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Title VII in the Federal Courts - Private or Public Law

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TITLE VII IN THE FEDERAL COURTS — PRIVATE OR PUBLIC LAW

PART I*

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I. INTRODUCTION

THE CIVIL RIGHTS ACT OF 1964[1] prohibits certain private and public groups from discriminating because of race, color, sex, religion, or national origin. Title I prohibits discrimination in the matter of voting rights; Title II outlaws discrimination by business establishments offering goods or services to the public; Title III prohibits discrimination in the use of publicly owned or operated facilities; Title IV prohibits discrimination in public education; Title V establishes the Commission on Civil Rights; Title VI prohibits discrimination in projects receiving federal aid, and Title VII outlaws discrimination in employment.

By far, Title VII is the most controversial and most important provision in the Act. It was initially the most controversial because the private sectors of the economy — the labor unions, the corporations and the employment agencies — resented governmental intrusion into what they had always considered the area of private decision-making — the employment relationship. As such, Title VII, in its final form, bears the marks of this controversy. With its exemptions and exceptions it is the most complicated title in the Act.

It is the most important title in the Act because by protecting job status it protects a basic value which is the key to all other political and civil rights. The right to enter a university or the right to eat in a public restaurant are empty rights to a person who does not have tuition or a dime to buy a cup of coffee.[2] In belatedly incorporating Title VII into the Civil Rights Act, Congress recognized the fundamental axiom of an industrial society — that an individual to be integrated into the political and social community must first

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1. 42 U.S.C. § 1981 (1964).

2. "Certainly it would have been naive to ignore the social truism that people who are hungry can hardly be expected to appreciate the values of either education or

be integrated into the economic community.[3] Today, economic citizenship is the passport to political and social citizenship and this the Act, at least in theory, recognizes.

The Civil Rights Act is an historic piece of twentieth century legislation not so much for what it says, but for what it reflects. It reflects, beneath its surface, a desperate national concern, not only with the oppression of the races but with the oppression of all freedom. The Act mirrors more than a "black" revolution; it mirrors a "social" revolution, whose object is to refashion American institutions so that both personal freedom and institutional freedom can co-exist.[4] It is the first major piece of legislation which imposes institutional checks upon organized centers of power, on behalf of the unorganized individual. Its theme of institutional responsibility marks the beginning of a new social trend, that of enhancing personal freedom and human dignity — the chief function of a free society.

Title VII, in protecting employment rights, recognizes that we have moved from a mercantile society based upon real property and contract to an industrial feudal society based upon intangible property and status. "For the vast majority of men their most valuable property is not their TV set, their home, or their car, but their job, their profession, their franchise, their contracts. The right to use their labor and skill has become their most valuable property right."[5] The pre-industrial institutions of the farm, the village, and the retail store no longer serve as shields against arbitrary institutional invasions of personality.

The fundamental unit in the new industrial feudal society is not the person, but the group. "Group decisions affect our lives from the cradle to the grave far more intimately and far more powerfully

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the franchise." Ming, *Critique on "The Constitution and Job Discrimination,"* 39 WASH. L. REV. 104–05 (1964).

3. Title VII was not a part of the original Civil Rights Bill submitted to Congress by President Kennedy on June 19, 1963. It was later added by Congress.

4. The Negro problem in America is but one local and temporary facet of that eternal problem of world dimension — how to regulate the conflicting interests of groups in the best interest of justice and fairness. The latter ideals are vague and conflicting, and their meaning is changing in the course of the struggle. G. MYRDAL, AN AMERICAN DILEMMA 69 (1964).

5. Affeldt, *Group Sanctions and Sections 8(b)(7) and 8(b)(4): An Integrated Approach to Labor Law*, 54 GEO. L.J. 55, 70 (1965). *See* F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951), which states:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for ALL of their income is something new in the world. FOR OUR GENERATION, THE SUBSTANCE OF LIFE IS IN ANOTHER MAN'S HANDS.

than the decisions of government."[6] These groups, for the most part, possess a stranglehold over employment opportunities. The employee who loses his union card, the doctor who loses his membership in the AMA, the lawyer who loses his license, are outcasts not only from the group but also from society. We have permitted large industrial unions to exercise almost plenary power over the lives of their members; craft unions are permitted to determine who shall work and who shall not work; large corporations are permitted to carve out economic outposts from which they exact tribute from consumers and complete obedience from employees. The rule of law in the form of economic due process has had little success in penetrating these fortresses.

If personal freedom, therefore, is to be maintained within our society, the legal process must provide the same safeguards to the new property as it afforded the old property. This group citizenship means much more than the right of the individual to a paycheck; it directly affects his past, present, and future life. It should mean: (1) the right to become a member of the economic group; (2) the privileges of economic citizenship — such rights as seniority, pension funds, insurance, vote, etc.; (3) the right to economic due process — all the benefits of the grievance procedure; (4) the right to dissent within the group; (5) the right of fair representation by the union; and (6) the right of fair treatment by the employer.

It is necessary, therefore, in order for a person to achieve autonomy in the matters of the spirit, freedom of speech, freedom of religion, freedom of association, etc., that he have a citadel which is secure from all group invasions. Another name for this citadel is the new property — first class group citizenship — which should be constitutionally protected under the due process clause of the fifth and fourteenth amendments. To strike at this new property is to strike at the rights of personality, for they are intimately tied together. "We are becoming a society based upon relationships and status — status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality."[7]

Despite the fact that group citizenship involving the right to work is a basic, fundamental right deserving of constitutional protection, the legal process has afforded little protection to it. The common law refused to recognize any right to work. Under the common law an

6. Affeldt, *supra* note 5, at 68.
7. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964).

employer had the absolute right to discharge the employee for any reason; the employment relationship being an "at will" relationship.[8] Federal legislation, such as the National Labor Relations Act, has done very little to protect job status, for, as interpreted by the courts, the employer can dismiss his employees at will, for good cause, for no cause, or even for bad cause.[9] The only type of discharge prohibited by the NLRA is a discharge actuated by anti-union reasons, and since it is very difficult for the Board's general counsel, who has the burden of proof, to demonstrate that the employer's real intent is to discharge because of union action, little protection is given to the employees.

The United States Constitution does not follow employment rights into the private sector of the economy. Since 1883, the date of the Civil Rights Cases, the Supreme Court has held that the constitutional amendments only applied to state action, not to private action.[10] Lately, however, the Court has liberally extended the concept of "state action" to the private sector when the government has become involved,[11] ratified,[12] supported[13] or enforced[14] the actions of private organizations. Although this trend is encouraging, imposing public responsibilities upon private governments exercising quasi-public functions, the doctrine does not stretch far enough to touch the source of the employment problem — invasion by large corporations and labor unions.

Another possible aspect of the legal process which could be used to protect job rights is the "executive action" concept. Governmental protection of job rights in government contracts has been recognized since President Roosevelt's executive order of 1941.[15] Unfortunately, however, the legal process is in default here to. The Office of Federal Contract Compliance, which oversees the enforcement of federal contracts, relies almost exclusively upon persuasion, not judicial enforcement. Indeed, it is not at all clear whether these contracts can be

8. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404–05 (1967).

9. *See* Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968).

10. Civil Rights Cases, 109 U.S. 3, 11–14 (1883). *See also* Shelley v. Kraemer, 334 U.S. 1 (1948).

11. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M.D. Tenn. 1963), *aff'd* 336 F.2d 630 (6th Cir. 1964).

12. Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

13. Cooper v. Aaron, 358 U.S. 1, 19 (1958).

14. Griffin v. Maryland, 378 U.S. 130 (1964); Pennsylvania v. Bd. of Directors of City Trusts, 353 U.S. 230 (1957); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Screws v. United States, 325 U.S. 91 (1945).

15. Exec. Order No. 8802, 3 C.F.R. 957 (Comp. 1938–43).

enforced in court because of the doctrine of separation of powers. In the few instances where aggrieved parties did litigate, the courts held that they had no standing because the contract was a bilateral one between the government and the company, not a third party beneficiary contract.[16]

The inescapable conclusion is that the three branches of Government — the Congress, the Executive, and the Supreme Court — at least until 1964, have failed to accord legal recognition to the acquisition and retention of employment. Instead of viewing employment rights as preferred rights, on the same scale as freedom of speech, association, religion, etc., the decision-makers have chosen to side with the institution, not the person. This is an especially sad commentary upon the effectiveness of our legal process when one reflects upon the fact that it was not at all necessary for the Civil Rights Act to have been passed, for the legal process already had the power to rectify most of the wrongs which the Act prohibited. The problem has always been not a lack of legal power but a refusal to exercise that power.[17]

It is the purpose of this article to analyze the principal provisions of Title VII with a view of determining whether this form of statutory protection is adequate in safeguarding the new property — em-

16. The right of individuals discriminated against, however, in violation of such contracts provisions till now, has been limited to administrative remedy. The refusal of the courts, so far, to apply orthodox notions of the rights of third parties beneficiary to enforce contracts made for their benefit in this situation raises the always perplexing problem of the propriety of using private law concepts to resolve public controversies.

Ming, *supra* note 2, at 112.

17. "[T]here is an overriding federal responsibility for both policy declaration and policy implementation in employment discrimination which has been overlooked on the one hand, and, on the other hand, where power has been perceived it has remained for the most unexercised." Ferguson, *The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power to Withhold Appropriated Funds,* 14 BUFFALO L. REV. 1 (1964).

In Truax v. Raich, 239 U.S. 33 (1915), the court recognized the fundamental value of the right to work:

> It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.

Id. at 41.

"It is submitted that the right of Americans to procure employment is fundamental, and is to be distinguished from general business activities which can constitutionally be regulated on an 'any rational basis' showing. Certainly the right to procure a job — or more precisely the right to have government not impede the opportunity to freely negotiate a job with an employer, unless in furtherance of some absolutely OVERRIDING state policies — would appear to be just as fundamental as the right to marry, characterized as basic in Loving v. Virginia." Kanowitz, *Constitutional Aspects of Sex-Based Discrimination,* 48 NEBRASKA L. REV. 131, 166 (1969).

ployment rights — at least in respect to minorities. The success or failure of Title VII will not depend upon its language, but rather the interpretation of that language by the federal courts. It is the contention of this article that employment rights will be protected and freedom furthered if the courts adopt a liberal view, regarding discrimination as a public wrong, not a private wrong. In this way, by viewing acts of discrimination by companies and labor unions as prima facie wrongs, and by compelling them to come forward with higher social reasons to justify their discrimination, a significant contribution will be made by the courts in protecting economic rights. If, however, the courts are inclined to view acts of discrimination as private wrongs, demanding specific evidence of fault or culpability, upon the part of management and labor unions, the Civil Rights Act is doomed to failure. This futile quest for "intent," "malice," "culpability," or "state of mind" has crippled the intent of the National Labor Relations Act more than any other doctrine.[18] Institutional responsibility, not institutional immunity, is the policy of the Civil Rights Act and as such the courts should balance the effect of the alleged discrimination against the social weight of the employer's reasons; not probe into the mind of the employer or union to determine whether they were at fault.

II. THE PROVISIONS OF TITLE VII

It is necessary before undertaking a critical analysis of Title VII to briefly examine its provisions. The title is structured upon four principles: (1) coverage, (2) definition of equal employment opportunity, (3) enforcement procedures, and (4) the initiary power of Government. The Act covers all employers involved in interstate commerce which have a work force of 25 or more employees and labor unions having a membership of 25 or more persons. Despite this broad coverage over eighteen million workers are not covered by the Act.

Section 703, like section 7 of the National Labor Relations Act, is the heart of Title VII. It consists of four subsections defining the rights of minority groups and six subsections defining institutional immunities. This section is comprehensive in nature and embraces virtually every type of unfair employment practice. It makes it an unlawful employment practice for an employer to hire, to discharge or in any other way to interfere with the terms and conditions of em-

18. *See* Affeldt, *Employer Free Speech: The Hostile Motive and Affirmative Duty Tests*, ... GEO. L.J. ..... (.....); *see also* Christensen and Svanoe, *supra* note 9.

ployment of an individual "because of such individual's race, color, religion, sex, or national origin."[19] It is also an unlawful employment practice for labor unions to deny membership because of race, color, religion, sex, or national origin, or in any way to interfere with an individual's status as an employee or prospective employee for these reasons.[20] In a provision identical to section 8(b)(2) of the NLRA, labor unions are also prohibited from attempting to cause employers to discriminate.[21] Employment agencies, too, are forbidden to fail or refuse to refer for employment or otherwise to discriminate against any individual because of these reasons or to classify for employment any individual on such a basis. The same general prohibitions are also applicable to employers, labor unions, and joint labor-management committees "controlling apprenticeship or other training or retraining, including on-the-job training programs."[22]

These federal employment rights are immediately followed by a list of institutional immunities, pointing out what Congress considered not to be unfair employment practices. These immunities are contained in subsections 703(e) to (j). Subsections 703(e)(1), 703(h) and 703(j) will only be considered here since the other subsections are of little or no importance. Subsection 703(e)(1) allows employers, labor organizations, and employment agencies to discriminate for reasons of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Subsection 703(h) deals with two important subjects — seniority and testing. The Act states that it is not an unlawful employment practice "for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." Subsection 703(h) also states that it is not an unlawful employment practice for an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin." Finally, subsection 703(j)

19. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000 e-2(a)(1) (1964).
20. Civil Rights Act of 1964, § 703(c)(1), 42 U.S.C. § 2000 e-2(c)(1) (1964).
21. Civil Rights Act of 1964, § 703(c)(3), 42 U.S.C. § 2000 e-2(c)(3) (1964).
22. Civil Rights Act of 1964, § 703(d), 42 U.S.C. § 2000 e-2(d) (1964).

was incorporated into the act to assure congressional skeptics that employers and labor unions had no affirmative duty to give minority groups preferential treatment in order to remedy existing racial imbalances in employment. In essence, this means that employers and labor unions have no duty to maintain racial quotas.

A five man bipartisan Equal Employment Opportunity Commission (E.E.O.C.) is established to (1) administer the Act, (2) conduct research, (3) investigate unlawful employment charges, and (4) attempt to resolve employment disputes by conciliation.[23] After the expiration of a 60-day deference period, during which the charging party must exhaust his state or local remedies, he must file his charge with the Commission. For the Commission to take jurisdiction, it must receive the charge within 90 days of the alleged unfair employment practice. The Commission, after serving a copy of the charge to the respondent, must investigate to determine whether there is reasonable cause. If it determines that reasonable cause exists, it will then attempt to settle the matter by means of conciliation. If the Commission is successful, it will have both parties sign a conciliation agreement whereby the respondent agrees to eliminate the unfair employment practices and the charging party agrees, in return for certain benefits, to waive his right to sue.

If the Commission, however, is unsuccessful in obtaining a conciliation agreement, it must then inform the charging party who then has 30 days from the receipt of notice to commence a civil action in the federal court. Although a charge may be filed by a member of the Commission, and any person aggrieved under the charge may bring an action in court, the Commission itself cannot initiate a complaint in court. The court in its discretion may appoint an attorney for the plaintiff and may authorize the commencement of the action without payment of court fees, costs, or security. The court also has discretion to award attorney fees to the prevailing party.

The federal courts are the exclusive enforcers of Title VII in a trial de novo. The Act grants broad enforcement powers to the courts. They may grant "such affirmative action as may be appropriate," such as injunctions, reinstatement, back-pay, modified seniority plans, objective testing procedures, etc.[24] Also the court may permit the Attorney General to intervene if the Justice Department feels the case is of "general public importance."[25]

23. Civil Rights Act of 1964, 42 U.S.C. §§ 2000 e–4, e–5 (1964).
24. Civil Rights Act of 1964, 42 U.S.C. § 2000 e–5(g) (1964).
25. Civil Rights Act of 1964, § 706(e), 42 U.S.C. § 2000 e–5(e) (1964).

The Attorney General's real power, however, lies in his ability to initiate a civil action when he has reasonable cause to believe that any institution is engaged in a "pattern or practice of resistance," which interferes with the rights granted by Title VII.[26] Unlike an individual complainant who must exhaust his administrative remedies, the Attorney General can bypass the state and Commission and go directly to court. Also, if he certifies that the case is of "general public importance" he can ask for a three-judge panel and for an immediate trial.[27]

This in substance is the gist of Title VII of the Civil Rights Act of 1964. On the surface one might receive the impression that Congress made a heroic effort to bestow first class citizenship upon minority groups. Beneath the surface, however, within the crevices, there is language of "intention," the language of private law. The enforcement section, section 706(g) states that judicial relief is forthcoming only if the court finds that "the respondent has intentially engaged in, or is intentionally engaging in an unlawful employment practice."[28] If the courts strictly interpret this section so as to require specific evidence of a respondent's state of mind, then Title VII will be doomed to ineffectiveness. Also, if the courts view the charging party's suit as a private suit, with no public interest, the Title is again doomed. The success or failure of Title VII lies in its enforcement by the federal courts — whether they will view discrimination as a private or a public wrong. Accordingly, this article will deal with the enforcement provisions of Title VII with the purpose of urging the courts to adopt a public law approach to both the procedural and substantive aspects of Title VII.

III. DISCRIMINATION IS A PUBLIC WRONG

Of all the types of discrimination which the Civil Rights Act prohibits, the most difficult to detect and to enforce is discrimination in employment. This is "an area in which subtleties of conduct play no small part."[29] It is relatively easy for an employer or labor union to set up artificial barriers where it is exceedingly difficult for the law to penetrate. The principal reason that it is much easier for an employer or union to discriminate within a factory than, for instance, an educational institution or a public accommodation is because of the many institutional interests an employer or union can hide behind. Any

26. Civil Rights Act of 1964, § 707(a), 42 U.S.C. § 2000 e-6(a) (1964).
27. Civil Rights Act of 1964, § 707(b), 42 U.S.C. § 2000 e-6(b) (1964).
28. Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000 e-5(g) (1964) (emphasis added).
29. Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954).

effective legislation, therefore, seeking to root out employment discrimination should establish a strong administrative enforcement machinery which is speedy, efficient, and well-armed with sanctions. It is ironic that Congress, well aware of this problem, instead of taking as its model a strong administrative agency as the National Labor Relations Board, took as its model weak Fair Employment Practices state agencies whose record is a long one of failure.[30]

Originally, during the early drafting stages, the House did look to the NLRB as its model. It created a Commission, like the Labor Board, which had quasi-judicial powers and which possessed the authority to issue cease and desist orders enforceable by the courts.[31] Even though the House Judiciary Committee chipped away at this enforcement power by limiting the Commission's role to that of a prosecutor, the administrative aspect of the Bill was still strong. When the Bill reached the Senate, however, Title VII's enforcement provisions, especially the Commission's powers, were more bitterly attacked than any other portion of the Act.

The result of the "leadership compromise" was to strip the Commission of all its enforcement powers, both its quasi-judicial and its prosecution functions.[32] Control over the enforcement of unfair employment practices — access to the courts — was taken from the Commission and placed under the exclusive control of the charging party. This compromise, in effect, reduced the role of the Commission from that of a strong enforcer to that of a silent mediator. And, as will be pointed out, the agency's principal function today is that of issuing

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30. "State and local agencies have made at most modest progress in eliminating discrimination by employers. They have exerted even less impact upon discriminatory union practices." Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 442 (1965). *See also* Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964).

> State experience suggests that settlements of individual complaints by the Commission itself are likely to be infrequent. A nearly identical state agency in Kansas which also was restricted to investigation and confidential mediation was so ineffectual that after eight years the statute was redrawn. Parallel experiences with non-enforceable acts in Indiana, Baltimore and Cleveland confirm that voluntary programs are generally ineffective. Most aggrieved individuals will probably attempt to avoid the Commission or, at best, will regard it as a mandatory intermediate stage in the enforcement process.

Comment, *supra* at 436–37. Footnote 44 in this article states: "Between 1953 and 1960 the agency was unable to reach an adjustment with twenty-one of twenty-two employers it approached until it called upon the President's Committee on Government Contracts for assistance." 1960 KANSAS ANTI-DISCRIMINATION COMMISSION REPORT OF PROGRESS 12; see also 1961 REPORT OF PROGRESS 11. The law was amended in 1961 to enable the Commission not only to hold hearings and issue cease-and-desist orders but also to order an employer to hire or reinstate a complainant with back pay. GEN. STATS. KAN. §§ 44–1001–04 (Supp. 1961).

31. H.R. 405, 88th Cong., 1st Sess. #9(j), 109 CONG. REC. 13009 (1963).

32. 110 CONG. REC. 13693 (daily ed. June 17, 1964).

tickets to charging parties for admission to the main event in federal court.

This limitation of the Commission's power to the task of conciliation instigated a barrage of criticism from commentators.[33] Many saw the Act as a paper tiger designed not for minority groups, but as a political device to ease national and international tensions. "[T]he Negro in America had been mediating and conciliating over 150 years. He has little faith in the process nor should he."[34] The NAACP advised victims of discrimination to bring their charges before the NLRB, not the Commission.[35]

There is much truth in these criticisms. It is difficult not to escape the conclusion that Congress had no intention of setting up a high powered administrative agency to enforce the Act. To accuse Congress of a hollow commitment to civil liberties is an overstatement, but nevertheless "[m]ake no mistake about it. The enforcement system created by Title VII was a deliberate choice of court over administrative agency as the type of institution in which the adjudicative power should be vested. The legislative history with its progressive withdrawal of the Commission from an adjudicative role, makes this abundantly clear."[36]

It is my conviction as a former conciliator for the EEOC that the conciliatory method is indeed a frail weapon, especially when it is employed against the large economic giants of the nation. The smaller companies tend to fear the consequences of unsuccessful conciliation — such informal sanctions as unfavorable publicity, problems with civil rights groups, possible initiation of a civil suit with attendant economic losses, such as back pay and attorney fees, etc. With the large company, however, the conciliator has little or no bargaining power. Appeals to persuasion, to the company's sense of social responsibility are usually fruitless. The large company and the large labor union usually feel that they have more to gain through litigation than through conciliation. These large institutions realize that the litigation process favors them, making the battle a David and Goliath contest. While the defense of such a suit is only a slight inconvenience to the respondent's legal staff, its initiation involves

33. Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417 (1966); Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COM. L. REV. 473 (1966); Schmidt, *Title VII: Coverage and Comments*, 7 B.C. IND. & COM. L. REV. 459 (1966).

34. Schmidt, *supra* note 33, at 460.

35. On the day the National Labor Relations Board announced its decision in the *Hughes Tool* case, stating it would regard race discrimination as an unfair labor practice, the NAACP advised its members to bypass the Commission for the NLRB.

36. Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 522 (1966).

considerable burdens, such as expense, delay, and uncertainty, to the plaintiff. The very nature of employment discrimination demands urgency, but the large organizations take advantage of the law's delay to break down the charging party's resistance. At first, during the early days of the Act, this unhesitancy upon the part of the large organizations to litigate was not present, largely because of their relative unfamiliarity with the law and the fear of unfavorable publicity, but today they are more prone to litigate than conciliate.

Regardless of its defective administrative machinery, however, it is possible for Title VII to be an effective instrument of social reform and fulfill its objective of granting first class citizenship to minority groups if the federal courts view the title as a public act, not a private one. Title VII has been referred to as having a "split personality." [37] At various times it has been termed a private,[38] a quasi-public,[39] and a public Act.[40] This language of private and quasi-public should be abandoned for it is clear, notwithstanding Congressional rejection of effective administrative machinery, that Congress had no intention to privatize Title VII. Instead, it ordered another federal enforcement agency, the courts, to fashion and apply public federal law.

It is virtually impossible to speak of discrimination as only invasions of private rights. Economic invasions of personality transcend the rights of the victim; they directly touch all members of his class and indirectly the entire community. Invidious discrimination by its very nature is a public wrong. Any attempt upon the part of the

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37. Hall v. Werthan Bag Corp., 251 F. Supp. 184, 187 (M.D. Tenn. 1966).

38. Probably the most significant change made in Title VII by the leadership compromise was to deprive the Equal Employment Opportunity Commission of the right to bring suits to enforce compliance with the title and to substitute an individual right of action by the person aggrieved. . . . This represented a rather basic change in the philosophy of the title and implied an appraisal of discrimination in employment as a private rather than a public wrong, a wrong, to be sure, which entitles the damaged party to judicial relief, but not one so injurious to the community as to justify the intervention of the public law enforcement authorities.
Berg, *Equal Employment Opportunity under the Civil Rights Act of 1964,* 31 BROOKLYN L. REV. 62, 67 (1964).

39. Congressional modification of the bill clearly indicated a shift in the emphasis of Title VII toward the vindication of individual rights since the burden of enforcement was placed on the individual rather than on the commission. But this shift in emphasis does not by itself remove the basic public interest in the elimination of discrimination in employment. Consequently, in view of the chaotic legislative history of Title VII, it would be futile to attempt to analyze the enforcement provision in terms of vindicating only a public or a private right. Rather, a practical approach to an analysis of section 706(g) must recognize that the bill's metamorphosis was not complete and that the final statutory scheme actually is a blend of both private and public interests.
Note, 46 TEXAS L. REV. 516, 521 (1968).

40. Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964,* 22 RUTGERS L. REV. 465 (1968).

decision makers to view it as a private wrong would be contrary to the economy of justice, for it would result in a multiplicity of suits involving the same facts and the same law.

The inner logic and structure of Title VII is directed primarily not to the protection of private rights but to the protection of the public interest in the elimination of all discriminatory employment practices. Congress recognized this public interest when it encouraged charging parties to litigate by permitting courts to appoint attorneys for them. It also recognized this interest when it permitted the Attorney General to initiate suits against institutions which engaged in practices detrimental to the Act's policy. Also, other defenders of the public interest may unilaterally act to prohibit and prevent discrimination. A commissioner may file a charge against an organization; the Office of Federal Contract Compliance may institute proceedings on the basis of non-discriminatory clauses in government contracts.

The Commission itself, although deprived of its primary enforcement powers, still continues to exercise public functions. The charging party must initially file a charge with the Commission and cannot without Commission approval withdraw the charge.[41] At the trial itself, the Commission may intervene by filing an amicus curiae brief. Also, after trial, if the charging party prevails, the Commission is entrusted with the task of supervising the court's order and may, if necessary, sue to compel compliance.[42]

The public nature of Title VII is also seen in the broad enforcement powers which Congress granted to the courts. These expansive and flexible powers in section 706(g) closely resemble the broad powers contained in section 10(c) of the National Labor Relations Act, which were designed not primarily for private parties but for groups. Also, it would appear that if Title VII were designed to remedy only private wrongs, the award of back pay, for instance, would be considered mandatory because of a violation of a private right. Back pay, however, like the provision in section 10(c) of the NLRA is discretionary with the court and as such betrays a congressional intent to award it only to effectuate the purposes of the Act.

In two recent important decisions the United States Supreme Court and the Fifth Circuit Court of Appeals have unequivocally declared that Title VII should be interpreted in a broad, public spirit. In *Newman v. Piggy Park Enterprises, Inc.*,[43] the Supreme Court in

41. 29 C.F.R. § 1601.9 (1969).

42. Civil Rights Act of 1964, § 706(i), 42 U.S.C. § 2000 e-5(i) (1964).

43. 390 U.S. 400 (1968).

a Title II suit, later held applicable to Title VII,[44] formulated the principle that private charging parties represented not only their own interests but that of the public. The court said:

> A Title II suit is thus private in form only. . . . If he [the plaintiff] obtains an injunction, he does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[45]

In *Jenkins v. United Gas Corp.*,[46] the charging party alleged that he was not promoted because of his race. The Commission found reasonable cause to believe the charge was true. The District Court, however, dismissed the complaint as moot when the employer demonstrated that the plaintiff had been promoted after the suit was filed. On appeal to the Fifth Circuit, the Commission argued that the suit was more than a private suit but one which affected the public interest. The court's decision, the Commission urged, did not effectuate the policy of the Act by eliminating the employer's institutional discriminatory practices which injured others. The Court agreed, stating:

> The suit is therefore more than a private claim by the employee seeking the particular job which is at the bottom of the charge of unlawful discrimination filed with EEOC. When conciliation has failed — either outright or by reason of the expiration of the statutory timetable — that individual, often obscure, takes on the mantel of the sovereign. *Newman v. Piggie Park Enterprises.*[47]

This mandate from the Supreme Court that the charging party is a private attorney general protecting not only his individual interest but that of his class and the public seems clear, but, as will be pointed out, many federal courts prefer to regard it as mere rhetoric. This matter of interpretation of Title VII is important. The courts will be closely watched. Many critics maintain that the courts are not suitable institutions for experiments in social reform, but they are intent finders, not fact finders. They are designed, it is said, to resolve individual interactions of the 19th century — private law — not to

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44. In Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968), the court after referring to *Newman v. Piggie Park Enterprises, Inc.*, said:

> Clearly, the same logic applies to Title VII of the Act. Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.

45. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968).

46. 400 F.2d 28 (5th Cir. 1968), *reversing* 261 F. Supp. 762 (E.D. Tex. 1966).

47. *Id.* at 32.

resolve group interactions of the 20th century — public law.[48] For the most part the record supports this criticism. The federal courts by attempting to privatize such statutes such as the NLRA by demanding evidence of intent instead of balancing interests have frustrated congressional policy.[49]

It is not easy to predict how the courts will interpret Title VII, but it is easy to predict that if the courts interpret it as a private statute, the trend of the 20th century — administrative adjudication over judicial adjudication — will continue unabated.

IV. JUDICIAL INTERPRETATION OF TITLE VII

A. Procedural Problems

1. The Right to Sue

Most of the court decisions, as one would expect in the interpretation of a new statute, have centered around the procedural aspects of Title VII. The principal procedural question so far has been — what are the prerequisites for suing in federal court? Can the charging party bypass the Commission and sue directly in court or must he exhaust his administrative remedies before the Commission? Section 706(a) states that the Commission shall investigate all charges and if it finds reasonable cause to believe respondent committed an unlawful employment practice, it shall attempt to conciliate the dispute. Section 706(e) states that if the Commission is unable "to obtain voluntary compliance with this title" within thirty days (this period of time may be extended to sixty days), it must then notify the charging party who then has the right to bring suit.

It appears from a literal interpretation of section 706(e) that Congress directed the Commission to investigate, find reasonable cause and to conciliate within a maximum period of sixty days. Uncontrollable events, however, such as the avalanche of charges, the Com-

48. Are the courts suitable institutions for the enforcement of laws, especially laws which are designed to effect basic rearrangements in de facto and de jure relationships in society? The modern tendency, which is especially though not exclusively found on the federal level, has been to give to administrative agencies rather than to courts the power to issue initial enforcement orders which have the character of adjudicative decision. This can only be taken as evidence of disaffection with the courts as effective institutions for the administration of laws of social reform. . . . If the efforts to give the commission powers of administrative adjudication are not immediately successful, the record of the trial courts in enforcing Title VII may well prove to be a kind of institutional testing ground for the future role of courts at the trial level in the social reform process. If the courts fail in their task, the proponents of future reform laws can be expected to fight even harder for administrative adjudication.
Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 522 (1965).

49. *See* Affeldt, *supra* note 18.

mission's limited staff, its small budget, and the extensive amount of time involved in investigating and conciliating made this an impossible task. In the practical order, it takes the Commission about two years to process a case. A strict interpretation would militate against the policy of the Act in that it would deprive charging parties, whom the Commission had not notified within the sixty-day time period, of their cause of action and would strike against the congressional intent of encouraging private settlement over litigation.

In *Dent v. St. Louis-San Francisco Ry.*,[50] the respondent argued for a literal interpretation of section 703(e). He maintained that since the suits were not brought within the ninety-day period (sixty days for Commission action and thirty days for plaintiff to sue) and because there was no actual conciliation by the Commission, plaintiff's action should be dismissed. The District Court disagreed with the first contention. It said: "[T]he sixty-day time period provided for the investigation and conciliation of charges is properly to be accorded a directory rather than a mandatory construction."[51] It agreed with the respondent's second contention, however, saying that some actual conciliation by the Commission was a jurisdictional condition for suit.

The Fifth Circuit agreed with the District Court on the first point, but reversed it on the second point. The Court said:

> [Section 703(e)] very clearly sets out only two requirements for an aggrieved party before he can initiate his action in the United States District Court: (1) he must file a charge with the Equal Employment Opportunity Commission and (2) he must receive the statutory notice from the Commission that it has been unable to obtain voluntary compliance. It is extremely important in these cases that both the spirit and the letter of Title VII reflect an unequivocal intent on the part of Congress to create a right of action in the aggrieved employee. The dismissal of these cases deprived the aggrieved employee of that right of action, not because of some failure on his part to comply with the requirement of the Title, but for the Commission's failure to conciliate — a failure that was and will always be beyond the control of the aggrieved party.[52]

Outside of a few scattered cases, the federal courts are in agreement that a charging party in order to sue in court need only obtain a ticket in the form of a thirty-day letter from the Commission.[53] The

50. 265 F. Supp. 56 (N.D. Ala. 1967).
51. *Id.* at 58.
52. Dent v. St. Louis-San Francisco Ry., 406 F.2d 399, 403 (5th Cir. 1969).
53. Those decisions in accord with the Fifth Circuit's decision in *Dent* are: Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968); Reese v. Atlantic

charging party has two alternatives on when to obtain this ticket. He can wait for his thirty day letter, giving the Commission an opportunity to conciliate his case, or he can request it sixty days after he filed his charge with the Commission. When this request is made, the Commission even if it has made no effort to investigate his case, must issue it to him.[54]

2. Technical Procedural Defenses

Many attorneys for respondents are seizing upon technical procedural points in an attempt to dismiss actions brought by charging parties. Many of these technical defenses are based upon the proposition that non-compliance with administrative procedures defeats the jurisdiction of the courts. It is difficult to understand how the district courts can seriously entertain these arguments because under Title VII the courts act in a de novo capacity, not as reviewing agencies for administrative boards. For the courts to assume jurisdiction, it is only necessary for the charging party to file a charge and receive a thirty day letter; no party has a right to investigation and conciliation. The right to a hearing is satisfied by the court. To place a premium upon administrative technicality within this empty framework is to frustrate the policy of the Act. The respondent, if he has a legitimate objection to administrative procedures, should object to the Commission, not to the court.[55]

In *Choate v. Caterpillar Tractor Co.*,[56] the District Court dismissed plaintiff's complaint because he did not allege that his charge was made "under oath" as dictated by section 706(a), despite a Com-

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Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967); Choate v. Caterpillar Tractor Co., 274 F. Supp. 776 (S.D. Ill. 1967); Quarles v. Phillip Morris, Inc., 271 F. Supp. 842 (E.D. Va. 1967); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967); Moody v. Albermarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967); Evanson v. Northwest Airlines, Inc., 268 F. Supp. 29 (E.D. Va. 1967); Centra-Cunningham v. Litton Indus., 66 L.R.R.M. 2697 (C.D. Cal. 1967).

54. This [notice] is particularly true where the Commission's rule provides that such notice may be obtained on request any time after termination of the sixty (60) day period. Both the statutes and regulations provide for such notice. The statute provides that it "shall" issue after a maximum of sixty (60) days, and the regulations provide that it "shall" issue after sixty (60) days upon request by either party. . . . Only in exceptional circumstances may this requirement be waived. If a plaintiff can state that he waited sixty (60) days, and properly demanded that such notice be issued but that the Commission failed or refused to issue the notice, then a suit might be commenced.

Cox v. United States Gypsum Co., 284 F. Supp. 74, 83 (N.D. Ind. 1968).

55. "To permit such an objection to be raised for the first time as a defense to an action under section 706 violates the principle that objections to procedural irregularities must be made in the course of the administrative proceeding and may not be made for the first time in the courts." Berg, *Title VII: A Three Year's View*, 44 NOTRE DAME LAWYER 311, 321 (1969).

56. 274 F. Supp. 776 (S.D. Ill. 1967).

mission regulation which stated that defective charges could be amended to cure defects.[57] The Seventh Circuit reversed, saying:

> Enforcement of the rights of aggrieved parties resides exclusively in the federal courts. When the statute is thus considered, it is clear that the requirement for verification of charges lodged with the Commission relates solely to the administrative rather than to the judicial features of the statute. We believe that the provision is directory and technical rather than mandatory and substantive.[58]

It is fatal and rightly so for the charging party to fail to name the respondent in the charge before the Commission. Many times the charging party fails to name the union or only names the local and not the international union.[59] In a true sense the respondent's statutory rights are violated because the Commission never had the opportunity to conciliate the dispute. It is not fatal, however, even though the statute directs it, for the Commission to delay serving a copy of the charge upon the respondent until the investigatory stage. The courts while critical of this practice will not permit the delay to destroy the jurisdiction of the plaintiff's claim.[60] The courts also view with great liberality the language of a charge, recognizing that most charges are drawn up by working people unaccustomed to the niceties of language employed by professional people.[61]

Under Title VII the aggrieved party has ninety days from the alleged act of discrimination to file a charge with the Commission. This provision, while appearing to be self-evident, is extremely complex. The difficulty lies not in counting the days but in determining what is a continuing violation. The NLRB's policy that most racial discriminatory acts are continuing in nature gives a tremendous ad-

57. 29 C.F.R. § 1601.11 (1967).
58. Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968).
59. Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968).
60. Pullen v. Otis Elevator Co., 292 F. Supp. 715 (N.D. Ga. 1968).
It is noted that under the statutory scheme, the EEOC investigation and procedure is a supplementary element in plaintiff's action. While it is a procedural and jurisdictional prerequisite [see Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258, 66 L.R.R.M. 2721 (E.D. La. 1967)], it is not a substantive part of plaintiff's right. Therefore, this court is not persuaded that EEOC's administrative delay should be allowed to destroy the jurisdiction of plaintiff's claim, despite EEOC's clear violation of the obvious statutory intent that a defendant be timely apprised of action against him.
Id. at 717. *See also* Local 5, IBEW v. EEOC, 398 F.2d 248 (3d Cir. 1968).
61. In Antonopulous v. Aerojet-General Corp., 70 L.R.R.M. 2666 (E.D. Cal. 1968), the court said:
We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on their way to the courthouse.

vantage to aggrieved parties.[62] They may file at any time. The courts, however, under Title VII relying upon a strained interpretation of the EEOC's general counsel's interpretation of the ninety-day proviso have literally interpreted this section.[63] In general, the courts have disfavored continuing violations.[64] One court in a somewhat puzzling decision held that the discriminatory act was completed at the time of the act, before the employee pursued his remedies under the collective bargaining contract.[65] The correct decision would appear to be to view the act as a continuing violation until the final decision of the arbitrator.

The inherent conservatism of some courts in interpreting Title VII is illustrated in those decisions which restrict litigation only to those charges which the charging party filed before the Commission.[66] This is a disturbing trend and serves to point to the fact that many courts view Title VII as a private statute. The judicial rationale is that a plaintiff who attempts to litigate charges in court which he did not file before the Commission is in the same position as an aggrieved party who never appeared before the Commission because "[t]he EEOC cannot investigate allegations which have not been filed in writing under oath under section 706(a)."[67]

This language is not only the language of technical jargon, but it also carries a false analogy. Investigators and conciliators often discover added instances or dimensions of discrimination and these

62. Steelworkers Local 2401, 52 LAB. REL. REP. 247 (1963).

63. A letter dated August 19, 1966, and released September 14, 1966, stated:

> The 90 day time period within which to file a complaint of discriminatory discharge begins to run upon complete termination of the employment status. This limitation cannot be waived, unless it can be shown that employment status continued pending a final review by management and that the complaint was filed within 90 days of the final review of exhaustion of grievance procedures.

64. Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968).

65. The court concludes that the failure by the company to award the job on March 28, 1967, was not continuing but was a completed act when effected. This is true because complainant's right to file a charge with Equal Employment Opportunity Commission accrued immediately, without regard to union contract, grievance procedure, or any unofficial reconsideration by management. There is no known authority to the effect that a failure to rectify an alleged unlawful act converts it into a continuing transaction or suspends the 90-day period.

Culpepper v. Reynolds Metals Co., 70 L.R.R.M. 2360, 2362 (N.D. Ga. 1969).

66. In Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968), the court said:

> This passage (Title 42 U.S.C. § 2000 e–5(a)) clearly indicates that the commission is confined to the charge that was filed by the charging party and is not given carte blanche to investigate all activities of the respondent. Thus, here where several of the plaintiffs have limited their charge against the company to a claim of discriminatory layoffs, both the commission and the court are limited to a consideration of that charge.

Id. at 79.

67. Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199, 204 (C.D. Cal. 1968). In King v. Georgia Power Co., 69 L.R.R.M. 2094 (N.D. Ga. 1968), the court took a more liberal view. It held that an employee bringing a civil rights suit against his employer is entitled to litigate all issues he had standing to raise before the EEOC not merely the issues he did raise.

acts or patterns of discrimination are made part of the conciliation agreement. If, as often happens, the respondent objects to the incorporation of these provisions in the conciliation agreement, he is informed that a future Commissioner's charge will only succeed in lengthening the process. The point here is that there is a profound difference between the status of a person who never appeared before the Commission and one who has appeared but who failed to incorporate all the discriminatory acts in his charge. In the latter instance, the Commission had an opportunity to conciliate.

The policy of the Act is not furthered by the courts taking this restrictive and legalized view of discrimination. If, as the Supreme Court has said, the aggrieved person is a "private attorney general" who alone possesses the key to the courtroom door, then it seems that he should be able to use that key to open not only some doors in the factory but all such doors. The charges filed with the Commission should not be regarded as static, their range being determined by the wrong to the charging party, but should be viewed as public charges expanding with the range of investigation and conciliation. This policy causes no harm to the respondent, for he is aware of his discriminatory practices and had an opportunity to conciliate them. Little is to be gained by the court's private wrong approach, except to invite a flood of repetitious litigation initiated by other charging parties or the Commission.

Another procedural problem of the same magnitude is also beginning to assume a private law shape. This is the problem of "election of remedies." In many instances where the union has a collective bargaining agreement with a company, a single act of discrimination may give rise to two remedies: (1) a contractual right under the grievance procedure and (2) a statutory right under Title VII of the Civil Rights Act.

The federal courts agree that the charging party has no duty to exhaust his contractual rights prior to filing a charge with the Commission.[68] Beyond consensus on this point, however, little else is clear. In *Bowe v. Colgate-Palmolive Co.*,[69] the District Court, at the beginning of trial, compelled the plaintiff to elect to proceed either under Title VII or under the grievance procedure of the collective bargaining agreement. The court reasoned that the employment of both remedies would unduly harass the company. Other courts have refused to force plaintiffs to make an election initially but hold that

68. Dent v. St. Louis-San Francisco Ry., 265 F. Supp. 56 (N.D. Ala. 1967); Reese v. Atlantic Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967).
69. 272 F. Supp. 332 (S.D. Ind. 1967).

a final decision or relief in one forum precludes a suit or relief in the other forum.[70]

These decisions by the courts are not so important for what they say, but for what they reveal. And they reveal that many federal courts are viewing discrimination as a private wrong. On the surface this judicial doctrine of election of remedies has a glittering appeal. The plaintiff has only suffered one wrong and has had his day in court or before an arbitrator. It would be understandable how the court formulated such a doctrine, that is, if there were only two parties involved. But what the courts have overlooked is that there are three parties — the participants and the public.

There is no guarantee that an arbitrator will consider plaintiff's statutory rights. In fact, there is every guarantee that he will ignore them, for it is his function to focus exclusively on the contract — the intent of the parties — without resort to any interests outside the factory community. The issues before the arbitrator and the Commission are completely different.[71] Even if the arbitrator grants relief to the plaintiff, this relief is only predicated upon a violation of a private right, not a public right. The public interest in the prohibition of discrimination is still unsatisfied. Expiation still has not been made.

If the courts continue to insist that a charging party waives his statutory right by going to arbitration, they will be defying not only the law of labor relations, the policy of Title VII, but also possibly interfering with constitutional rights. In the law of labor relations the policy of concurrent jurisdiction prevails; the NLRB and the courts may overrule the decision of an arbitrator.[72] Also, the policy of Title VII would be frustrated — judicial enforcement — because under the courts' rationale it would be possible for employers and labor unions through their collective bargaining agreements to oust

70. Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968); Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968).

71. In United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147 (5th Cir. 1964), a case arising under the National Labor Relations Act, the court said:

> [T]he employer for the most part labors under the fallacy of assuming that by the Board proceeding and arbitration, the Union is seeking to enforce a single right in two forums. Actually, there are quite separate rights involving separate legal and factual issues. In the arbitration proceeding, the Union is seeking to enforce the right of employees not to be discharged "unjustly." On the other hand, what is at issue in the Labor Board proceeding is the statutory right of employees. . . . [O]nce the complaint is issued the Board proceeding takes on a public character in which remedies are devised to vindicate the policies of the Labor Act, not afford private relief to employees.

Id. at 152.

72. In Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964), the court said:

> Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301. . . . The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.

the courts of their jurisdiction. In the recent case of *Dewey v. Reynolds Metals Co.*,[73] the District Court saw the constitutional dangers of the doctrine of election of remedies. In this case, an employee was discharged for refusing to work on Sundays because of religious reasons. He protested, chose the grievance procedure and the arbitrator found against him. The court rejected respondent's election of remedy defense. It held that the arbitration process is public in nature.

> Since the arbitration tribunal or arbitration proceedings are in many instances a substitute for traditional judicial remedies, it follows that the rules of due process and other constitutional protections must extend to the substitute proceedings lest the courts, through approval of arbitration agreements in arbitration proceedings, support proceedings which result in the deprivation of statutory and constitutional rights. If this grievance — arbitration system, which exists as a result of court approval, is permitted to dispose of disputes involving substantial rights without heeding constitutional protections, the courts will find themselves supporting and giving credence to decisions, which if rendered by the courts would be a violation of the free exercise of religion clause of the First Amendment or some other essential constitutional protection.[74]

The right to work, to be free from invidious discrimination, is too important a right to be left to arbitrators in the private arena. If the Act is to be effectively enforced plaintiff should be entitled to pursue both contractual and statutory remedies.

3. Class Suits

Early in the history of the Act, the courts decided that a plaintiff could bring a class action because Title VII protects both private and public interests.[75]

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. . . . But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of a discriminatory policy threatens the entire class.[76]

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73. 69 L.R.R.M. 2601 (W.D. Mich. 1968).

74. Dewey v. Reynolds Metals Co., 69 L.R.R.M. 2601, 2604 (N.D. Mich. 1968). At page 2603, the court emphasized there was nothing inconsistent in the two remedies.

> It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law. . . . Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process, as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action. . . . When rights of this type are involved, they outweigh the interest of the company-defendant in avoiding the inconvenience and expense of multiple actions.

75. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

76. Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

The Fifth Circuit in *Oatis v. Crown Zellerbach Corp.*,[77] elaborated upon the requirements of a class action. It stated three conditions.

> First the class action must . . . meet the requirements of Rule 23(a) and (b)(2). Next, the issues that may be raised by plaintiff in such a class action are those issues that he has standing to raise (i.e., the issues as to which he is aggrieved, see §706(a) supra) and that he has raised in the charge filed with the EEOC pursuant to §706(a).[78]

The third requirement, that the plaintiff must previously have raised each issue before the Commission, has given much trouble. The Fifth Circuit itself has liberally interpreted this requirement. Realizing that charging parties usually prepare their own charges, the court said: "All that is required is that it give sufficient information to enable EEOC to see what the grievance is about."[79] This problem, however, of whether a class action can expand the scope of the original charge is far from settled. In *Colbert v. H. K. Corp.*,[80] plaintiff charged that the company refused to hire her because of her race. In a class action suit against the company, she also alleged that the company discriminated against its employees in job discrimination and classification. The court dismissed the class action because as a non-employee she was not a member of the employee class. The court said:

> Moreover, the members of the class, as opposed to the representative of the class who has filed a complaint with the EEOC, must proceed within the periphery of the issues which the plaintiff could assert. Thus, it is clear that this plaintiff cannot represent the 20 Negro employees of defendant who are allegedly discriminated against in terms of job promotion and job classification. Moreover, only that aspect of the case dealing with the question of discriminatory practices in hiring and seeking injunctive relief supports a class action.[81]

In *Carr v. Conoco Plastics, Inc.*,[82] another District Court took a different view. In this case Negro applicants for employment brought a class action alleging that the employer not only denied them employment because of their race but also that he maintained within the plant segregated jobs and segregated facilities. The court dismissed

77. 398 F.2d 496 (5th Cir. 1968).
78. *Id.* at 499.
79. Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968).
80. 70 L.R.R.M. 2638 (N.D. Ga. 1968).
81. *Id.* at 2639.
82. 70 L.R.R.M. 2632 (N.D. Miss. 1969).

respondent's contention that the plaintiffs could not maintain a class action because they were not members of the class. The court said:

> It is foolhardy to say that once plaintiffs have removed racial discrimination practices at the door, they are required to start anew in order to remove those that exist on the inside. Such a practice would result in a multiplicity of suits and a waste of time and money for all interested parties.[83]

Again, if the Act is a public act and if the charging party is a "private attorney general," there is no rational basis for the courts to limit litigation in a class suit to the charges the plaintiff raised before the Commission. The criterion should not be the actual impact of the discrimination upon the plaintiff but the potential impact of the discrimination.

Another important procedural problem has arisen in respect to class actions — that of the right to damages by members of the class who did not file a charge with the EEOC. Although the courts acknowledge that for injunction purposes, a member of the class need not have filed a charge with the EEOC, they feel that his failure to file a charge with the EEOC prevents him from obtaining relief in the form of back pay or damages.[84] The reasoning behind this doctrine is twofold: (1) the courts feel that the granting of monetary relief would encourage circumvention of the Act by discouraging recourse to the Commission in the first instance, and (2) they regard damages or back pay as a private remedy, not a public one.

Both of these arguments are baseless. To compel each member of the class to bring separate suits puts a premium upon the private aspects of the Act, and would result in a multiplicity of suits. To view back pay as a private remedy is at odds with the NLRB's long experience in this area. The Board has always looked upon the awarding of back pay not as a private remedy but as a public remedy necessary to effectuate the purposes of the Act.[85] Under the broad powers in section 706(a) the courts have the power to award back pay. This ability to award it is in accordance with the concept that the charging party is an attorney general who sues to vindicate not only his personal rights but the rights of all those adversely affected by discriminatory practices.[86]

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83. *Id.* at 2637.

84. Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

85. Nathanson v. NLRB, 344 U.S. 25 (1952); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

86. In Local 186 v. Minnesota Mining & Mfg. Co., 71 L.R.R.M. 2427 (N.D. Ind. 1969), a case in which the writer served as a conciliator, the District Court held that

A class action suit means little if the courts deny damages to members of a class. This policy would sap class actions of most of their strength. The Civil Rights Act is a remedial statute and all parties who have been injured should be made whole. It is difficult not to suspect that the courts are not being overly fearful of large damage claims without adequate consideration that the threat of such claims would promote private settlements — the policy of the Act.

On the whole the response of the federal courts to the procedural aspects of Title VII has been encouraging. Despite some disconcerting decisions by some district courts emphasizing the private nature of Title VII, there is evidence in such opinions as *Newman* and *Jenkins* that the Supreme Court and the circuit courts will accentuate the public nature of the Act.

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all non-charging and non-exhausting class members were entitled to damages. The court stressing the public nature of the Act stated that it had inherent power to award damages:

> Finally, even the defendant implicitly concedes that some of the cases it relies upon have properly concluded that an award of relief in the form of reinstatement and back pay is inherently a matter of judicial discretion. That other courts have chosen to exercise this discretion by refusing such relief is not sufficient reason, by itself, for this court to stay its hand if the surrounding circumstances warrant judicial relief. . . .

Id. at 2436.

Earlier the court stated:

> [T]he limitation here urged by defendant on possible relief for the alleged sexual discrimination policy in defendant's plant seems particularly inconsistent with the public nature of such suits, as expressed by the United States Supreme Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), and further amplified by the Fifth Circuit in Jenkins v. United Gas Corp., 400 F.2d 28, 69 L.R.R.M. 2152 (5th Cir. 1968).
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> * * *
>
> It seems abundantly clear that the public interest emphasized above is and should be served just as much, if not more, by relief through awards for back wages and reinstatement to obscure class members as by the issuance of an injunction.
>
> Moreover, the limitations urged here by defendant seem even more inconsistent with the reasoning of Oatis v. Crown Zellerbach and its progeny; to wit, that it is wasteful, if not vain, for all employees with the same grievance to file charges with the Commission. If that reasoning be persuasive, and the court finds that it is, then back wages and reinstatement, if appropriate, should be awarded without regard to which employee in fact filed.

Id. at 2434–35.