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EQUAL EMPLOYMENT OPPORTUNITIES:

THE PROMISES OF THE 60's — THE REALITY OF THE 70's*

By JAMES E. JONES, JR.

IT HAS BECOME the vogue in the last several years to meet almost any criticism regarding racial inequalities in a given community with a recitation of the great progress which has been made in civil rights over the last decade. We are constantly reminded that history will record the 1960's as the high water mark of civil rights in this country. It has been pointed out that in recent years a disproportionate amount of social effort has been directed toward ameliorating the plight of black people. Other minority groups, or ethnic groups which are inspired by the example of black initiatives, or, perhaps, resentful of the appearance of black progress, have asserted that blacks have gotten more than their share and what is being demanded now, is not equality but preference.

Since history is compiled essentially from the paper record, it is quite likely that 50 years from now historians will record of the decade of the 60's, or certainly that period of time which has elapsed since *Brown v. Bd. of Education*,¹ as a period of unbelievable progress in civil rights. Blacks in America have in fact been the beneficiaries of a complete civil rights revolution. By a combination of litigation and legislation, everything from lunch counters of the Five & Ten and toilets of the Greyhound Bus Depot to the suburban bedrooms in the countryside of Virginia has been integrated. Beyond that, integration has even reached the cemeteries. A New York Times editorial caption of November 19, 1967 read: "What do the Negroes Want?" The answer is not very complicated at

all. Blacks want to translate the symbolic victories of the 60's into tangible benefits — equal *rights* into equal *results*. The drive is to see tangible progress in the quality of life of blacks throughout the country. While it can be generally agreed that on the paper record of the last twenty years, equality has been written into the book of law, only minimal effort has been expended to write equality into the book of life.² These complaints are not intended for a moment to suggest that progress, even in matters of peripheral importance, goes unappreciated. It is good to know that, by law, the airlines, the motels, the hotels and the lunch counters are required to give blacks the same service that is available to everyone else. Granted, Col. Jim Crow, sometimes subtle and sometimes gross, is still encountered, but it is increasingly becoming the exception rather than the rule. However, it is of marginal benefit to the masses of blacks to have the legal right to check into the Regency in Atlanta without the legal tender with which to pay the bill.

The pervasive incidents of segregation and discrimination in all aspects of American life between 1940 and 1960 made it an exceedingly difficult task to select priorities for black initiatives.

*The substance of this article was delivered as a speech to the 62nd Annual Convention of the National Association for the Advancement of Colored People, Minneapolis, Minnesota, July 8, 1971. The author acknowledges the research assistance of James Barnett and William Martin, third year law students, University of Wisconsin Law School.

1. 347 U.S. 483 (1954).

2. Wirtz, Willard, Address to the Annual Meeting of the United Negro College Fund, New York City (1965).

Without the slightest suggestion of criticism of the choice made, it seems, with perfect 20-20 hindsight vision, that black advocates picked the wrong priority for concentrated efforts at civil rights reforms over the last 20 years. A disproportionate amount of the money, energy and hopes of the black community was expended on education litigation, and seventeen years after the colossal victory in *Brown v. Bd. of Education, supra*,³ the extent of segregation in education is embarrassing. The equality of education in those areas such as the District of Columbia and other racially impacted cities is appalling and it is obvious that there is little prospect for any meaningful integration in such areas unless all surrounding suburbs are to be treated as a single school district. These realities have given us busing as the presiding agony of the 70's.

A very strong argument can be made that the dominant obstacle in the struggle for black equality is economic. The continuing disparity between black and white incomes, despite educational gains of blacks and increasing educational parity, is persuasive evidence that something more than equal education is necessary if improvement in housing, income and employment levels of blacks in this country is to become anything more than the progress of percentages.⁴

THE PROMISES OF THE 60's

PRIOR TO 1960 only 16 states and Puerto Rico had laws prohibiting employment discrimination. During that decade, twenty additional states and the District of Columbia enacted "fair employment practices" laws.⁵ The Department of Labor reported in 1966 that over 200 cities had adopted ordinances prohibiting discrimination in employment. Congress, after two decades of pleading "fair employment practices" law, responded with Title VII of the Civil Rights Act of 1964.⁶ Adding to this the Executive Orders of the President, which extend back to June 1941⁷ and continue in an almost

unbroken chain to the present time, we had amassed, by the mid-nineteen sixties, an awesome array of enactments which prohibited employment discrimination. At that point in time, it was easy to conclude that the strategies of black advocates had been correct — equality of education through litigation and equality of employment through legislation. This mass of legal pronouncements gave hope to the oppressed and promised punishment to the oppressors. From our vantage point in the winter of 1971, it is clear that neither hope nor promise has been realized.

What happened to the momentum in civil rights since that proud day in the Summer of 1963 when 250,000 marched to the mall in Washington, D.C. to hear the New Sermon on the Mount — that great dream of the late Martin Luther King? With such an awesome collection of legal devices, devices which primarily place the enforcement of the prohibitions against employment discrimination in the hands of government entities, why such minimal progress? In my opinion, government (federal, state and local, as well as private institutions), by a combination of accident, ineptness and deliberate design dissipated much of the momentum of the 60's on programs and priorities which avoided the hard enforcement problems, the solution of which would be necessary in order to make equal employment a reality. With the federal government in the lead, the priorities in the 60's were manpower, development and training. The concept of the "disadvantaged" was created — embracing the poor, the young, the old, the crippled, and the Blacks. Trading on the sympathy of the nation for poor unfortunates, politi-

3. See e.g., U.S. Commission on Civil Rights, *Racial Isolation in Public Schools*, (1967).

4. See Olson, *Employment Discrimination Litigation; New Priorities in the Struggle for Black Equality*, 6 *Harvard Civil Rights-Civil Liberties Law Review* 20 (1970). (Hereinafter cited as Olson.)

5. See Summary of State Acts, Labor Laws Series No. 6-A, August 1966, as revised April 1967, U.S. Department of Labor, Bureau of Labor Standards, Washington, D.C. See also CCH *Employment Practices Guide*, Vol. II, State Laws.

6. 42 U.S.C. Sec. 2000e et. seq. (1968); 78 Stat. 241.

7. Exec. Order No. 8802, 3 CFR, 1938-1943 Comp., p. 957.

cal support, creative talent and money were rallied to the cause. Helping the disadvantaged to help themselves became the new crusade. Between manpower money and war on poverty money, both simpleminded and sophisticated schemes for attacking the many problems of the disadvantaged were funded. Some of the activities appeared suspiciously to be devised to buy "cool summers," and others resembled new fangled pork barreling. Moreover, because of the irresistible lure of large sums of money, much of the creativity and energy of the black community was diverted into short term, self-help projects aimed at so called self-improvement rather than at knocking down racial barriers. Willard Wirtz, former Secretary of Labor, a champion of manpower development, captured the feelings of the times in an article entitled "A Mountain Called Disadvantage."⁸ "It is as though in this historic hundredth year, we have climbed a mountain, called Discrimination, only to find on approaching the summit that what lies ahead is another mountain, called Disadvantage." He goes on to note that the single most critical front in the current battle for meaningful equal opportunity was education of the presently disadvantaged minority group youth, asserting: "We have effectively opposed the folly of discrimination. Now we must stop the fallout of disadvantage."

With all due respect to the former Secretary of Labor, he projects what I believe was a mistake in priorities for the nation at large. In effect, this untimely concentration on something called the disadvantaged assumed, first, that the essential problems of discrimination had been licked and, second, the remaining problem was the inequality of blacks. Neither proposition was then nor is now acceptable. Let's take the first one: We have indeed climbed a mountain called discrimination, if we measure the ascent by the number of printed words prohibiting it. However, rather consistently since 1960, Negroes have accounted for about 11% of the total population,⁹ and both

in 1960 and 1969, Negroes and other races account for about 11% of all workers in selected occupations.¹⁰ Although the census figures project the number of Negroes there are in America, the employment figures are for Negroes and other races, namely all nonwhites. Consequently, although blacks are reported at 11% of the population, they do not have 11% of the jobs. That percentage is shared with all other nonwhites. The figures are instructive further, for in the 20 categories of occupations covered by the government's report, the only ones in which the percentage participation of nonwhites approaches the percentage in the population are those described as operatives, laborers, waiters, cooks and bartenders, etc. It should be no surprise that nonwhites dominate the statistics in these areas. There was progress noted among teachers, except college teachers, which in 1969 moved up to 10%.¹¹ The reason there is such a high proportion of black teachers in primary and secondary schools is not unrelated to *Brown v. Bd. of Education*, *supra*, and its progeny.

Black people don't have to be told that lack of education and training is not the primary reason we don't get hired. The white society seems to require statistical evidence of that which blacks know as a matter of everyday experience. That evidence has long been a part of the record and, increasingly, research tends to add to the body of knowledge. In 1959, a nonwhite male college graduate earned less than a white male who never attended high school. In 1966 the Department of Labor analysis indicated that the income of a black man decreased relative to that of his white counterpart as the education increased. The average black who had graduated from high school earned slightly more than \$5,000 while the average white with a high

8. W. Willard Wirtz, *Labor and the Public Interest*, 114 (Harper and Row, 1964).

9. See BLS Report No. 375, *Current Population Reports, Series P-23, No. 29, The Social and Economic Status of Negroes in the United States, 1969*, p. 2, (G.P.O., Washington, D.C. 1970). (Hereinafter cited as: BLS Economic Status Report).

10. See BLS Economic Status Report at 43.

11. *Id.*

school education earned 40% more, or slightly more than \$7,000. And, a non-white that had completed college, made 66% of the median income of a comparable white.¹²

Recognizing the value of education and training, admitting that the plight of blacks, young and old, is related to the lack thereof, does not blunt the plain and simple truth that job discrimination was in the 60's, and continues to be a substantial cause of the plight of black people. The question then is why did this nation commit such a substantial chunk of limited resources to improving the plight of the disadvantaged and such a pitifully small portion to the enforcement of equality in job opportunities? We knew in 1964 that almost 8,000,000 blacks were in the labor force, either working or actively seeking work, and at the same time there was something like 600,000¹³ classified then as the hard core unemployed, 1 in 4 of whom was nonwhite. By 1968 there was in excess of 8,000,000 blacks in the labor force and about 595,000 nonwhite hard core unemployed¹⁴ and yet, the total budget for manpower, not counting about \$541,000,000 for aid to students, was \$2,344,000,000. \$1,767,000,000 of the manpower budget was reportedly spent on the disadvantaged.¹⁵ An estimated 44% of the individuals served by the manpower program in 1968 were nonwhite. Last year, the *New York Times* reported that several studies done for the federal government in the last few years came to the independent conclusion that the main reason for the lag between incomes of blacks and whites was discrimination, not the lack of education and training. Moreover, the major problem in discrimination was not entry into jobs but in advancement in jobs once employed. One such researcher referred to a government study indicating that about one-third of the difference in occupational ranking between black and white men was due to low education, leaving the inevitable conclusion that the other two-thirds was due to discrimination. His comment, "I'm for education too, but I do not think that we

should spend 99% of the resources on one-third of the problem."¹⁶

Some recent comparative figures illustrate the point: Against \$1.7 billion reportedly expended in one year in manpower programs on the disadvantaged, for three years, 1966-1968, the total budget for the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, and the entire Civil Rights Division of the Department of Justice was under 38 million dollars.¹⁷ In the manpower program the government auditors would be content if no more than that was wasted in three years. In this country, we tend to judge the importance of a matter by the extent to which budgets are committed to its achievement. Effective enforcement machinery runs on money. Small wonder that employers and labor unions do not take the federal government seriously when it speaks of enforcement of equal employment opportunity matters.

If there's any doubt in the minds of the discriminators regarding the lack of seriousness of purpose on the part of federal government illustrated by the paltry budgets for enforcement, it can be quickly dispelled by looking at the government's record of equal employment among its own. It has been hypothesized that one of the central conditions which must exist for law to be an instrument of social change¹⁸ is a model of compliance. One would expect government to be the primary model. In recent years the U.S. Civil Service Commission has prepared studies of minority group employment in

12. See Olson at 24-25.

13. Hearings before the General Subcommittee, House Committee on Education and Labor, 88th Cong., 1st Sess. on H.R. 405, p. 465 et. seq. (G.P.O., Washington, D.C., 1963).

14. Manpower Report of the President, U.S. Department of Labor (G.P.O., Washington, D.C., 1969). The variance in numbers is no doubt due to the change in definition of hard core unemployed. In 1963 people out of work for 26 weeks or more were classified as hard core unemployed.

15. See E. Wight Bakke, *The Mission of Manpower Policy*, 16-17 (Upjohn Institute for Employment Research, 1969).

16. *New York Times*, March 1, 1970, p. 69.

17. *The Budget of the U.S.*, Appendices, 1967, 1968, 1969 (U.S. G.P.O., Washington, D.C.).

18. W. M. Evan, "Law as an Instrument of Social Change," *Applied Sociology*, 285-291 (Gouldner and Miller, ed., 1965).

the federal government. One need only look at the 1970 minority groups study to get a revealing picture of the employment posture of the federal government.¹⁹ Although Negroes comprise 15% of the total in all pay systems, which is somewhat higher than the 11% nonwhites we noted in the 20 categories of all employers,²⁰ the variance from the private employer figures ends at that point. Twenty-one percent of the jobs in grades one through four are occupied by blacks and 13 percent of jobs five through eight. In the Wage System, jobs below \$5,000 a year are 48.4% black and those below \$7,000 are 38.4% black. In the Postal Service, in which blacks hold 19.4% of all jobs, only the lowest classifications reflect black occupancy proportionate to their numbers in the department. These figures are a compelling argument that black people should include the federal government as part of the problem rather than part of the solution. Nor should this view be restricted solely to the federal government. All levels of government — federal, state and local, must be considered as part of the problem. And, as will be discussed below, all levels of government should be included as party defendants in civil rights law suits.

Not only does the employment profile of the Federal Government fail to provide a confidence inspiring model of compliance, but the statutory vehicle which Congress at last provided in 1964 has aptly been dubbed "the poor enfeebled thing."²¹ After waiting 20 years²² for FEPC, what emerged was a device defective in the extreme. Moreover, this toothless tiger, armed only with powers of investigation and conciliation, has been grossly underfed. In addition to limited budgets, the Commission has suffered from extensive turnover in its senior staff.²³ As if that situation were not bad enough, the statute itself provides for dispersal of responsibility and authority. The Commission which has the power to investigate and conciliate has no powers of enforcement in the courts. It has neither the independent authority to issue cease and desist orders nor gen-

eral standing to litigate the plaintiff's case before the court. The enforcement power was given to the Department of Justice under Section 707,²⁴ which power is independent of the Commission process. For the first three years of its operation, the Commission, the Labor Department and the Justice Department conducted their business almost as if they were agents of separate governments. This failure of coordination reinforced the image of a government not serious about its mission and provided a legitimate complaint of multiplicity and conflict which was exploited by those persons subject to the several programs.

THE REALITIES OF THE 70's

AN ASSESSMENT of the realities of the 70's made it necessary briefly to examine some false promises of the sixties. The picture, however, is not a totally bleak one. The outpouring of legislative and judicial pronouncements on job discrimination produced legal vehicles which, if exploited with the tenacity of school integration litigation, may yet produce results. Not the least of these are a couple of sleepers in Title VII which no one anticipated would be as effective as they have become. The first was the provision in Section 706 that, after the exhaustion of the conciliation syndrome, or more particularly after the time has been exhausted, the plaintiff can seek his own counsel and bring his own lawsuit. It is under this provision that the overwhelming majority of the Title VII lawsuits have been brought. Moreover, through the accidents of compromise drafting²⁵ the Commission has authority to seek court enforcement of compliance orders issued pursuant to private lawsuits, and

19. U.S. Civil Rights Commission Report, *Minority Group Employment in the Federal Government*, p. 7, Table 1-1 (1970).

20. Note 10, *supra*.

21. *Sovern, Legal Restraints on Racial Discrimination in Employment*, 205 (20th Century Fund, 1966).

22. Congressman Adam C. Powell, Jr. and others introduced the first FEPC bill in 1944.

23. Report, *Federal Civil Rights Enforcement Effort 1047* (1970).

24. 42 U.S.C. Sec. 2000e-6 (1968).

25. 42 U.S.C. Sec. 2000e-5 (i) (j) (1968).

through the creativity and tenacity of Russell Specter, former EEOC Deputy General Counsel, the Commission, as a friend of the court, has helped to shape developing law.

We can add to this an entirely independent occurrence from a collateral branch of civil rights law. In a footnote to *Jones v. Mayer*,²⁶ a housing discrimination case, the Supreme Court breathed new life into the Civil Rights Acts of 1866-1870²⁷ as they relate to employment discrimination.

The remaining portion of this paper is devoted to where we stand in law on certain critical issues in late 1971, and to some suggested direction if equality of employment opportunity is to become a reality in our lifetime.

It has become popular of late to lament the minimal progress in civil rights since *Brown v. Bd. of Education*, *supra*. By a curious accident of history that case has become the ground zero level against which civil rights progress is measured and, indeed, it would be difficult to overestimate the significance of that historic decision. However, it generally escapes attention that *Steele v. Louisville and Nashville Railroad*²⁸ in 1944 imposed upon unions under the Railway Labor Act a duty of fair representation without irrelevant and invidious discrimination based on race. That case, partaking of constitutional necessity, required both the labor union and the railroad to respect the rights of blacks in the making of collective bargaining agreements. We speak of lack of progress since *Brown*, but *Steele* antedates *Brown* by a full ten years, yet labor and management have flouted the doctrine of *Steele* throughout the intervening time.²⁹

DUTY OF FAIR REPRESENTATION

THE COURTS HAVE imposed the duty of fair representation upon unions operating under the R.L.A.³⁰ and the N.L.R.A.³¹ because of the special legal status which those Acts confer upon the labor organizations. Both Acts make unions which

represent a majority of the employees in the craft or class, or the unit appropriate for collective bargaining, the *exclusive* representative of all such employees regardless of whether or not they are union members.³² Thus the union is empowered by the Congressional mandate to negotiate agreements which affect the terms and conditions of employment and are binding on subject employees. The court has reasoned that such a grant of authority by Congress without a commensurate duty to exercise it fairly would run afoul of the Fifth Amendment Due Process Clause. Therefore, the courts have implied that such a duty is compelled by the R.L.A. and the N.L.R.A. to save them from constitutional challenge.

The principle, first recognized and applied by the Supreme Court in *Steele* is enunciated as follows:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.³³

In a case decided the same day, *Wallace Corp. v. N.L.R.B.*,³⁴ the Court suggested such a duty under the N.L.R.A. when it stated that bargaining agents under the N.L.R.A. were: "charged with the responsibility of representing . . . (the employees') interests fairly and impartially."³⁵ However, the Court made it clear that the duty was to be implied

26. 392 U.S. 409, 441, No. 78 (1968).

27. 42 U.S.C. §§ 1981, 1982 (1968).

28. 323 U.S. 192 (1944).

29. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 Rutgers L. Rev. 268, 276 (1969).

30. 45 U.S.C. § 151 et seq. (1968).

31. 29 U.S.C. § 151 et seq. (1968).

32. See Sec. 2, Fourth of the R.L.A. and Sec. 9(a) of the N.L.R.A.

33. 323 U.S. 192, 204 (1944).

34. 323 U.S. 248 (1944).

35. 323 U.S. 248, 255 (1944).

from the N.L.R.A. in the 1953 case of *Ford Motor Co. v. Huffman*³⁶ and the 1955 case of *Syres v. Oil Workers International Union*³⁷ with little discussion other than a direct reference to its opinion in *Steele*.

Conceptually, no new or innovative theories were added to *Steele* from 1944 to the 1960's. Moreover, much of the innovation during the early 60's was merely an extension of the doctrine of that case. Professor Archibald Cox, former U.S. Solicitor General, is generally credited with developing the theory of the duty of fair representation, subsequently endorsed by the National Labor Relations Board and the courts as an unfair labor practice under the Taft-Hartley Act.³⁸ However, it was through the creative genius of the late Charles Houston, one of the many black advocates of the Howard University Law School, that the concept of the duty of fair representation later elaborated and extended by the learned professor from Harvard was added to the body of labor law.³⁹

The N.L.R.B. gave early recognition to the duty of fair representation doctrine announced by the courts by threatening in a 1953 case⁴⁰ to revoke the certification of a union unless it ceased its unfair conduct immediately. In the 1962 case of *Miranda Fuel Co., Inc.*,⁴¹ the Board laid down the rule that a breach of the duty of fair representation constituted an unfair labor practice, thus giving an aggrieved plaintiff an administrative forum with a free lawyer. This action by the Board was impliedly approved by the Supreme Court in the 1967 case of *Vaca v. Sipes*⁴² and was held to be an additional remedy to that of a civil suit in the federal courts to enforce the duty.

The duty of fair representation clearly prevents a union from: (1) causing an employer to discriminate against an employee on an invidious basis (of which race is a prime example) in regard to discharges,⁴³ layoffs,⁴⁴ job classifications,⁴⁵ or other terms and conditions of employment;⁴⁶ (2) discriminatory griev-

ance handling;⁴⁷ and (3) accepting a discriminatory contract.⁴⁸ The N.L.R.B. has decided that segregated union membership with disparate rights and benefits runs afoul of the duty.⁴⁹ But it is unsettled as to whether the duty of fair representation prevents a union from excluding minorities from membership.⁵⁰ However, if the duty is grounded on constitutional necessity, it follows that Congressional support via exclusive representation status granted by the N.L.R.A. is sufficient government involvement⁵¹ to constitutionally taint the practice of excluding blacks from union membership as well as those mentioned above.

Title VII could almost be dubbed the Lawyer's Relief Act. It is so shot full of holes that the first few years of its existence have been productive mostly of cases involving procedural issues.⁵² To date, only five cases have reached the Supreme Court.⁵³ The Court has agreed to hear at least three others;⁵⁴ one in-

36. 345 U.S. 330 (1953).

37. 350 U.S. 892 (1955).

38. Cox, *Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957).

39. See Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?* 24 Maryland L. Rev. 113 (1964).

40. *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

41. 140 N.L.R.B. 181 (1962).

42. 386 U.S. 171 (1967).

43. See *Rolax v. Atlantic Coastline R.R.*, 186 F. 2d 473 (4th Cir. 1950).

44. See n. 33, *supra*.

45. See *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952).

46. See *Local 12, United Rubber Workers (Business League of Gladsden)*, 150 N.L.R.B. No. 18 (1964) (Segregated lunch and work facilities).

47. See *Conley v. Gibson*, 355 U.S. 41 (1957).

48. See *Central Ga. Ry. v. Jones*, 229 F. 2d 648 (5th Cir. 1965), *cert. denied*, 353 U.S. 846 (1956).

49. See *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964).

50. But see *Sovern, The N.L.R.A. & Racial Discrimination*, 62 Colum. L. Rev. 563 (1962).

51. See e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1965). See also *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831 (1946).

52. See *Coleman, Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 *Duquesne L. Rev.* 1 (1970).

53. *Glover v. San Francisco Railroad*, 393 U.S. 324 (1969); *Crosslin v. Mountain State Tel. and Tel. U.S.* 91 S. Ct. 562 (1971); *Griggs v. Duke Power Co.* 91 Sup. Ct. 849 (1971); *Phillips v. Martin Marietta*, 91 S. Ct. 496 (1971); *Dewey v. Reynolds Metals Co.*, 429 F. 2d 324 (6th Cir. 1970); affirmed U.S. S. Ct. (1971), 3 EPD ¶ 8216.

54. *Dewey v. Reynolds Metal Co.*, 91 S. Ct. 566 (1971); *EEOC v. Pullman Company*, 91 S. Ct. 873 (1971); *Love v. Pullman*, 91 S. Ct. (1971).

volving religious discrimination and the others a procedural issue. If one diligently sifts through the welter of procedural cases, primarily interposed as delaying devices by defendants, one is left with the feeling that the net yield of meaningful principles of law has been limited to a few key areas. Most of these have not yet received the stamp of approval of the Supreme Court. However, there are a few general principles which seem reasonably secure in late 1971 and which warrant a brief comment.

Of crucial importance was the establishment of the principle that although Title VII was intended to operate prospectively, relief may be granted to remedy present and continuing effects of past discrimination. This principle had its genesis in *Quarles v. Philip Morris*,⁵⁵ an important seniority case, and has been followed in a growing number of cases in many of the Federal appellate courts.⁵⁶

RATIONALE FOR TITLE VII RELIEF FOR PRESENT & CONTINUING EFFECTS OF PAST DISCRIMINATION

THIS CONSTRUCTION is bottomed on the realization that, if the Act were to be applied prospectively in the strictest sense, many minorities could have been easily denied any chance of equal employment opportunities by their employers replacing discriminatory employment practices with facially neutral ones upon the effective date of Title VII.⁵⁷ The broad legislative purpose behind the Act, to promote maximum equal employment opportunities, would have been frustrated by a narrow construction and would have been contrary to the plain language of the statute⁵⁸ and its legislative history.⁵⁹

In *Quarles*, Judge Butzner, after reviewing §703 of the Act which proscribes certain unfair employment practices, stated:

The plain language of the Act condemns as an unfair labor practice *all racial discrimination that originated in*

*seniority systems devised before the effective date of the act.*⁶⁰ (emphasis added)

The Judge then dealt with the defendant's contention that the legislative history of the Act supported its position that the present consequences of past discrimination were outside the coverage of the Act by stating:

. . . The legislative history indicates that a discriminatory seniority system established before the Act cannot be held lawful under the Act. The history leads the court to conclude that Congress did not intend to require "reverse discrimination," that is, the Act does not require that Negroes be preferred over white employees who possess employment seniority. *It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.*⁶¹

This reading of the Act and its legislative history by the *Quarles* court has been widely accepted by the commentators⁶² and the Courts of Appeal⁶³ and can be considered established Title VII law. While the Supreme Court in *Griggs v. Duke Power Co.*⁶⁴ did not cite the line of cases following *Quarles* it did affirm the primary principle in the following quote:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and

55. 279 F. Supp. 505 (E.D. Va. 1968).

56. See *U.S. v. Dillon Supply Co.*, 429 F. 2d 800 (4th Cir. 1970); *Griggs v. Duke Power Co.*, 420 F. 2d 1255 (4th Cir. 1970), reversed on other grounds, 91 S. Ct. 849 (1971); *U.S. v. Sheet Metal Workers*, 416 F. 2d 123 (8th Cir. 1969); *Local 189, UPP & Crown Zellerbach v. U.S.*, 416 F. 2d 980 (5th Cir. 1969); *U.S. v. Hayes International Corp.*, 415 F. 2d 1038 (5th Cir. 1969); *Local 53 v. Vogler*, 407 F. 2d 1947 (5th Cir. 1969).

57. See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Har. L. Rev. 1109, 1160-63 (1971).

58. See 42 U.S.C. §§ 2000e-2(a)-2(c) (1968); 78 Stat. 255-256.

59. See 110 Cong. Rec. 649 (1964) (Remarks of Sen. Humphrey); 110 Cong. Rec. 6564 (1964) (Remarks of Sen. Kuchel); Dept. of Justice Memo, Bureau of National Affairs Operations Manual, *The Civil Rights Act of 1964*, pp. 326-327, 329, 332.

60. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 515 (E.D. Va. 1968).

61. *Id.* at 516.

62. See n. 57, *Supra*. See also Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Har. L. Rev. 1260 (1967).

63. See n. 56, *Supra*.

64. 91 S. Ct. 849 (1971).

remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, *cannot be maintained if they operate to 'freeze the status quo of prior discriminatory employment practices.* (Emphasis supplied).⁶⁵

Griggs v. Duke Power Co., *supra*, decided by the Supreme Court on March 8, 1971 is, of course, the most authoritative case on Title VII law. Generally speaking, the Court there decided that the Act prohibited an employer from requiring a high school education, or the passing of certain standardized intelligence tests as a condition of employment in, or transfer to, certain jobs when neither requirement is shown to be significantly related to the successful performance of the job. Both requirements operated to disqualify Negroes at a substantially higher rate than white applicants and the jobs in question formerly had been filled by only white employees as part of a long standing practice of giving preference to whites. The potential implication of this case is rather broad and it will be a long time before its limitations and scope are fairly illuminated. However, at the very least it suggests the end of the indiscriminate use of testing devices and other such qualifications which in effect tend to disqualify disproportionate numbers of blacks and bear no demonstrable relationship to successful job performance. An aside by the Court in closing its decision suggests the establishment of merit as the controlling factor in our job market. The Court said: "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." No such requirement is specifically included in Title VII.

In view of the history of using the rule book of job qualifications only when blacks appeared at the employment office, it is paradoxical that an anti-discrimination law is likely to enshrine the American Myth of merit hiring as a legal requirement.

As almost every black person and every black lawyer knows, it is one thing to know you have been discriminated against but it's an entirely different thing to be able to prove it. A significant development in the law which will be of assistance in making proof is illustrated by *Jones v. Lee Way Motor Freight*.⁶⁶ Although there is a long history in the law of use of statistics in cases involving jury exclusion, voter registration, school integration, and even school cases involving faculty and staff employment, direct utilization of statistics to establish a prima facie case of job discrimination has been rather slow in coming. Increasingly, employment statistics are being used by the courts in evaluating compliance with anti-discrimination law.

STATISTICAL EVIDENCE

IN *Jones, supra*, the defendant-employer was sued by its black truck drivers, because they had been denied transfer from city drivers to line, or over-the-road, drivers. While these transfers had been denied on the basis of an apparently non-discriminating no-transfer rule which applied to white city drivers as well as black, plaintiffs claimed that the "neutral" no-transfer practice was used to perpetuate discriminatory hiring practices. Plaintiffs further claimed that there was no business necessity for the no-transfer rule, concluding that the rule was an illegal one under Title VII. To prove the discrimination in hiring, statistics were offered showing that for the period in question, 20% of the city drivers were black while none of the large number of line drivers was non-white. The Court accepted these statistics as establishing "a prima facie" case that during the 1964-1968 period race was a factor in staffing the two driver categories.⁶⁷ Also relating to the importance of the statistical evidence is the fact that the *Jones* court refused to accept a mere

65. 91 S. Ct. at 429.

66. 431 F. 2d 245 (10th Cir. 1970).

67. *Id.* at 247.

denial of discrimination as a rebuttal of the prima facie case and held that supportive evidence of actual instances of discrimination was not necessary. The reasons cited by the Court for this second holding are that Blacks often do not apply for "white jobs" because of widespread knowledge of the discrimination, and an assertion of a lack of specific instances of discrimination did not rebut the prima facie case created by the statistics.

Another example of the use of statistics is *Parham v. Southwestern Bell Telephone Co.*⁶⁸ In that case, the defendant had employed only about 1.7% blacks between 1964 and 1968. Of these blacks, most were employed as janitors or common laborers. Even though supportive evidence was rebutted by defendant, the Court stated:

We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964.⁶⁹

In so holding, *Parham* has apparently gone farther than other Courts have been willing to go.

The Court, in *U.S. v. Ironworkers, Local 86*,⁷⁰ states that:

This judicial practice (relying on statistical evidence) has most often taken the form of the use of such data as a basis for allocating the burden of proof. On the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of blacks raises an inference that the racial imbalance is the result of discrimination, the burden of going forward and the burden of persuasion is shifted to the accused, for such a showing is enough to establish a *prima facie* case . . . Of course, as in the case with all statistics, their use is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn.⁷¹

Thus, we can conclude that statistics can create, at a minimum, a prima facie case of discrimination, but that to do

so they must convincingly demonstrate the reasonableness of the inference of discrimination. In *Ironworkers*, this convincing demonstration was provided by the fact that the defendants' unions each had one black member despite total membership of from 900 to 1900 persons in an area which was 7% black. It is reasonable to expect that as the percentage of blacks in an employing unit or a union increases, or the percentage of the total population in an area which is black decreases, the demonstrative value of statistics may decrease. The point at which such value is so low as not to create a prima facie case is at present undefined.⁷² It should be seen, however, that certain factors do add to the strength of statistical evidence. These are the supportive facts and variables referred to in *Ironworkers*. Examples of these supportive facts and variables are the categories of jobs present in a case.⁷³ Thus in *Jones v. Lee Way Motor Freight, supra*, the fact that there were no black line drivers was made relevant by the existence of the city driver category containing blacks. In *Parham*, the fact that black employees filled menial jobs was relevant and the existence of a recruitment system recognized to be subject to abuse was also relevant to the demonstrative value of the statistics presented.⁷⁴

In conclusion, while statistical evidence is now a valuable tool in job discrimination cases (so valuable in some cases that proof of acts of discrimination

68. 433 F. 2d 421 (8th Cir. 1970).

69. *Id.* at 427. The court also took judicial notice that 2.9% of the population in the state in which defendants operated was black.

70. 3 EPD ¶ 8213 (9th Cir. 1971), *cert. denied* 4 EPD ¶ 7583 (1971).

71. *Id.* at ¶ 6717.

72. In seeking to define the demonstrative value of statistics the following cases are of some value. *U.S. v. Local 38, IBEW*, 428 F. 2d 144, 151 (6th Cir. 1970); *U.S. v. Dillon Supply*, 429 F. 2d 800 (4th Cir. 1970); *EEOC v. Plumbers, Local 189*, 311 F. Supp. 468 (S.D. Ohio 1970); *U.S. v. Hayes International Corp.*, 415 F. 2d 1038 (5th Cir. 1969); *U.S. v. Sheet Metal Workers Local 36*, 416 F. 2d 123 (8th Cir. 1969); *Quarles v. Philip Morris*, 279 F. Supp. 505 (E.D. Va. 1968).

73. *See, U.S. v. Dillon Supply*, 429 F. 2d 800, 805 (4th Cir. 1970).

74. 433 F. 2d 421, 426 (8th Cir. 1970); *see also, Id.* at 805.

has not been required),⁷⁵ statistics must be used with care as regards their demonstrative value and, where possible, other evidence should be used to support the statistics in the strongest manner possible. Further, in evaluating the strength of statistical evidence, the cases decided in the area⁷⁶ provide guidance as to the use of statistics, but not exact definition of the point at which the demonstrative value of the statistics is high enough to assure the acceptance of them as creating a prima facie case of discrimination. Increasingly, however, employment statistics are being used by the courts in evaluating compliance with anti-discrimination law.⁷⁷

In addition to this use of statistics demonstrating racial imbalance or racial exclusion in making proof of discrimination, the recent decision of the 3rd Circuit sustaining the validity of the goals and time tables involved in the Philadelphia Plan⁷⁸ legalizes the use of numbers in establishing performance standards with regard to job participation. So far, in most instances in which the goals and time tables, or the manning table concept, have been challenged in the courts, the validity of the concept has been sustained. The earlier cases⁷⁹ in modern litigation on this issue involved actions in Ohio, and one of them was instituted by the NAACP.

A comment is appropriate at this point on a recent assertion by brother Bayard Rustin⁸⁰ that the Plan is part of a conservative conspiracy to divide blacks and trade unions. First of all, the Plan is a lineal descendant of the manning table concept utilized in Cleveland in 1966 under a Democratic administration. Secondly, the revised Philadelphia Plan was put forward by career staff personnel in the Department of Labor, after the people of Philadelphia, through their congressional delegation and visitations to the Nixon administration officials, demanded that something be done to replace the original plan which had been derailed by the Comptroller General. If Mr. Rustin is to establish a conspiracy, he will

have to come forward with more convincing evidence than this modest effort to eradicate discrimination in the building trades.

Some sympathy with Bayard's lament regarding the conflict of interest between labor and civil rights is in order. But the period upon which he looks back with nostalgia in which labor and civil rights groups marched shoulder to shoulder was one in which black priorities were matters of promise and labor's priorities were matters of program. Blacks are still willing to cooperate with labor, or anybody else, on matters on which they can agree, but the job issues, more and more, bring blacks in direct conflict with some elements in the labor movement and we are no longer willing to postpone our interests in order to maintain unity. That unity is easily achieved. All it would take is for black job demands to be made a matter of labor's first priority. A great deal could be done if the construction unions would stop being one of the major obstructionists to the achievement of full equality of employment opportunity.

Moreover, all this hullabaloo about the Philadelphia Plan is unwarranted. Not only is it a modest approach, but there are dangers that black people may believe that more has been achieved than in fact has. The great victory in the Philadelphia litigation is not the number of jobs it has generated, but, that it got the government past its fear of using numbers to measure progress in job penetration in the construction industry. Now that goals and time tables are not illegal per se,

75. *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Jones v. Lee Way Motor Freight*, 431 F. 2d 245 (10th Cir. 1970); *U.S. v. Sheet Metal Workers, Local 36*, 416 F. 2d 123 (8th Cir. 1969).

76. See, note 72, *supra*.

77. See note 75, *supra*.

78. *Contractors Association of Eastern Pennsylvania v. Schultz*, 311 F. Supp. 1002 (E.D. Pa. 1970) *Aff'd* 442 F. 2d 159 (3rd Cir. 1971).

79. *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio E.D. 1967). *Weinger v. Cuyahoga Comm. College Dist.*, 249 N.E. 907 (1969); *cert. denied*, 396 U.S. 1004 (1970). See also *Tufts College Trustee v. Volpe Construction Co.*, 264 N.E. 2d 676 (1971).

80. Rustin, "The Blacks and the Unions," *Harpers Magazine* (May 1971).

the government is emboldened to use them in its other programs.

The 3rd Circuit decision did not hold that the Federal Executive is required by the constitution to have an effective program to prevent job discrimination subsidized by the Federal dollar. Congress, under Judge Gibbons' decision, could still take the President out of the anti-discrimination business. It is still necessary to establish the applicability of the theories of *Ethridge v. Rhodes*,⁸¹ which held the governor constitutionally responsible for a program which produced results at all levels of government.

One final note on the construction dialogue: the construction unions are damning the Philadelphia Plan and decrying its extension, and the Labor Department is picking up black brownie points by extending it to other cities. Meanwhile if you read closely, and suspiciously, the modifications in the Philadelphia Plan as it is extended, you could conclude that if there is a conspiracy it is between the administration and labor. The Atlanta Plan⁸² should be dubbed the *Atlanta Compromise*. If an Atlanta contractor has a referral agreement with a labor organization in the area and the total minority membership and referrals of the union meet the goals, or the union has made good faith effort, the contractor will be in compliance. Good faith effort will now be determined by either the efforts of the contractor or the labor organization. The plan specifically notices the efforts of Atlanta LEAP. And, under a close reading of the provisions of the Appendix to the Plan, a Department of Labor supported LEAP program, or other union training programs, might be enough without more to establish the good faith efforts of both contractors and unions. If the building and construction unions can't live with this approach, this should be evidence that they do not want any job discrimination program. Whether blacks can live with the Atlanta Compromise is doubtful. It seems that, again, black priorities for plans that promise realistically to work, and to work

now,⁸³ got shuffled down the list to a position behind construction labor and may be back to the status of "all deliberate speed" in employment. Plans which overemphasize training programs such as pre-apprenticeship and apprenticeship are not so subtle programs of gradualism.

The Atlanta Compromise established the troika of government, management and labor, as formal participants in the implementation of the plan. The minority community is relegated to a proposed voluntary Evaluation and Advisory Committee. To this limited extent it may be a step back from the Home Town Plans. It is consistent with the rest of the Executive Order program in that blacks don't have the right to participate in enforcement, only a privilege; but labor, because of its collective bargaining relationships, is a party as a matter of right.⁸⁴

The construction unions' performance to date in this area does not inspire confidence regarding their "good faith efforts" in the discharge of this new trust. The recent developments regarding the Boston Plan further extend the Atlanta Compromise idea. There a Tripartite Plan, unions, management and blacks, was modified with Labor Department approval, to exclude the minority community from participation in the administration of a Home Town Plan. They were relegated to some yet to be established performance review committees. The black community was so incensed that a suit was filed seeking to halt the implementation of the new Boston Plan.⁸⁵ If the suit does not succeed, the descendants of Crispus Attucks, will have suffered yet another "taxation without representation."

Once in a long, long while blacks get an unexpected windfall in this business. Such was the case in a 1968 Supreme Court housing discrimination decision,

81. 268 F. Supp. 83 (S.D. Ohio E.D. 1967).

82. 36 Fed. Reg. 12096 (June 25, 1971).

83. U.S. v. Montgomery County School District, 395 U.S. 225 (1969).

84. See 41 CFR Part 60-1.26 (1971).

85. See *Robinson v. Hodgson* (Filed in D.C. Mass., Dec. 1971).

Jones v. Mayer,⁸⁶ in which the Civil Rights Acts of 1866 were reinvigorated by a footnote in the decision. Prior to that case, those old laws were interpreted to exclude private acts of discrimination. With the old civil rights acts now resting on the 13th as well as the 14th Amendments to the U.S. Constitution, the *Jones* case breathed new life into 42 U.S.C. 1981, which is applicable to contracts of employment. Several Circuit Courts of Appeal have issued decisions under the authority of these old laws.⁸⁷ With this number of Circuit Courts of Appeal in substantial agreement on the applicability of the statute to employment contracts, it would seem that the legality of this protection is fairly secure. Perhaps of greater significance is the fact that the Civil Rights Act of 1866 is a separate basis for seeking court assistance distinct from Title VII of the Civil Rights Act of 1964. Thus it is possible to avoid the delay and complications of Title VII by direct court suit under the old laws. However, the *Caldwell* case and the *Young* case, both sustaining the 1866 Act as an independent basis for suit which did not require the plaintiff to exhaust administrative remedies available to him under Title VII, recommended that trial courts use their powers to stay relief until the conciliatory procedures of Title VII have been given an opportunity to work. However, these old laws may be used when the plaintiff waits too long to be able to sue under Title VII.

At this juncture, after having recited some success stories in recent litigation, it would be legitimate to ask: "If blacks are winning so many outstanding lawsuits, explain the employment statistics with which this article started?" Some of today's students are even more abrupt. They are challenging the viability of law as an instrument of social change in the field of equal employment. If we reflect for a moment on the net yield of 20 years of school desegregation litigation, one can easily understand this skepticism. It is generally recognized that we are not much better off in school integration than

we were in 1954 when *Brown* was first won. However, that experience suggests, not that the law is an inadequate tool but, perhaps, that lawsuits have been aimed at the wrong targets. It seems obvious that the focus upon entire school districts was not broad enough to bring about sufficient change. The problem in equal employment litigation is that generally, the defendant is more narrowly circumscribed. The employment litigation focus has been upon a particular plant or corporation, or a cluster of plants. Too few remedies have been obtained which apply to an entire corporate structure. Pattern and practice cases involving certain construction unions may be aimed at a city-wide operation, but even this focus is too narrow. If we are forced to litigate employment cases on a plant by plant basis, it could take another 100 years to make a substantial dent in job discrimination. However, we are not so limited, at least not in theory.

What is needed is a creative litigation approach which has the capacity for bringing about systematic change in discriminatory employment practices in this country. To find such a vehicle we need only look back a few short years in the 1966-68 litigation files of the National Association for the Advancement of Colored People. *Ethridge v. Rhodes*, *supra*, a lawsuit brought and won by the NAACP, against the Governor of Ohio has the greatest potential for massive impact on employment discrimination of any case since *Steele v. Louisville*, *supra*. It is only a District Court decision. It involves "state action," which has long been considered proscribed by the 14th Amendment on the authority of *Burton v. Wilmington Parking Authority*.⁸⁸ However, in spite of limited authority and limited success in expanding the concept, the theory there sustained is poten-

86. 392 U.S. 409 (1968).

87. *Caldwell v. National Brewing Company*, 3-EPD ¶ 8241. (CA-5, June 15, 1971); *Young v. International Telephone and Telegraph Co.*, 438 F. 2d 757 (3rd Cir. 1971); *Waters v. Wisconsin Steel Works*, 427 F. 2d 476 (7th Cir. 1970), 400 U.S. 911; *Sanders v. Dobb's House*, 431 F. 2d 1097 (5th Cir. 1970).

88. 365 U.S. 715 (1961).

tially the most effective device in modern equal employment law. It should be noted that this decision preceded the historic *Jones v. Mayer* case discussed above. *Jones* expands the potential of *Ethridge* to include not only the actions of states, but the actions of private employers and labor unions as well. Moreover, it is arguable that the statutes resting on the 13th Amendment would be applicable to Federal officials as well as state officials and private persons. In *Ethridge*, plaintiffs obtained an injunction against the Governor of Ohio and other state officials to prevent them from signing construction contracts with firms which had delegated their hiring to racially exclusionary unions.⁸⁹ To obtain this injunction, the NAACP argued that by engaging the specified contractors with knowledge of the discriminatory results which would follow, the state officials in question would be depriving the plaintiffs and the class they represented, "under color of state law, of their privileges and immunities as citizens of the United States as secured to them by the equal protection and due process clause of the Fourteenth Amendment . . ."⁹⁰ Since the discrimination in question was linked only to private parties, plaintiffs crucial challenge in advancing this constitutional theory was to prove "state action."⁹¹ This challenge was met in the court's eyes by the contractual relationship involved, and by the state official's awareness of the discrimination which would ensue. It was these factors which would have made the discrimination of the private parties "state action." Thus, the state officials were restrained from acting to place themselves in such a position.⁹²

The potential of *Ethridge* is disclosed by the duty which it theoretically places on governments in their capacities as purchasers of both services and goods.⁹³ Governments may not "involve" themselves through the contracting process with employers who participate in employment discrimination. If they do, the discrimination becomes actionable under

the Fourteenth Amendment against both the government and the private contractor.⁹⁴

Unfortunately, attempted applications of this theory to the federal contracting process have been dismissed in District Courts.⁹⁵ The alternative bases for the dismissal in these cases were jurisdictional and procedural in nature so the "state action" and discrimination issues involved were not reached. The first ground for dismissal was the doctrine of sovereign immunity which, apparently, is still applicable to the federal government. Invoking this doctrine, the *Hadnott* court held that the suit was barred as an unconsented suit against the United States. The court appeared to ignore plaintiff's claim that his cause of action should have fallen into an exception to sovereign

89. In addition to evidence that the prospective contractors would delegate their hiring to discriminating unions, the court was also led to its finding that discrimination would occur by the fact that at least one of the contractors had refused to submit anti-discrimination assurances required by the Ohio Governor's Executive Order on construction contracts. See *Ethridge v. Rhodes*, 268 F. Supp. 83, 85 (S.D. Ohio 1967).

90. *Id.* at 85.

91. *Id.* at 87.

92. Further requirements which were met in this case to allow the granting of injunctive relief were: (1) the court found irreparable harm would ensue if the injunction was not granted, and (2) the court found that administrative remedies did not have to be exhausted because they were inadequate to prevent this irreparable harm. The administrative remedies found to be inadequate here were both those provided by the Ohio Civil Rights Law and by Title VII. See *Ethridge v. Rhodes*, 268 F. Supp. 83, 88-89 (S.D. Ohio 1967).

93. Two major problems are raised at this juncture with regard to the utility of the *Ethridge* concept. (1) Would the result in *Ethridge* have been the same if the contractors in question had discriminated on all of their private but not their public projects? (2) Would the result have been the same if there had been no evidence to show that the state officials in question knew that discrimination would occur? While no easy answers are available, it is at least theoretically possible that the theory under discussion would apply if a contractor selectively discriminated on only private projects, for the employer remains a discriminator, and he is still obtaining the benefits of the government contract. Further, it is also theoretically possible to argue that since employment discrimination is so widespread, the government should be held to constructive knowledge of discrimination when it is, in fact, subsidizing a discriminating employer.

94. *Ethridge v. Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio (1967)); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The "state action" theory of the Fourteenth Amendment is applicable to the federal government through the due process clause of the Fifth Amendment. See e.g. *Bolling v. Sharpe*, 347 U.S. 497 (1963).

95. *Hadnott v. Laird*, 317 F. Supp. 379 (D.D.C. 1970); *Freeman v. Schultz*, 63 LC ¶ 9539 (D.D.C. 1970).

immunity which allows suits against named officials as individuals when they act within authority which is in itself, or in the manner used, constitutionally void.⁹⁶ Davis, in his treatise, *Administrative Law*, documents that the courts have frequently misapplied the doctrine of sovereign immunity to constitutional claims,⁹⁷ citing as evidence of this *Gnotta v. United States*,⁹⁸ a case which uses sovereign immunity in a manner almost identical to its use in *Hadnott*. While there is basis for hope that the sovereign immunity defense may be breached, the doctrine must currently be viewed as a major obstacle to the extension of the *Ethridge* theory to the federal government.

The alternative ground of dismissal in *Hadnott* was that plaintiffs had not exhausted either the administrative remedies available to them under Title VII⁹⁹ or those provided by the President's Executive Order 11246.¹⁰⁰ It may well be that exhaustion of one or both of these procedures will be an eventual prerequisite to the use of the *Ethridge* theory in the federal setting. However, the *Ethridge* holding that the administrative remedies were inadequate to prevent irreparable harm should be pursued. There is some cause for optimism in the vitality of such a claim in *James v. Ogilvie*.¹⁰¹ In that case (the facts of which were similar to *Ethridge*), the court refused to grant the plaintiff a preliminary injunction because it was not persuaded of the futility of exhaustion as was the court in *Ethridge*.¹⁰² The encouraging thing is that the *James* court also refused to dismiss the case, indicating its willingness to hear evidence of futility of exhaustion at the trial on the merits.

The great potential of the *Ethridge* theory is its multiplier effect. Rather than going after successive employers and labor unions, the governments, federal, state and local, could be prohibited from doing business with any such institutions unless or until they eradicate employment discrimination. Government could only do business with those parties

who were in compliance with the policy pronouncements of equal employment opportunity. This would reward the faithful. Moreover, governments would be impelled to be more vigorous in the enforcement of their own prohibitions against discrimination in order to expand the procurement base from which they would be able to purchase goods and services.

We recognize, of course, that such an approach would not directly reach every offender. But if direct contracting and subcontracting, and subcontracting without respect to tiers, were encompassed within the requirements, it is doubtful that very many modern enterprises would be insulated from the reach of such an approach.

What seems a desirable objective for the NAACP and other civil rights advocates in years to come, is for every available courthouse in the land to have pending before it at least one *Ethridge v. Rhodes* type case. On the construction side, every time a city, state or federal government digs a hole, and the construction force does not reflect a fair share of the jobs for black folks, a lawsuit to restrain the construction until equal employment necessities are complied with should be filed. Moreover, comparable lawsuits should be undertaken whenever any government agencies purchase goods or other services from noncomplying companies. If each of the chapters of the NAACP undertook to insure that at least one lawsuit would be pending in its jurisdiction, the results would be dramatic. We could well anticipate, at least in the

96. *Dugen v. Rank*, 372 U.S. 609 (1963). See also *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949).

97. K. Davis, *Administrative Law*, Sec. 2.7.00 (Supp. 1970).

98. 415 F. 2d 1271 (8th Cir. 1969).

99. 42 U.S.C. § 2000e (1968).

100. 3 C.F.R. 339 (1965), as amended 3 C.F.R. 320 (1967), as amended 3 C.F.R. 406 (1969).

101. 310 F. Supp. 661 (N.D., Illinois, E.D. 1970).

102. *Ethridge v. Rhodes*, 286 F. Supp. 83, 88 (S.D. Ohio 1970). Evidence which was apparently of great significance in *Ethridge* was the testimony of Ohio Director of the Ohio Civil Rights Commission that his commission had been ineffectual in dealing with employment discrimination.

beginning, that most of the lawsuits would be lost. However, the mere filing of a serious lawsuit generally brings about some corrective action on the part of the defendant, particularly if he knows that he is guilty of the offense alleged. Beyond that, the NAACP has decades of experience in being the lonely voice in the courthouse litigating suit after suit in order ultimately to get a new principle of law firmly established by the Supreme Court and ultimately applied by the District Courts. Shortly after the *Ethridge v. Rhodes* decision, Herbert Hill, National Labor Director, NAACP, was reported in the New York Times to have asserted that similar law suits would be filed throughout the length and breadth of the land. Only a few such lawsuits have been filed against the government. In *Hadnott*

v. Laird and Freeman v. Schultz,¹⁰³ it was sought to establish the minimal obligation on the part of the federal government for continuing business with discriminating companies. As could be anticipated, the District Court decision was adverse to the plaintiffs and the cases are pending approval. We also have *James v. Ogilvie*¹⁰⁴ where at least the suit against the governor was not dismissed.

No matter how these cases turn out eventually, the theories upon which they rest are respectable theories and in due season their time should come. The day when those theories are generally accepted will be hastened if Herbert Hill's pledge of a lawsuit in every courthouse is redeemed.

103. See note 95, *supra*.

104. See note 101, *supra*.

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