negro faculty members was an appropriate means of dealing with past discrimination in the public school system. The Court specifically noted that it was not holding that racially balanced faculties were constitutionally required in all instances; but it also rejected the holding of the court of appeals that the ratio should be "substantially or approximately" complied with and that compliance with the desegregation orders should not be tested solely in terms of ratio.[65] Although the Supreme Court admitted that the ratio would be "troublesome" if it were regarded as an inflexible approach which might cause an injustice to the school board, it stated that such was not the case in the circumstances before it.[66] The Court based that conclusion on the district court's careful analysis of prior discriminatory practices[67] and on the facility with which the school board could achieve the required ratio.

There is a similar trend in the labor area. That trend can be seen in the Department of Labor's recent announcement of the Revised Philadelphia Plan.[68] There the Department took the position that an "effective affirmative action program" under the President's Executive Order[69] requires that certain racially oriented factors be considered in determining a definite standard for minority employment in the better-paid trades in Philadelphia. Those standards are (1) the current extent of minority group participation in the trade; (2) the availability of minority group persons for employment in the trade; (3) the need for training programs

64. 395 U.S. 225 (1969).

65. United States v. Montgomery County Bd. of Educ., 400 F.2d 1 (5th Cir.), *affg.* 289 F. Supp. 647 (M.D. Ala. 1968).

66. 395 U.S. at 234-35.

67. 289 F. Supp. at 649-52.

68. Department of Labor, Order Requiring Specific Goals for Hiring Minorities in Better-Paying Philadelphia Construction Jobs, June 27, 1969; Memorandum from Assistant Secretary of Labor Fletcher to Heads of All Agencies, June 27, 1969.

69. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.), *as amended,* Exec. Order No. 11,375, 3 C.F.R. 320 (1967 comp.), 42 U.S.C. § 2000e (Supp. IV, 1965-1968). For a discussion of Executive Order No. 11,246, see JOBS AND CIVIL RIGHTS, *supra* note 8; Powers, *Federal Procurement and Equal Employment Opportunity,* 29 LAW & CONTEMP. PROB. 468 (1964).

in the area or the need to assure a demand for those who are in an existing program or who have recently left one; and (4) the impact of the proposed program upon the existing labor force. The Department of Labor has argued persuasively that its plan is not prohibited by the antipreferential-treatment provision of the Civil Rights Act of 1964.[70] But without regard to the legal issues, the very existence of such a plan provides an indication, as do some recent court rulings,[71] that the mere thought of a quota no longer prevents the implementation of truly effective remedies for past discrimination.

It is unclear, however, whether the principles of race consciousness enunciated in *Montgomery County* and the Revised Philadelphia Plan are pertinent to the critical problem of integrating union leadership so that the races may share power equitably. Many of the difficulties that were discussed in connection with third party intervention and the black workers' distrust of union leadership[72] result from a confrontation between a black rank-and-file and a predominantly white union officialdom. The problem of integrating union leadership is particularly important when two local unions that have been segregated in the past—one all white and the other all black—merge as required by title VII.[73] Great tension will arise after such a merger if Negro local officers are voted out by a white majority, especially when past discrimination in employment conditions has been engaged in by the white local.[74] Can title VII be said to require the use of a quota or a ratio in order to insure that in these circumstances the minority group will have some representation?

Since it was the white leadership which initially negotiated the discriminatory conditions, and which probably imposed the segregation of the locals, that leadership's unchecked control of the union's position after a merger hardly bodes well for a collective bargain-

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70. 42 U.S.C. § 2000e-2(j) (1964). The Attorney General has approved the Plan. *See* Opinion of Attorney General John N. Mitchell on Legality of Revised Philadelphia Plan, DAILY LABOR REPORT No. 184, at E-1 (Sept. 23, 1969).

71. Local 53, Intl. Assn. of Heat & Frost Insulators v. Vogel, 407 F.2d 1047 (5th Cir. 1969); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969).

72. *See* text accompanying notes 36-45 *supra*.

73. 42 U.S.C. § 2000e-2(c) (1964).

74. Moreover, severe eligibility requirements can often effectively discourage newly hired black workers from participating in internal union political activities and from electing other blacks to leadership positions. *Cf.* Wirtz v. Hotel, Motel & Club Employees, Local 6, 391 U.S. 492 (1968); Wirtz v. National Maritime Union, 284 F. Supp. 47 (S.D.N.Y.), *aff'd.*, 399 F.2d 544 (2d Cir. 1968).

ing process which is supposed to be fair to the Negro minority. If black elected officers are not able to participate in policy judgments, then the union's policy-making body is akin to a malapportioned or gerrymandered legislature. Even more analogous to the situation at hand is that which arose in *Allen v. State Board of Elections.*[75] In that case, the Supreme Court held that a state which is within the coverage of the Voting Rights Act of 1965 cannot convert its district system of election to an at-large system without a declaratory judgment or approval by the Attorney General, because the proposed conversion might result in a dilution of the Negro vote. The Court found that, "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[76] Similarly, in the labor situation, when two segregated unions merge and black workers become the minority, the merger could cause those workers to lose all representation in the union leadership as effectively as would a total prohibition on their right to vote.[77]

Some of these issues arose in *Chicago Federation of Musicians, Local 10 v. American Federation of Musicians.*[78] In that case, the international union proposed to merge a local which was all Negro with one which was all white. Its merger plan provided that members of the black local would have the right to select a certain number of local union officials during a transitional period consisting of the first six years of the merged local's existence. The white local then challenged the international's proposal on two grounds: that a trusteeship had been formed in violation of the Landrum-Griffin Act,[79] and that such a trusteeship, together with the merger pro-

75. 393 U.S. 544 (1969).

76. 393 U.S. at 569.

77. *See also* note 74 *supra.*

78. 57 L.R.R.M. 2227 (N.D. Ill. 1964). *Cf.* Gould, *The Negro Revolution and the Law of Collective Bargaining*, 34 FORDHAM L. REV. 207, 255-57 (1965). In United States v. Local 189, United Papermakers, 57 CCH Lab. Cas. ¶ 9120 (E.D. La. 1968), a consent decree was issued providing that, during a transitional period, formerly segregated locals would have separate representation. *See also* Daye v. Tobacco Workers, 234 F. Supp. 815 (D.D.C. 1964).

79. 57 L.R.R.M. at 2230. Section 3(h) of the Landrum-Griffin Act, 29 U.S.C. 403(h) (1964) defines trusteeship as, "any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws." When a trusteeship is formed, various requirements are imposed upon the labor organization which forms it. *See* Landrum-Griffin Act tit. III, 29 U.S.C. §§ 419-24 (1964).

posal, violated title VII of the 1964 Civil Rights Act.[80] A federal district court rejected those contentions and held that the merger arrangement was not improper from a "practical standpoint," since the international union was attempting to induce the merger through a guarantee of representation to members of the black locals.[81] Although the court noted that title VII was not effective at the time that the suit was filed, it did indicate that, because the plan was designed to promote integration and to protect the smaller local, the statute was not violated.[82]

The *Chicago Federation* case indicates only that a plan which allocates seats to each local is permissible under title VII; it does not deal with the question whether the statute can be read to *impose* black representation upon the merged local in certain circumstances. But the clear intent of title VII would be undermined if the use of subtle devices—such as the voting out of black leaders—to lessen the value of the black vote were permitted. As the *Allen* case demonstrated in connection with the Voting Rights Act of 1965, the use of such evasionary measures cannot be allowed.[83] Thus, it appears that title VII should be read to require some fixed or proportionate number of blacks in union leadership positions when the alternative is complete exclusion. The EEOC apparently accepted that type of reasoning, for, by holding in a recent case that title VII prohibits the dismissal of a black local's officials by white leadership after a merger,[84] it indicated that it will review merger terms.[85]

The problem of using ratios to integrate union leadership will

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80. 57 L.R.R.M. at 2230. Section 703(c) of title VII, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

81. 57 L.R.R.M. at 2227.

82. 57 L.R.R.M. at 2236.

83. *See* text accompanying notes 75-76 *supra*.

84. Case No. NO 7-3-336U, 71 LAB. REL. REP. 339 (EEOC June 18, 1969).

85. The Commission relied, in part, on the lack of any attempt "to merge the staffs of the two unions on a nondiscriminatory basis so as to approximate the proportions of membership contributed by the two previously segregated locals." 71 LAB. REL. REP. at 340.

presumably become more intense as the statute's effect becomes stronger in dealing with segregation. It is extremely unrealistic to believe that the election of white trade unionists who have practiced segregation in the past is compatible with the even-handed treatment which title VII supposedly contemplates for the plant community. Assuming, then, that the statute does require that there be some Negro representation, the extent of that required representation and the size of the quota or ratio necessary for implementing it depend upon the size of the merged local and, perhaps, upon the severity of the discrimination previously practiced. It is clear that when the EEOC and the courts make judgments of this nature, they must articulate them on an ad hoc basis, in order to provide the kind of flexibility contained in both *Montgomery County* and the Philadelphia Plan.

Required representation in leadership is hardly inconsistent with the Landrum-Griffin Act, since such a requirement simply adheres to the democratic choice of the employees in each local union. Furthermore, required integrated leadership is a necessary step, because the alternative to it, black separatism, is not a feasible, let alone desirable, objective in this country. If a merger of two segregated locals is allowed to dilute existing black power in the unions, there will surely be industrial strife of a racial nature which is antithetical to the policies of the NLRA;[86] and the circumstances of that dispute will be bound to favor the rhetoric of the separatists. Thus, the color line in unions, as well as in jobs, must be erased, and integrated leadership must be ensured by an active and compulsory use of quotas and ratios.

IV. Gaston County and the Granting of Compensatory Seniority and Training

While it is clear that black leadership in elected policy-making positions at both the international[87] and local level is a *sine qua*

86. 29 U.S.C. §§ 202(a), (b), 203 (1964).

87. On an international level, the problem is that district lines are drawn on a regional basis, and Negroes are in a minority in each region, even in unions having a large Negro membership, such as the United Automobile Workers and the United Steelworkers. *See Steelworkers Debate Black Representation*, 91 Monthly Lab. Rev. 16-17 (1968). The UAW circumvented this problem in 1962 by electing to the Board a Negro Member-at-Large, Nelson Jack Edwards. More recently, the first Negro Regional Director-Board Member, Marcellius Ivory, was elected. *See* N.Y. Times, Aug. 1, 1968, at 11, col. 8; Owens, *Negro Is Pilot for 74,000-Member UAW Region*, Detroit Free Press, Aug. 15, 1968, at 2E. *See generally* Henle, *Some Reflections on Militants*, 92 Monthly Lab. Rev. 20 (1969); Hill, *Black Protest and the Struggle for Union*

non for equality, the matter cannot be considered in a vacuum. Discriminatory employment conditions, which have their origins prior to the effective date of the Civil Rights Act of 1964, still exist and must be completely eliminated. During the past three years this subject has been examined in detail, particularly with respect to the problems of seniority and advancement,[88] and there is no need to reiterate those views here. However, a recent development may shed some light on one of the most perplexing of those problems—that faced by black workers who have been in an all-black department of a plant and who are transferred to a department which had previously been all white. In the usual case, those workers will have no seniority in their new positions, and they will have little opportunity for advancement since title VII expressly compels advancement only for those workers who are qualified[89] and the newly transferred black workers will usually have neither the experience nor the seniority to qualify them. Because this situation is the result of prior discrimination, it is reasonable to argue that title VII requires unions and management to rectify their previous practices by granting the transferred workers compensatory seniority credit in their new positions and by providing to those with adequate potential the additional training necessary to qualify them for promotion.[90] A recent decision of the Supreme Court, *Gaston County v.*

Democracy, 1 ISSUES IN INDUS. SOCY. 19 (1969); Gannon, *Black Unionists: Militant Negroes Press for a Stronger Voice in the Labor Movement*, Wall St. J., Nov. 29, 1968, at 1, col. 1; Berstein, *Fervor of Racial Protest Starting To Press Unions*, Denver Post, June 15, 1969, § J, at 1; Stetson, *Negro Members Are Challenging Union Leaders*, N.Y. Times, June 29, 1969, at 37, col. 2.

88. *See* Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1 (1967); Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEXAS L. REV. 1039 (1969); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); St. Antoine, *Litigation and Mediation Under Title VII of the Civil Rights Act of 1964*, in ABA INSTITUTE PROC. ON EQUAL EMPLOYMENT OPPORTUNITY LAW (1969); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962); Note, *Title VII Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). *See also* Local 189, United Papermakers v. United States, 71 L.R.R.M. 3070 (5th Cir. July 28, 1969).

89. 42 U.S.C. § 2000e-2(h) (1964). For discussions of the comparable "affirmative action" remedial provision contained in § 10(c) of the NLRA, see St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968); Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69 (1963). Section 10(c) authorizes the NLRB "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act] . . . ." 29 U.S.C. § 160(c) (1964).

90. I have made this argument before. *See* Gould, 13 How. L.J. 1 (1967), *supra* note 88; Gould, 47 Texas L. Rev. 1039 (1969), *supra* note 88.

United States,[91] in which analogous issues were raised, provides considerable support for that view.

The question in *Gaston County* was whether a state could escape coverage of the Voting Rights Act of 1965 because the low number of registered voters was attributable to their lack of literacy. The Court held that when the illiterate condition of Negro residents is attributable to past inferior educational opportunities, the statute is applicable and the state's literacy test must be suspended. The Court emphasized the relationship between the existing conditions and the past inequality:

> It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will be so among their better-educated white contemporaries. And, on the Government's showing, it was certainly proper to infer that Gaston County's inferior Negro schools provided many of its Negro residents with subliterate education, and gave many others little inducement to enter or remain in school.[92]

The lesson of *Gaston County* is that the state cannot take the illiterate Negro as it finds him if the state educational facilities are responsible for his condition. Much of the current fighting over seniority systems and other employment conditions involves very similar issues and contentions. Like the state in *Gaston County*, unions and management argue that the denial of compensatory seniority and training results from the previous practice of discrimination, and that the denial is not discriminatory in itself; no more should be required of them than that they put an end to discriminatory employment practices. That viewpoint deserves no greater acceptance by the Burger Court than that which the Warren Court gave to the comparable defense in *Gaston County*.

In a recent case, however, the Court of Appeals for the Fifth Circuit failed to take cognizance of the full implications of *Gaston County*. In that case, *Local 189, United Papermakers v. United States*,[93] the court, while accepting the general principle that title VII does not permit unions and employers to carry forward the effects of past discrimination in the employment relationship, stated in dicta that the statute assists only those Negro workers who have "qualifications," that is, existing skills, which qualify them for promotion without training.[94] The court found that "business neces-

91. 395 U.S. 285 (1969).

92. 395 U.S. at 295-96.

93. 71 L.R.R.M. 3070 (5th Cir. July 28, 1969).

sity" would preclude the employment of black workers in jobs for which the schools had failed to prepare them.[95] But the court did not take account of the situation in which unions and employers become involved in the discriminatory pattern by placing Negro workers in nonpromotable, unskilled jobs. *Gaston County* indicates that, in those circumstances, unions and management, because they were originally responsible for the black workers' failure to build up seniority in the new department and to receive adequate training for advancement, must provide those workers with compensatory seniority and training.

V. Conclusion

As of this date, one cannot know whether the Burger Court will permit the Negro worker to be left "standin' there" like Langston Hughes' Florida road workers. The Court should not be deceived by those who say that the problem of racial discrimination can be dealt with effectively through full employment policies, although surely effectuation of those policies is the foremost hope of both races. But the immediate legal issues involve equity for the black worker in terms of the jobs that are available now. Without that kind of analysis, we must find ourselves saying with Mrs. Alving in Ibsen's *Ghosts:* "Oh, that perpetual law and order! I often think that that is what does all the mischief in this world of ours."[96]

The issue, then, is whether the law of racial equality will be made applicable to employment in a meaningful sense, that is, whether the Court will alter the black worker's current plight which Langston Hughes put so well when he said:

> Sure,
> A road helps all of us!
> White folks ride—
> And I get to see 'em ride.

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94. 71 L.R.R.M. at 3071. Judge Wisdom's opinion did cite *Gaston County* for the proposition that, in order for title VII to be operative, past discrimination need not be unlawful at the time at which it was engaged in.

95. The court stated:

> Not all "but-for" consequences of pre-Act racial classification warrant relief under Title VII. For example, unquestionably Negroes, as a class, educated at all-Negro schools in certain communities have been denied skills available to their white contemporaries. That fact would not, however, prevent employers from requiring that applicants for secretarial positions know how to type, even though this requirement might prevent Negroes from being secretaries.
> . . . Secretaries must be able to type. There is no way around that necessity . . . .

71 L.R.R.M. at 3076.

96. H. Ibsen, *Ghosts*, in 7 The Collected Works of Henrik Ibsen 220 (1924).

I ain't never seen nobody
Ride so fine before.
Hey buddy!
Look at me.
I'm makin' a road![97]

97. *Florida Road Workers*, in MODERN AMERICAN POETRY 594 (L. Untermeyer ed. 1950).