Title VII in the Federal Courts - Private or Public Law - Part II

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IN THE FIRST PORTION of this article the procedural aspects of Title VII were examined and it was concluded that the federal courts on the whole were interpreting these provisions in a public law fashion. In this, the second part, the substantive aspects of Title VII will be examined with a view of determining whether the federal courts are interpreting them in a private or public law spirit.

The critical problem, at the outset, is to discover the meaning of discrimination as used by Congress in Title VII — whether Congress intended it to have a private or public law meaning. The problem is complex. Nowhere in Title VII has Congress defined discrimination. In four subsections of section 703, it has proclaimed that minority groups shall not be discriminated against without explaining what discrimination is or when or how it takes place. Also, to add to the confusion, Congress in six subsections of section 703 has proclaimed that institutions may discriminate under certain conditions. The guidelines for proscribed and prescribed conduct are thin and shadowy.

The measure of success in protecting the rights assured by Title VII will turn on the definition of discrimination and the standards required for proof of discrimination. It is to the federal courts to whom we must look for light in this area, for it is they who must define
discrimination and establish the standards of proof. It is they who will ultimately decide whether discrimination is a private or public wrong.

There are four distinct types of discrimination: (1) any differentiation or distinction; (2) any differentiation or distinction by a person in his individual role motivated by race, sex, color, religion or national origin; (3) any invidious distinction or differentiation by an institution motivated by race, color, sex, religion or national origin; and (4) any arbitrary differentiation or distinction by an institution without sufficient social reasons or interests.

Discrimination like power is a neutral term. In certain circumstances and under certain conditions, institutions not only have the right to discriminate but a duty to do so or our institutions could not function. The more skilled employee is entitled to greater rewards than the unskilled. Title VII does not prohibit all discrimination but only discrimination for the wrong reasons. It is obvious that the first type of discrimination is much too broad and inflexible, for it would prohibit discrimination for justifiable and meritorious reasons.

The second type of discrimination is also not prohibited by the Act. An individual has the right to discriminate in his personal relationships. So also, do such private groups as religious organizations. No matter how offensive we might personally find these practices, the social interest in the individual's right of personality — his freedom of choice and right of association — outweigh the social interest of being free from discriminatory treatment. In the practical order there is little the law can accomplish in this area since the elimination of racial prejudice is more the concern of the education and religious processes. In this private domain of the individual and his conscience the law should stay out. It is only when the person moves from the private domain to the public or quasi-public domain, performing public or quasi-public functions — the world of commerce — that the prohibitions of the law begin to apply.  


Under this analysis, the legal situation with respect to each business would turn upon its own facts. I would disagree completely with Dean Countryman that there is a constitutional right not to be discriminated against on a racial basis in employment as a domestic in a private home. I would concur that state action is present, but I would insist that the personal right to discriminate in such an instance is not a case of discrimination by the public, but is a case simply of the public enforcing private discrimination. I would insist that the church or religious group have every right to discriminate on a racial or religious basis, and I would not at all view them as the same as the labor union, which is fulfilling a public function. Yet, the state action analysis would seem to be precisely applicable in each case. Rather the positive interest in allowing private individuals to discriminate, which is a function of their individuality, would be controlling in the case of the church or other similar groups, and would not be controlling in the case of the labor union.
The third type of discrimination is based upon the politics of the mind. It views discrimination as a private wrong — a bilateral and private affair between the concerned parties. It denies or refuses to see any social connection between the alleged discriminatory act and adverse effects upon other minority groups and society. Any act or institutional practice which produced or perpetuated discrimination would be permissible if the plaintiff could not produce evidence of a specific intent to discriminate because of race, color, religion, sex, or national origin. This private law concept of discrimination, commonly called the hostile motive theory, is principally seen today in employer and union defenses that they are not discriminating because they are treating whites and blacks equally. This theory tends to overlook the fact that equal treatment which produces unequal effects may still be discrimination, even though there may be no evidence of a specific intent to discriminate.

The fourth type of discrimination, commonly called the justification or affirmative duty theory, defines discrimination as a public wrong. Hostile intent is considered irrelevant; the only intent required is that of intending the act. This theory focuses principally upon the effect of the act upon the target individual and group. The respondent under this theory intends to discriminate when he is aware, or should be aware, that his act or institutional practice adversely affects minority employment opportunities.

Discrimination in employment, according to this theory, is more than a private affair between the institution and its victim; it involves more than an injury to the individual's private interest and his family interest. It not only freezes the aspirations and rights of the minority group to which he belongs, but it interferes with the rights of all — the public, its social interest in productivity, and human dignity. It tears at the inner fabric of our entire society.

The concept that one should be socially responsible for the adverse racial consequences of his act, it is advocated, should be incorporated into the doctrines of the legal process. The immunity ritual of searching for hidden and secret intentions should be abandoned. The plaintiff to establish a prima facie case must show only: (1) the adverse effects of discrimination upon himself and (2) connect the discriminatory act to the fact that he is a member of a minority group. To defeat this prima facie case, the respondent must demonstrate that he fulfilled three affirmative obligations.

First, the respondent must justify his act of discrimination by coming forward with clear and convincing business reasons or a social reason which vindicates an important social policy. If he comes for-
ward with a sufficient institutional (business necessity) or social reason (a higher duty to the community) he overcomes the prima facie case; if he comes forward with an insufficient reason, the inference will be arbitrariness and discrimination. An economic reason, such as business inconvenience, loss of customers, loss of profit, etc., will not suffice. It is not the weight the respondent attaches to his reasons which determines the legality or illegality of his conduct. It is the weight which society attaches to the reason. And under Title VII, society through Congress has placed a high social weight on the right to be free from discrimination while assigning a much lower weight to most economic reasons.

The possession of a high institutional or social reason, it is submitted, should not be enough to justify an economic invasion of an individual's personality. At most, a sufficient reason should be regarded as a conditional privilege which can be lost if the respondent fails to perform the two further affirmative duties. He should be compelled to demonstrate that he made an attempt to erase any possible doubt concerning the nature of his action, not only to the plaintiff but to interested minority groups. An adverse act may be subject to many interpretations, and it is not until the real non-discriminatory reasons are revealed that these effects may be erased. In the law of labor relations for instance, an employer armed with sufficient reasons commits an unfair labor practice if he discharges an ardent union supporter without conveying the reasons to the group.\(^5\) The conveyance of sufficient reasons to the individual may satisfy his interest in being free from discrimination, but it does not satisfy the group's or the public's interest.

The respondent, therefore, if he is to justify his conduct must not only provide a highly sufficient reason and convey that reason to interested parties, but also he must fulfill the next affirmative duty and demonstrate that he had no other alternatives. If, for instance, he argues that business necessity dictates that Negroes start at the bottom of the progression line, he must be able to demonstrate that the progression line is based on interrelated skills and that he has no power to pass upon the qualifications of a successful bidder.\(^6\)

If the courts, on the other hand, adopt the hostile motive test approach by insisting that the charging party must prove that the employer or union had the specific intent to discriminate against him because of race, etc., there is little hope that Title VII will add any

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5. See NLRB v. McCatron, 35 L.R.R.M. 2012 (9th Cir. 1954). Under section 8(a)(1), the employer's reason for the discharge is immaterial. It is only necessary to show that the discharge interfered with the employees' right to engage in concerted activities. BNA, LRX § 5(a).

dimension of freedom to our society. Such a private law definition of discrimination resting upon the fault or culpability of the respondent would make the Act virtually unenforceable. It would place an insuperable burden on the charging party if he had to prove specific intent and to rebut all of respondent’s possible justifications for his conduct, especially in view of the fact that the respondent has these facts peculiarly within his knowledge. There is no reason why the charging party should have to prove intent. Title VII is not a criminal statute designed to penalize respondents for entertaining bad thoughts about minority groups, but a regulatory statute aimed at controlling anti-social conduct.

The quest for intent is a quest for futility in a pluralist society dominated by powerful clashing groups. “Groups have no wills and cannot therefore be responsible persons.”7 If the courts privatize the concept of discrimination, the result will be a move toward institutional immunity for employer, labor unions and employment agencies. Institutions will discriminate at will behind these legal shelters. The result will be a re-enactment of the tragic drama in labor relations wherein labor unions and employers continue to obtain their illegal objectives by hiding their real intentions behind legal masks.8 If Title VII is to be an effective statute, what is required is a public law definition of discrimination, a test of liability based upon institutional responsibility which probes not into the psychological use of power but one which regulates the effect of institutional power. The problem, in essence, is not one of discovering group intent but one of fixing institutional responsibility. This involves speaking in terms of the nature of the interest harmed and the nature of the institutional and social interest offered as a justification of such harm.

Proponents of the hostile motive theory argue that sections 706(g)9 and 70710 explicitly require proof of an intent to discriminate. The legislative history demonstrates, however, that the only intent required is a desire to intend the effects of discrimination. Congress was well aware of the fact that most employers do not discriminate against minorities because of personal reasons but rather because of economic reasons. The effect on minority groups, however, is the same. Late in the Senate debate the term “intent” was incorporated in the bill. It was accepted because the sponsors of the bill considered the addition to be a mere surplusage, a clarifying change.11 Senator McClellan

7. L. DUCUIT, LAW IN THE MODERN STATE 206 (1919).
made an effort to incorporate the hostile motive theory by attempting to add the word "solely" in front of each phrase of section 703 so that to prove discrimination it would be necessary to show that discrimination had occurred "solely" because of race. This amendment was defeated.\textsuperscript{12}

The changing meaning of discrimination from a private law concept to a public law concept is nowhere better reflected than in the labor law decisions of the United States Supreme Court. At first, in section 8(a)(3) discharge cases, the Court demanded specific evidence of an intent to discriminate because of unionization, even though no mention is made of the term discrimination in the National Labor Relations Act.\textsuperscript{13} During the last few years, however, after decades of struggling with the semantics of the hostile motive theory, the Supreme Court adopted the affirmative duty test. It held that "intention" under the Act is satisfied if the employer or union was aware or should have been aware of the adverse results of discrimination.\textsuperscript{14} This awareness of the adverse effects established a prima facie case which made it incumbent for the respondent to rebut by offering a weighty social reason. The definition of discrimination, the Court said, lies in this balancing of private and social interests, not in hidden interior motives which at best were fictive formalities. In an opinion emphasizing the social effect of and public nature of discrimination, the Court said:

Intent may be founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his action, and if he fails to explain away, to justify, or to characterize his actions as something different than they appear on their face, an unfair labor practice is made out.\textsuperscript{15}

Title VII and state fair employment laws have been the law of the land for some years, yet the plight of blacks is still grave. Negro unemployment is almost double that of whites. The Negro average income is much below the white average.\textsuperscript{16} The principal reason lies in the administration of the law. Great strides have been taken in eliminating obvious and overt forms of discrimination, but little has been accomplished in eliminating covert forms prevalent today. Everywhere, employers and labor unions are discriminating behind legal

\begin{itemize}
  \item \textsuperscript{12} H.R. 7152, Amend. No. 507, 110 Cong. Rec. 8194 (1964).
  \item \textsuperscript{13} Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).
  \item \textsuperscript{14} See NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).
  \item \textsuperscript{15} NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).
  \item \textsuperscript{16} U.S. Dept of Labor, The Negroes in the United States: Their Economic and Social Situation 20-21 (1966).
\end{itemize}
shelters of institutional immunity. The private law test of probing for secret states of mind has broken down and is completely unworkable in regulating groups practicing covert discrimination. We require a new test which will penetrate into group disguises, one which unveils institutional practices in hiring and promotion policies which are phrased in racially neutral terms. In short, what is required is the public law definition of discrimination. The purpose of this article is to examine the decisions of the federal courts in the areas of seniority, testing, and sex discrimination in order to determine whether the courts are applying a private or public law definition of discrimination under Title VII of the Civil Rights Act.

II. Seniority

For years Negroes have been denied first class citizenship within the industrial community; second class seniority systems have flourished which have relegated them to the status of second class citizens. Recently, employers and labor unions under legal stress from executive orders and statutes have abandoned overt acts of discrimination. Little has been accomplished, however, as both of these groups have only gone underground and covertly continue to deny the Negro his promotion and security opportunities. Most American Negroes are still disenfranchised.

On the surface the problem of determining the validity or invalidity of seniority systems is a complex matter. Most seniority system charters read like the constitutions of South American States; high in pronouncement of equitable rights but low in enforcement of them. It is necessary to discover their operational effects in order to determine their validity.

Seniority is a system established by the collective bargaining agreement which determines priorities among employees in the allocation of promotional opportunity, layoffs, shift preferences, and other economic advantages. When a vacancy occurs, for instance, the senior man among the competing workers will be preferred if he is qualified to perform the job. Length of service with the company is usually the chief determining element. There are many types of seniority.

17. Exec. Order No. 11, 246, 3 C.F.R. 339, 340 (1964-65 Comp.), states that government contractors and subcontractors must sign assurance agreements that they "will not discriminate against any employee or applicant for employment because of race" and that "he will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race. . . ."
such as plant seniority, departmental seniority, job seniority, and progression line seniority. 20 Seniority systems, although of some benefit to employers and labor unions, are of primary benefit to employees. They afford the worker the status of citizenship within the industrial community, an enclave of privacy where he can assess his private rights and predict his future ones, free from the arbitrary intrusion of management and his union. The quest for this form of economic autonomy is one of the worker’s chief objectives. 21

Despite the importance which the worker attaches to the security aspects of his seniority rights, there is nothing sacred about them as far as the legal process is concerned. What the union and the company have given, the union and the company may take away. Legally, these rights are not considered as vested property rights but only as conditional contractual rights. 22 At most, they are viewed as economic expectancies which the union may bargain away at any time. Any interference or amendment of these seniority rights through the collective bargaining process, therefore, does not interfere with the rights of the company, the union, or society as much as they interfere with the expectancies of the employee.

Title VII, in sections 703(a) and (c), prohibits employers and unions from discriminating in respect to workers’ seniority rights. This right to be free from discrimination in the enjoyment of seniority rights, however, is not absolute. Section 703(h) carves out an institutional immunity:

Notwithstanding any other provisions of this subchapter, it shall not be 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 . . . provided that such differences are not the


The legal process looks upon the new property, group citizenship, not as a vested right but a conditional right, largely a matter of group largess. What the group wants, the group gets. What the group gives, the group can take away. Critical job interests such as seniority and the job itself, are subject to divestment in the name of majority rights or industrial peace. A worker may leave his family and home in the morning secure in the knowledge of his rights under the collective bargaining agreement, looking forward to the financial benefits of retirement within a couple of years, and return home that evening without a job and no prospect of future financial benefits. If he decides to appeal in order to recoup his life earnings, he may find his union uncooperative or if it is cooperative he soon discovers that he is pitted against a rigged arbitration process dominated by the group. The legal process is deaf to his pleas that the two groups stole his property.

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result of an intention to discriminate because of race, color, religion, sex or national origin. . . 23

The question, of course, becomes — what is a bona fide seniority system? Will the courts insist upon proofs of specific intent or will they infer intent by results and say an institution intends the results which flow from its act? If the courts adopt the restrictive private law approach requiring the plaintiff to offer evidence of respondent’s evil intentions, little change will be made in most of the nation’s seniority systems. If the courts adopt the broad public law approach, which seems to be incorporated in section 703(h), requiring the respondent to justify any adverse racial effect flowing from his seniority system, revolutionary changes in most seniority systems can be expected to occur.

The wording of the Act seems to support a public law interpretation. Sections 703(a) (2) 24 and 703(c) (2), 25 which prohibit unlawful classifications, speak in terms of a functional test which looks to results and not in terms of a conceptual test which looks to private culpability. The phrases “tend to deprive” or “otherwise adversely affect” are phrases emphasizing consequences. Although it is true that the remedial provision, section 706(g), 26 refers to “intent,” the legislative history supports the conclusion that the thrust of this “intent” was directed to a volitional, not to an anti-racial act. The trend so far seems to be in the direction of inferring intent from the consequences of the act.

On July 2, 1965, when Title VII went into effect, most employers and labor unions merged black and white seniority lists, opening lines of progression to all classes, and thus felt that they were in compliance with the Act. They soon discovered, however, that this was not enough. A host of new and complex problems erupted which could not be contained within the confines of the traditional collective

24. Civil Rights Act of 1964, 42 U.S.C. § 2000e — 2(a) (1964), states that it shall be unlawful for an employer to:
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin; or
   (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
26. Civil Rights Act of 1964, 42 U.S.C. § 2000e — 5(g) (1964), states: “If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . “
bargaining system established by management and the labor unions. The Negro, deprived for generations of his seniority rights by discrimination, now demanded his equitable position in the seniority line, either beside or ahead of his white brothers, depending upon the length of time he had been with the company. Some Negro incumbents with greater plant seniority than junior whites claimed the right to displace those whites in their present job;\(^27\) others claimed at least the right to compute their time on black jobs in bidding for future vacancies.\(^28\) Some critics even maintained that non-incumbent Negroes, those who had been denied employment because of race, or even those who had been discouraged from applying for employment because of race, were entitled to super-seniority, retroactive to the date of discrimination.\(^29\) It was soon evident to all that Congress, in passing Title VII with its seniority provisions, had succeeded not in answering questions, but only in raising them.

Another problem of like magnitude stems from the seniority provisions of Title VII. Over the years many Negroes built up a sizable amount of job security and obtained a ceiling wage on their black jobs. The opening up of white lines of progression did not benefit them, for transferring to an entry level white job usually meant, according to collective bargaining seniority rules, that they would have to suffer a pay cut and lose their plant seniority. They claimed that the visitation of such economic sanctions constituted a discriminatory interference with the enjoyment of their seniority rights.

A typical case illustrating the present effects of past discrimination is as follows. Before 1965 an employer maintained two separate lines of progression; one for whites and one for blacks. The Negro employee was historically excluded from the low level or entry jobs in the white progression line, usually being confined to a labor pool. After 1965, however, he was permitted to enter the white line but, in accordance with separate departmental seniority rules, he had to assume the inferior status of a junior man subordinate to junior white employees who worked in the white department longer than he, even though he had greater plant seniority than they. Moreover, at times, it even turned out he had trained these whites at their jobs. The advocates of the "rightful place"\(^80\) theory make no claims to a

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\(^{27}\) Note, *Title VII, Seniority Discrimination and the Incumbent Negro* 80 *Harv. L. Rev.* 1260, 1274 (1967). This note describes such a theory as the "freedom now" theory.

\(^{28}\) *Id.* at 1268. The note describes this theory as the "rightful place" theory.


\(^{30}\) See notes 27, 28 supra.
white incumbent’s job, but rather, maintain that once a vacancy arises in a formerly white department, a successful qualified Negro bidder should be able to carry over his plant or employment seniority to the job even though this leapfrogging might interfere with the expectancies of some white employees in that department. By preferring a white employee with lesser years of service in the plant to the senior Negro employee, its advocates argue, the employer has a present intention to discriminate because he is applying a prior discriminatory standard — the length of service in the department from which Negroes were historically excluded. But for that historical discrimination, the argument is, the Negro would have been in his rightful place in the seniority line. By continuing to apply the prior 1965 discriminatory standard the employer and labor union are perpetuating past discrimination and hence have a present intention to interfere with Negro promotional opportunities.

The proponents of the hostile motive theory reject this interpretation of the Act. Their arguments are based upon two propositions. First, they aver the employer and the labor union by merging their seniority rosters and opening up white jobs to blacks unequivocally demonstrate their good faith and hence have no present intention to discriminate. Equal treatment to members of both races in no way can imply an intention to discriminate. Second, the legislative history conclusively demonstrates that the Act was intended to be prospective, not retrospective. While separate seniority rosters for Negroes and whites are illegal, the seniority rights of all whites who entered the departmental seniority system earlier are protected regardless of its effects. The incumbent white employees are untouchables in respect to their job and seniority rights. In support of their contention that the legislative history of the Act supports their argument, they refer to the interpretative memorandum of Senators Clark and Case:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force when the Title comes into effect the employer’s obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged — or indeed, permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier.31

It is difficult to accept the argument that equal treatment of white and black workers demonstrates that the union or employer has no intent to discriminate. It overlooks the reason the Negro has little or no departmental seniority — the employer's past policy of excluding him from white progression lines. By preventing him in the past from acquiring such status and adopting a policy in the present built upon that inequality of status is perpetuating past discrimination. Equal treatment of unequals equals inequality.

The assertion that the Clark and Case interpretative memorandum reflects congressional intent that white workers be considered untouchables also has no legal standing. First, the memorandum if it has any effect at all, only applies to formerly white-only plants, not to formerly segregated plants. The legislative history clearly demonstrates that Congress was only concerned with protecting the present job of white employees, not future jobs which open up when vacancies occur. Departmental seniority unlike plant seniority was not mentioned in the debates. While it is true that Congress had no intention of permitting blacks even with greater plant seniority from displacing junior whites in their present jobs, there is nothing to indicate that blacks may not carry over their plant seniority in bidding for future vacancies. Second, section 703(h), incorporating the public law affirmative duty test, which does not view white employees as untouchables, was added to Title VII after the Clark and Case memorandum. Since this section contains the only language on seniority in the Act, it must take precedence over the legislative language.

It is also difficult to sympathize with the complaints of the white incumbent employees who allege interference with their seniority rights when successful Negro bidders with greater employment service leapfrog over them in departmental seniority. There is little public interest in this type of complaint especially when one considers that the interference is only with tainted expectations. These seniority rights are the fruits of past discrimination and can hardly be considered legitimate claims.


Several facts are evident from the legislative history. First, it contains no express statement about departmental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority. Second, 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.
Court Decisions

Most of the federal courts have taken a public law approach on seniority problems, looking to the adverse effects of the seniority system and compelling the respondent to come forward with convincing business or social reasons to justify the discrimination. The aristocratic departmental rules, a heritage of the past, are being challenged, and everywhere discriminatory employers and labor unions are on the defensive.

In Whitfield v. Steelworkers Local 2708, the employer and labor union for years operated under a discriminatory seniority system which distinguished between white and Negro lines of progression. The white line led to the highly coveted skilled jobs; the black line led to a dead end. In 1956, the parties changed the collective bargaining agreement to permit Negroes to bid for jobs in the white progression line, but a successful bidder transferring into the white line went to the bottom of the departmental seniority roster. The Negro's principal complaint was that a transfer to a white line not only entailed a pay cut in many instances, but also a loss of plant seniority in the computation of their departmental seniority. The Fifth Circuit found no violation of a union's duty of fair representation even though the Negroes were adversely affected by the new collective bargaining agreement. The court noted that the white line consisted of a group of inter-related jobs, each job in a hierarchy requiring experience in a prior dependent job. In balancing the adverse effects of discrimination on Negroes the court concluded that the employer's reason — business necessity — justified the present invasion of minority rights.

Such a system was conceived out of business necessity, not out of racial discrimination. An employee without the proper training and with no proof of potential ability to rise higher, cannot expect to start in the middle of the ladder, regardless of plant seniority.

Although the language in this decision leaves much to be desired, it is difficult to quarrel with the result. The social interest in the steel

33. 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).
34. Id. at 550.
35. Some of the language seems to stress good intentions. For example, the court said:

We attach particular importance to the good faith of the parties in working toward a fair solution. It seems to us that the Union and the Company ... acknowledged that in the past Negroes were treated unfairly in not having an opportunity to qualify for skilled jobs. ... This is the product of the past. We cannot turn back the clock.

Id. at 551.
mill's continued existence outweighs the social interest of being free from discrimination. Whatever the reason for the discrimination in the past, the irrefutable fact stands out that the Negro employees were incapable of performing the skilled jobs. The business justification of institutional existence, not institutional inconvenience, should take precedence over the right to be free from discrimination.

Substantially the same fact pattern appeared in Quarles v. Philip Morris, Inc.\(^{36}\) and in United States v. Papermakers Local 189.\(^{37}\) In Quarles, Philip Morris Company had, over the years, followed a policy of overt discrimination at its Richmond plant, establishing separate departments for whites and blacks. On January 1, 1966, it ceased overt discrimination by permitting workers in the all black pre-fabrication department to transfer to the all white departments. The employees entered the white department, however, as new employees at the bottom rung of the progression ladder. Quarles, a black employee in the pre-fabrication department, was prevented because of economic sanctions from transferring to the position of truck driver, a higher rung position in a white department. The district court found that the company's seniority system discriminated against minorities because it penalized those who transferred to the white department by depriving them of their plant seniority and in some instances compelling them to take a cut in pay. Like the Whitfield case, the court found that the company's seniority system had an adverse effect upon Quarles and members of his class, but unlike the Whitfield case it found that the company had not fulfilled its affirmative duty of justifying the discrimination by supplying any business necessity. Section 703(h), the court said, required the employer to justify any seniority system that had an adverse effect on minorities.\(^{38}\) Substantially the same result was reached in the Papermakers Local 189 case.

38. The court stated:

It is not the job seniority system in and of itself, but rather the continuous discrimination practiced by the defendants within the framework of that system, which now requires that the system be abolished in this case. Within the framework of a "job seniority" system, Negro employees have been forced into the interior lines of progression and the less desirable jobs. The defendants claim that active discrimination against Negroes has now ceased. But the fact that Negroes who, under the present liberalized policy, have only recently entered formerly white progression lines are forced to compete with white employees for promotion on the basis of "job seniority" continues, in each case of such competition, the discriminatory effect of the long history of the relegation of those Negroes to other, less desirable lines.

*Id.* at 44.
In the classic case of *Crown Zellerbach* — the *Papermakers Local 189* case on appeal — decided last August, the Fifth Circuit in an exhaustive and excellent opinion confirmed the trend of the federal courts in applying the public law affirmative duty test. The case involved a company which refused to count black time worked in the plant under its union seniority system — the same problem encountered in the other cases. It had a long history, dating back to 1964, the date the company ceased overt discrimination by adopting a policy of permitting blacks to enter white progression lines. In 1965, after Title VII was passed, the Equal Employment Opportunity Commission intervened but only succeeded in obtaining minor modifications in company policy. In 1967 the Office of Federal Contract Compliance (OFCC), threatening to terminate future government contracts, recommended a change in the seniority system. The company accepted but the white local rejected and threatened to strike. The government then secured an injunction against the strike. The District Court, in a Title VII suit, then decided that the company's job seniority system had to be replaced with a plant seniority system.

The company's principal argument before the Fifth Circuit was that it had no intention to discriminate on the basis of race as evidenced by its opening up of all progression lines to blacks. The effect that blacks were at the bottom of these lines was not the result of a present intention to discriminate but rather the unfortunate result of prior 1965 discrimination. The court firmly rejected the state of mind test and held that a prima facie case of intent was made out by the plaintiffs when they demonstrated that the employer and union were aware of the adverse effect of the seniority system. While upholding the *Whitfield* decision as good law, it distinguished that case by pointing out that the defendants had not fulfilled their affirmative duty of proving that business necessity justified the retention of the seniority system.

The decisive question then is whether the job seniority standard as it is now functioning at the Bogalusa plant is so necessary.

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41. *Papermakers Local 189 v. United States,* 71 L.R.R.M. 3070, 3082 (5th Cir. 1969). The court said:

We find unpersuasive the argument that, whatever its operational effects, job seniority is immune under the statute because not imposed with the intent to discriminate. Section 703(h), quoted earlier, excludes from the strictures of Title VII different working terms dictated by "bona fide" seniority systems "provided that such differences are not the result of an intention to discriminate because of race,...," Here, however, if Crown did not intend to punish Negroes as such by reinstituting job seniority, the differences between the job status of Negroes hired before 1966 and whites hired at the same time would have to be called the "result" of Crown's earlier, intentional discrimination.
to Crown Zellerbach's operation as to justify locking Negroes hired before 1956 into permanent inferiority in their terms and conditions of employment. The record supports the district court's holding that job seniority is not essential to the safe and efficient operation of Crown's mill.\(^{42}\)

The defendant's other argument was that since the Act is prospective and not retrospective in nature, Congress, under no condition, intended to interfere with the job rights of whites. The court, citing Quarles,\(^ {43} \) agreed that Title VII did not intend to interfere with the present job rights or plant seniority of whites — "white incumbent workers should not be bumped out of their present position by Negroes with greater plant seniority"\(^ {44} \) — but held that since Congress was silent concerning departmental seniority it prohibited discrimination in respect to future awarding of vacant jobs. Any other interpretation, the court said, would simply perpetuate the effects of past discrimination.\(^ {45} \)

On a narrow level, these cases stand for the proposition that the tainted seniority expectations of incumbent white employees are of insufficient weight to justify the adverse effect of discriminatory rules. On a broader level, these decisions mirror the changing meaning of discrimination from that of a private law meaning to that of a public law meaning. The courts have unequivocally rejected the necessity of demonstrating an adverse state of mind. In adopting a public law definition of discrimination they have formulated a three-step procedure. One, to establish a prima facie case the plaintiff must demonstrate that he was adversely affected by respondent's conduct and connect the harm to the fact that he was a member of a minority group. Two, to rebut this prima facie case the respondent must come forward with highly significant non-racial reasons. Ordinary business reasons will not suffice. Three, if the respondent does succeed in rebutting this prima facie case by justifying his conduct, he may nevertheless lose his privilege if plaintiff can demonstrate that his business interests could have been protected by the adoption of other alternative means. For instance, in Quarles\(^ {46} \) and Papermakers Local 189\(^ {47} \) the courts

\(^{42}\) Id. at 3077.
\(^{44}\) Papermakers Local 189 v. United States, 71 L.R.R.M. 3070, 3076 (5th Cir. 1969).
\(^{45}\) Id. at 3081. The court stated:

"When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes ongoing discrimination, unless the incidents are limited to those that safety and efficiency require. That appears to be the premise for the Commission's interpretation of § 703(h)."

found that the employer’s business needs were not adversely affected by permitting the plaintiff to carry over the plant seniority because the employer retained his right to reject unqualified employees. 

There is evidence, however, that the hostile motive test still lingers as a threat in seniority problems. Several legal scholars have endorsed it, and at least one federal court has given evidence that it will apply it. In *H. K. Porter Company*, the government requested the court to abolish the company’s departmental seniority system and substitute in its place a plantwide seniority system whereby blacks would use their plant seniority when bidding for departmental jobs. The court refused to do this. It found that the company by its attitude and by its actions, providing some opportunities for blacks to transfer, had no intention to discriminate because of race. It is doubtful that the *H. K. Porter* decision will blaze any legal trail but its presence testifies to the fact that the private law approach among the federal courts is still very much alive.

III. TESTING

The goal of Title VII is the elimination of discrimination in employment relations and this means the progressive elimination of the subjective factors in management hiring and promotion policies. The more control over hiring and promotion policies is taken away from management and is placed in objective events outside its control the nearer we will be to eliminating discrimination. This quest for objectivity is seen in the recent wholesale adoption of standardized employment tests by American industry. The subjective factor, however, still remains with us. The social scientists have failed to come up with any discrimination-free test.

The current controversy centering around the use of employment tests is portrayed in the following illustration. A retail store in the process of hiring employees for its new store in a suburban community requires a successful applicant to have two years of college and to attain a minimum score on the Wonderlic Personnel Test. The latter is an aptitude test which measures the applicant’s general knowledge,


51. Id.

particular emphasis on his verbal and mathematical skills. When
the store opens for business, it opens with virtually a white working
force. Most Negroes either failed the test or did not possess the
necessary educational qualifications to take the test. To the charge
that he is discriminating in his hiring practices, the employer retorts
by saying that he has the right to establish any standards, even those
unrelated to the job, as long as he treats white and black applicants
equally. If plaintiff is to prevail, the employer contends, he must show
that the employer specifically intended to discriminate against Negroes.

The employer is unable to comprehend how he can be accused
of discrimination when he selected applicants upon the basis of a test
which was equally open to members of the white and black race.
He disclaims any responsibility for the failure of Negroes to pass the
test. This failure, he asserts, was caused either by their lack of initiative
in accumulating the necessary education, or by society's failure in
providing the necessary educational facilities to minority groups. In
any event, it is his contention that he is operating a business, not an
employment or social agency. He sees the minority group's arguments
on testing procedures as running in a vicious circle. At first, he
argues, civil rights groups strongly urged the adoption of standardized
employment tests in order to objectify management's discretionary
power over hiring and promotion policies. When such tests were ac-
cepted by management, but adverse results still continued, civil rights
groups retreated from the objective testing approach and reverted to
the original subjective testing approach. They now want manage-
ment to consider "total assessment" of the "whole man." This, in
essence, he says, means that they want preferential treatment for
blacks such as giving additional test points to those suffering from
cultural deprivations.

Today we live in a technological society that takes pride in
reducing even the most spiritual values to quantitative terms and
thereby scientifically measuring them. It is hardly surprising therefore,

53. Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of
54. Cooper & Sobol, note 29 supra, at 1666. These authors assert:
In H. K. Porter the court refused to consider the differential prediction prob-
lem on the ground that such consideration could lead to the conclusion that blacks'
tests should be evaluated according to a different standard than whites', and that
this "would itself constitute prohibited discrimination." But it seems doubtful
that double standards would be unlawful where their purpose was to make test
use more accurate. For example, age correction factors in test scoring are some-
times used to offset well-recognized inaccuracies caused by age differences. Use
of corrective measures for male and female differences is not unknown. This does
not constitute discrimination: it merely improves the accuracy of tests. Indeed, it
would be unfair to older applicants or to one sex not to make the corrections.
The same should be true of racial correction factors where they are justified by
solid evidence; such factors simply assure accuracy regardless of race.
especially after 1965, that employers, to avoid charges of personal discrimination, looked to the social scientists for tests which would measure not only the physical skills but the spiritual potentialities of modern man. The alarming increase in the percentage of complaints filed under Title VII charging discrimination in testing give proof to the observation that the social scientists have yet to find a method of measuring the job—worth of a man.\textsuperscript{55}

On a theoretical level, the testing method is a legitimate objective tool for predicting performance on the job. Tests fall into three general categories: (1) the skill test, (2) the achievement test, and (3) the aptitude test. Little trouble is usually experienced with the first two types of tests. The applicant taking the skill test must demonstrate his proficiency in his craft or art by performance. The typist must know how to type; the carpenter must know how to build. The applicant taking the achievement test must demonstrate a mastery of his craft or art by drawing upon knowledge gained from past performance. The third type of test, the aptitude test, seeks to predict the future performance of the applicant and it is in this area that most of the controversy on the merits of testing exists.

The purpose of the aptitude test, such as the famed Wonderlic test, is to evaluate general intelligence so as to predict success or failure on the job. These type of tests are abstract in nature, informationally slanted, and culturally oriented. It is understandable why minority groups are concerned with their widespread use. Blacks score only one-half as high as whites on these tests, although experiments have demonstrated that they perform as well as whites on the job.\textsuperscript{56} Minority groups contend that most aptitude tests are illegitimate tools of racial discrimination. They are not only unfair, it is asserted, but fraudulent because they do not accomplish what they purport to accomplish. Instead of testing skills and qualities relevant to successful job performance, they test past success in formal education. By measuring past performance in education, not potential performance on the job, they are achievement tests parading under the label of intelligence tests. The norm is the job, not the school, these minority groups argue, and by emphasizing cultural and educational deprivations, these tests simply perpetuate racial discrimination.\textsuperscript{57}

In essence, these groups contend that the employer has a right to establish high job standards and to select the most skilled employees

\textsuperscript{55} E. Ghiselli, The Validity of Occupational Aptitude Tests 51 (1966).
\textsuperscript{56} Mitchell, Albright & McMurry, Biracial Validation of Selection Procedures in a Large Southern Plant, Proceedings of the 76th Annual Convention of the American Psychological Ass'n (1968).
\textsuperscript{57} D. Goslin, note 52 supra, at 93; L. Tyler, The Psychology of Human Differences 148 (3d ed. 1965).
as long as these skills are related to the job. He has no right to establish artificially high standards or skills which bear no relation to the job. The right to prospective advantage — the right to a job — is no longer a privilege, the exclusive domain of the employer. Today it is a basic right which is indispensable to the realization of the other human values and as such it is much more than a property right — it is a constitutional right. 58

The advocates of the hostile motive theory state that an employer can use any test, related or unrelated to the job, as long as he has no intent to discriminate against minority groups. The presumption of a test’s validity must be overcome by the plaintiff who must produce evidence of the employer’s specific intent to discriminate. In support of their position, they cite Senators Clark and Case’s interpretative memorandum, section 703(h), and the Tower amendment. During the legislative hearings, Senators Clark and Case said:

There is no requirement in Title VII that employers abandon bona fide qualification tests, where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer can set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance. 59

The Tower amendment to section 703(h) states that it is not unlawful:

. . . for an employer to give and to act upon the result of any professionally developed ability test provided that such test, its administration or action upon the result is not designed, intended or used to discriminate because of race. . . . 60

On the surface it appears a private law interpretation is warranted and that unrestricted use of employment tests is permissible unless

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The person will never be successfully integrated into the group, however, until the group is integrated into the legal process. This means that power pluralism must give way to integrated pluralism, whereby the state under its reserved powers can intervene in group activities which economically invade the personalities of its members. The solution is not to eliminate groups, but rather to control them by making them socially responsible. Legitimate groups, acting as buffers between the individual and the state, are indispensable harmonizers for freedom. No longer, however, can we afford to have large powerful groups acting as the basic social unit in our society; they must be converted into social institutions with social responsibilities. The labor union, the corporation, the American Medical Association, and most other economic groups are no longer private organizations, but rather quasi-public governments exercising public functions. As such, they should be subject to public constitutional power. Political, cultural, social, and economic obligations should be imposed upon them, transforming them from organizations into communities.


there is evidence that the employer is actuated by a hostile intent. Close examination, however, refutes this claim. It is evident from a close reading of the language of the Clark-Case memorandum that it changed nothing; that all it did was to confirm the interpretation that high qualifications may be required by the needs of the job, not by the unsupported demands of the employer. The language,

An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications. . . . would have little meaning if "qualifications" instead of referring to job norms, made reference to extraneous social norms such as nobility of birth, aristocratic education, etc.

The legislative history of section 703(h) also indicates that testing might be related to the needs of the job. Senator Tower said that the purpose of his amendment was "designed to determine or predict whether [an] individual is suitable or trainable with respect to his employment in the particular business or enterprise involved."61 His principal objective in introducing the amendment was to defeat the import of the Myart v. Motorola, Inc.62 decision, where a state trial examiner held that aptitude tests which reflect inequalities and environmental factors among disadvantaged and culturally deprived groups are illegal per se. Although it is true that section 703(h) rejected this extreme per se position, it in no way rejected the proposition that tests in certain circumstances are presumptively invalid and required the employer to justify them by demonstrating business need.

After a thorough study of the amendment, its legislative history, and the intricacies of testing procedures, the Equal Employment Opportunity Commission rejected a private law hostile motive test, and adopted a public law affirmative duty test. In its Guidelines on Employment Testing procedure, it said:

The Commission accordingly interprets "professionally developed ability tests" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.63

The Commission's policy on testing is that a test is presumptively invalid once it is shown that it has an adverse effect on plaintiff and

63. CCH EXPL. PRAC. GUIDE ¶ 16904, at 7319.
members of his class. After a plaintiff has demonstrated this effect by comparative statistical scoring information or by calling attention to the cultural context of the test, a prima facie case is made out. Evidence of respondent's intention to discriminate is unnecessary. In order to overcome this prima facie case the employer must justify the adverse effect in terms of business need. He has the affirmative duty to demonstrate the existence of three conditions: that the test is authenticated, related, and validated.

In demonstrating to the Commission's satisfaction that a test is properly authenticated, the employer must show not only that the test is designed by a professional testing firm but that it was administered in accordance with professional standards. Also, the employer must show that the content of the test is directly related to the skills required by the specific job. Validation means that proof must be offered which establishes that the test has meaning — that those who pass the test have a greater probability of job success than those who fail the test. 64

In Griggs v. Duke Power Co., 65 the district court rejected the Commission's public law approach and applied the private law hostile intent test. It said:

Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of the particular job or groups of jobs. . . .

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has a general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race. . . . The evidence establishes that the tests were professionally developed to perform this function and therefore are in compliance with the Act. 66

Aside from this decision, however, there is evidence from other circuits that the federal courts will eventually adopt a public law definition of discrimination in relation to testing procedures. Two district court decisions, although upholding the validity of the employers' tests, indicated adherence to the Commission's view that tests must be related to job requirements. In H.K. Porter, the court said:

64. EEOC Guidelines §§ 1(d)(c)(g). The OFCC has said: "Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job(s) for which candidates are being evaluated." § 2(b), 33 Fed. Reg. 14392 (1968).
66. Id. at 250.
The court agrees in principle with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs.\(^67\)

*In Dobbins v. Electrical Workers Local 212*, the court said:

> The fair test of an individual's qualifications to work in the electrician's trade in this geographical area is the actual ability to work on the job in the trade for the average contractor operating in the trade.\(^68\)

There is little doubt that tests, especially those tests which purport to measure general intelligence, can be subtle devices for discrimination. If the content of these tests are unrelated to the required skills of a specific job, but instead related only to the vagaries of the employer's mind, then it is evident that it will take another couple of generations for Title VII to have any impact on racial discrimination in employment. The problem here, as it is true of all problems in discrimination, is to control the employer's discretion without interfering with his institutional interests. The Commission's public law approach, which views all testing which has an adverse racial effect as a violation of the Act unless justified by the three affirmative steps — without regard to the employer's hostile intent — adequately grounds employers' power to discriminate. The OFCC and the Justice Department agree with this public law test, and it is believed that the federal courts, too, will agree on its application to employment testing.\(^69\)

## IV. Sex Discrimination

It is predicted, and the evidence so far seems to support this prediction, that Title VII's prohibition of sex discrimination in employment relations will be the most difficult of all the Act's provisions for the Commission and the courts to administer. Little legislative history exists concerning Congress' real purpose in enacting sex discrimination legislation. Opponents of the Civil Rights Act, one day before House passage, introduced an amendment which added the word "sex" to race, color, religion or national origin whenever that phrase appeared in Title VII. It was adopted with little debate and no hearings probably because the Act's supporters wanted to avoid a further log jam in the House and because they did not wish to appear in the role of favoring sex discrimination. Also, Congress probably felt that the raising of this sensitive issue was enough — let the courts solve it.


\(^69\) Cooper & Sobol, note 29 supra, at 1656.
Like the seniority and testing provisions, Title VII after prohibiting sex discrimination, follows up with an exemption. Most of the controversy which centers around sex discrimination in employment is focused on the proper interpretation of the institutional immunities proviso — the bona fide occupational qualification exception (BFOQ). Section 703(e) provides:

It shall not be an unlawful employment practice... for an employer, labor organization, or joint labor management committe... to admit or employ any individual... on the basis of his 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. 70

The key to predicting the outcome of sex discrimination cases lies in predicting how the federal courts will interpret the BFOQ exemption — whether they will interpret it in a narrow private law spirit or in a liberal public law spirit. Those advocates of the private law approach — the hostile intent theorists — maintain that sex discrimination is not the same type of social misconduct as racial discrimination, that at most it is a venial transgression, not a mortal one. They point to the fact that Congress made a distinction between sex discrimination and race discrimination. The BFOQ exemption, it is pointed out, permits an employer to discriminate in respect to sex, race and national origin but not in respect to race and color. Congress, therefore, it is argued, had no intention of changing the law on sex discrimination. It simply carried over the constitutional standards of “a rational basis of classification.” 71 To these advocates a rational basis means the providing by an employer of any economic reason however slight which is “reasonably necessary to the normal operation” of his business. To prove discrimination based on sex the plaintiff must come forward with evidence which shows that the employer had a specific intent to discriminate.

The proponents of a public law approach argue that Congress changed the antiquated law which distinguished between the functions of the sexes on anachronistic standards. They feel that Congress in Title VII recognized the legal and social changes in the status of women in our contemporary society. Since women today stand before the law as the equal of men, sex discrimination is as grave an offense as racial discrimination. 72 Economic reasons, such as business effici-

ency, cannot justify sex discrimination. The same standard which is applied to race discrimination — the affirmative duty test — must be applied to sex discrimination.

The Commission views sex discrimination on the same plane as racial discrimination and, as such, applies the same public law affirmative duty test to these type of violations. It reads the BFOQ exemption very narrowly, applicable only when sex discrimination is justified by the actual requirements of the job. The type of job, however, in which the Commission considers sex as a relevant requirement is rare. Only those type of jobs which require authenticity or genuineness as in the case of an actress or clothes model will suffice. 73 Justification based upon economic reasons as business efficiency or upon generalizations as to the characteristics of women as a class, such as their volatile temperament, their high turnover, or weak physical characteristics, the Commission will not accept. “The principle of non-discrimination requires that individuals be considered on the basis of individual capacity and not on the basis of any characteristic generally attributed to the group.” 74 In essence, the respondent has the duty of demonstrating that the particular employee cannot perform the particular job.

The Commission’s most painful experience in administering the sex discrimination aspects of Title VII has been with employers who defend their policies of not hiring and promoting women on the ground of BFOQ’s granted by the state. Most states, for instance, have laws which limit the number of hours a woman may work, while others restrict the amount of weight a woman may lift. A strong argument can be made that these laws which were passed at the beginning of the century to protect unorganized women from industrial exploitation are no longer in tune with industrial realities or the new status of women. There is evidence indicating that, although these laws were originally intended to protect women, they are now being used to exploit them. 75 The question must be asked in all seriousness, does Title VII, which stresses equality between the sexes, preempt these state laws and can they stand up before the equal protection clause of the fourteenth amendment.

The Commission's policy in respect to state laws which restrict employment opportunities of women has not only been cautious but circular. Initially, in 1965, the Commission, probably feeling that since Congress did not expressly overrule state laws and that the

73. 29 C.F.R. § 1604.1(a)(2) (1968).
overruling of such laws would have little effect on the employer who when faced with a choice between civil litigation and state prosecution would prefer the former, took a position that state laws were legitimate BFOQ's unless the clear effect of such laws was not to protect women but to discriminate against them.78 In 1966 the Commission retreated from this position by declaring that it would not even pass judgment on state laws but instead would advise complaining parties of their right to litigate.

Such litigation to resolve the uncertainties as to the application of Title VII seems desirable and necessary and the Commission reserves the right to appear as amicus curia to present its views as to the proper construction of Title VII.77

In 1968, the Commission abandoned its 1966 policy and reaffirmed its 1965 guidelines.78 Finally, in 1969 the Commission took a firm stand. No longer, it said, would it consider state maximum hours and weight limitations as BFOQ's.

The Commission has found that such laws and regulations do not take into account the capacity, preferences, and abilities of individual females and tend to discriminate rather than to protect . . . That such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.79

Unlike seniority and testing, the policy of the federal court for the most part is in direct opposition to the Commission's policy. The courts favor the private law interpretation of the BFOQ. Under this broad construction, as opposed to the Commission's narrow construction, they demand evidence of an employer's specific intent to discriminate because of sex. If an employer has any economic reason, however slight, related to business efficiency, as he invariably does, the courts are inclined not to find sex discrimination. The employer's state of mind, the purity or impurity of his intentions, thus become the central issue in sex discrimination cases. The result, as one court pointed out, is that "the exception will swallow the rule."80

In Ward v. Firestone Tire & Rubber Co.,81 a male employee, Ward, charged sex discrimination when the employer refused to

77. CCH EMPL. PRAC. GUIDE ¶ 16,900.001 n.2 (1968).
79. BNA, LRX 1835 § 1604.1(b).
transfer him to a lighter job reserved for women and handicapped men. The Commission found probable cause because the employer failed to demonstrate Ward's inability to perform the work. The district court, however, instead of viewing the fact pattern as a prima facie case, held that the employer and cooperating union were not in violation of the Act because they acted from economic motives — business efficiency. The court said:

In reserving certain jobs for women and restrictive men, Firestone and the Local were bona fide in the sense that they acted with honest purpose and acted within reason in their effort to accomplish the end that is expressly recognized as legitimate by section 2000(e)—2(e)(2) of the Act. 82

In Bowe v. Colgate-Palmolive Co., 83 the employer unilaterally promulgated and enforced a rule which prohibited females from working on any job which required the lifting of 35 lbs. or more. Even though the State of Indiana was silent on the subject of weight lifting for women, the court decided that the employer could reasonably conclude that women as a class were incapable of lifting 35 lbs. The possibility of there being superwomen capable of lifting 35 lbs. or more, in no way, the court said, compels the employer to give physical tests since the economic cost compared to the slight value involved impairs business efficiency. 84 By emphasizing the state of mind test the court also gave employers a stranglehold over the BFOQ exemption. It said:

[B]etween the absolute prohibition of section 703(a) . . . [and the exemption area] lay an area in which the employer has discretionary prerogatives within which he, in good faith ("bona fide") may determine that a sex qualification is "reasonably" necessary to the "normal" operation of his "particular business." 85

Other courts have upheld this rationale. 86

In Phillips v. Martin-Marietta Corp., 87 the plaintiff claimed that the employer refused to hire her because she had pre-school children, although he continued to hire men with pre-school children. Without compelling respondent to come forward with any economic or social reasons for refusing to hire such mothers, the court said that the

82. Id. at 581.
84. Id. at 357. The court said:
    It was not and is not practical or pragmatically possible for Colgate . . . to assess the physical abilities and capabilities of each female who might seek a particular job . . . or to consider special female individuals as uniquely qualified among women in general.
87. 58/D CCH Lab. Cas. ¶ 9152 (M.D. Fla. 1968).
employer had no intent to discriminate because of sex but only an intent to discriminate because of status — motherhood: "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies."88

A stream of cases dealing with the employment practices of airlines with respect to stewardesses has provoked a controversy between the Commission and the courts on the meaning of sex discrimination. Most of the cases involve the company's policy of discharging or grounding stewardesses when they marry or reach a certain age, usually 32 to 35. These restrictions are not applicable to male cabin attendants or to males and females working in other jobs for the company. The Commission has ruled that sex is not a BFOQ for the job of flight cabin attendant.89 In Cooper v. Delta Airlines,90 the court held, without reaching the question of whether sex was a BFOQ, that the plaintiff, Mrs. Cooper, had no cause of action because the company had no intent to discriminate against her because of her sex but only discharged her because of her status — that of being a married woman. The court obviously viewed sex discrimination as disparate treatment between the two sexes and rejected the possibility that it may exist among members of the same sex. The Commission views sex discrimination in a much broader perspective.

The concept of discrimination based on sex does not require an actual disparity of treatment of male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job.91

In a recent case, Weeks v. Southern Bell Telegraph Co.,92 the Fifth Circuit Court of Appeals rejected the narrow private law approach and applied the Commission's public law approach on sex discrimination. In that case, the employer refused to consider a female's application for the position of switchman because of the state's weight lifting law, the strenuous nature of the job, and the necessity of late hour call-out work. To the plaintiff's contention that she be considered on the basis of individual capacity and not on the basis of characteristics generally attributable to her sex, the district court turned a deaf ear and found that sex was a bona fide occupa-
tional qualification for the job. The Fifth Circuit reversed. Rejecting the hostile intent test, the court held that a prima facie case was made out from the fact pattern and that it was incumbent upon the respondent to justify his action by supportable reasons.

We think it is clear that the burden of proof must be on Southern Bell to demonstrate that this position fits within the "bona fide occupational qualification" exception. The legislative history indicates that this exception was intended to be narrowly construed. This is also the construction put on the exception by the Equal Employment Opportunity Commission. Finally, when dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it.

The court then proceeded point by point to dispose of respondent's justifications for refusing plaintiff's application for the position of switchman. It quickly dismissed the obstacle of the state weight lifting law by noting that the State of Georgia repealed it. The court rejected the defense that the job was too strenuous, because the company failed to come forward with any supportable reason. "Labeling a job strenuous simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception. There must be a factual basis."

To the company's contention based upon the generalization that the position was too dangerous for a woman because it necessitated late hour calls, the court said:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead invests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

It is unfortunate that the district courts have resorted to the hostile intent test in sex discrimination cases. The result of such a private law approach is to grant a license to employers and labor unions to discriminate at will against the female sex. The Commis-

94. 408 F.2d 228, 232 (5th Cir. 1969) (citation omitted).
95. Id. at 234.
96. Id. at 236.
sion's public law approach with its emphasis on adverse effect and affirmative duties is the correct one. It is also unfortunate, however, that the Commission has construed the BFOQ exemption so narrowly. The adoption of such a provision, I believe, will cause the Commission much embarrassment in the future. The indisputable fact, no matter how the law tries to cover it, is that there is a difference between race and sex discrimination. The Commission's standard, the ability to perform the job, while a workable test for race cases, will not always work in sex cases. A woman might have the skills to be a night watchman or collect money for a finance company in a terror ridden neighborhood but skills are not enough. The social interest in her well-being should serve as a BFOQ. The Commission's public law approach it is believed will eventually be accepted by the courts, but with the judiciary broadening the BFOQ exception.

V. Conclusion

Lately there is evidence of a dangerous trend toward absolutism coming from some liberal quarters. These advocates of a per se approach on the interpretation of the Civil Rights Act resemble misguided crusaders more than statesmen. They would have the Commission and the courts regard discrimination as a per se violation of the Act, disregarding any employer or union defense. The Whitfield decision, where the court found that business necessity justified race discrimination, they would overrule.97

Conscious of the fact that recent Negro gains have splintered the labor-liberal-civil rights coalition and turned the white majority against the black minority, for instance, in the judicial decisions on seniority rights, these liberals are now making a plea for unity by attempting to rally all factions against the employer. The employer, their argument runs, is principally responsible for segregation in the industrial community, and as such, he must pay for his past transgressions in the form of an "Equal Opportunity Fund."98 This fund would guarantee that no one would suffer financially from any discrimination necessitated, for instance, by restructured seniority systems.

This liberal extremist position, like the conservative extremist position of private fault which emphasizes the necessity of an evil intent, is founded upon a social misconception. It assumes that one institution — the employer — is responsible for centuries of oppression of the Negro race. This is not true. We are all responsible. It

98. Id. at 310-13.
is not a matter of private responsibility, but rather a matter of collective responsibility. When these liberal critics contend, however, that the courts should not employ a quantitative balancing test in discrimination cases, balancing the economic harm to majority expectations against the right to be free from discrimination, they are correct. A qualitative balancing test should be employed. Under this test, when a prima facie case has been presented, the presumption should be that the discrimination is inherently destructive of plaintiff's civil rights, and that only a strong business necessity or highly significant social reason can justify the invasion. This is in accordance with the emerging social policy that the extent of the employer's or union's affirmative duties is in direct proportion to the importance of the social value to be protected. So far, the federal courts, for the most part, have adopted the qualitative balancing test. This approach represents a great gain not only for civil rights advocates, but also for all concerned with the cause of justice founded upon social responsibility.