Enforcement of equal opportunity in employment would be difficult under any statute. Even if implementation were entrusted to a powerful quasi-judicial agency, the inherent difficulties in policing an area "where subtleties of conduct may play no small part" are so formidable as to obstruct proof of much illegal discrimination. The effort to protect the employer's interest in making non-discriminatory business decisions without governmental interference led Congress to compound the inevitable complexities of enforcement in the Civil Rights Act of 1964. No section of the Civil Rights bill was more extensively revised in the course of its passage than was the fair employment title; a barrage of delimiting amendments, which emasculated the Equal Employment Opportunity Commission [EEOC] and compelled deferral to state and local agencies, disappointed proponents of the legislation and has led commentators to belittle the possibilities of enforcing title VII.

This comment will examine the problems which must be confronted when the enforcement provisions of title VII take effect on July 2, 1965.

3 See Berg, Equal Employment Opportunity under the Civil Rights Act of 1964, 31 BROOKLYN L. REV. 62, 96-97 (1964); Kammholz, Civil Rights Problems in Personnel and Labor Relations, 53 ILL. B.J. 465, 479 (1965). ("Businessmen subject to title VII should disregard it.") For statements evincing the disappointment of liberal supporters of strong FEP legislation, see 110 CONG. REC. 12580 (1964) (Humphrey statement of regret that "we have weakened the bill"); 110 CONG. REC. 12593 (1964) (remarks of Senator Clark); 110 CONG. REC. 14189 (1964) (description by Senator Douglas of Federal Commission as "a blind alley and a delaying chamber"); CONG. Q. WEEKLY REPORT, May 15, 1964, p. 949 (Leadership Conference on Civil Rights, an influential lobby representing eighty-five national civil rights, church, labor and civic groups, tentatively rejects leadership compromise).
4 Sections 703 and 704 make it an unlawful employment practice for certain employers, employment agencies, and labor organizations to discriminate against individuals because of their race, color, religion, sex, or national origin. The basic coverage of title VII remained largely unchanged throughout congressional debate and will not be considered in any detail in this comment. See generally BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 23-31 ("Operations Manual" for laymen);
First to be considered is a major set of problems which will arise from the limitations placed upon the authority of the Equal Employment Opportunity Commission and its jurisdictional overlap with other state and federal agencies. A second section of the comment will deal with the considerable discretionary power which title VII has lodged in the federal executive. Finally, the comment will consider problems that will face the federal judiciary when it attempts to fashion standards for proof of discrimination and appropriate remedial action. As background for these issues the legislative history should first be briefly considered, for an understanding of title VII is not easily obtained without knowledge of its original structure and of the far-reaching Senate compromise.

Before the March on Washington in 1963, bills attempting to establish federal regulation of employment practices had been voted down amid great controversy in every session of Congress since World War II. When in the aftermath of the Birmingham riots the Kennedy administration began to frame a comprehensive civil rights proposal, its spokesmen feared that inclusion of strong fair employment provisions would endanger the entire bill. Nevertheless in October 1963 the House Judiciary Committee decided to incorporate into a separate title of the omnibus proposal a pre-existing Fair Employment Practices bill which was mired before the Rules Committee. As a result, delimiting amendments to title VII were accepted throughout the legislative process so that other titles of the bill could survive relatively unscathed. Particularly drastic revisions were imposed during a final “leadership compromise” in the Senate; Senator Humphrey, the floor manager, explained that “we have taken title VII and rewritten it.” Less than a week after this “clean
"bill" was presented, however, cloture was invoked; passage of the bill thereafter was only a matter of time.\(^1\)

It is therefore the clean bill shaped during the leadership conference that stands virtually intact as law today. Instead of drafting a new bill, the participants in the compromise considered separately over seventy amendments proposed by Senator Dirksen, the one man who could command the Republican votes necessary for cloture.\(^2\) Upon him fell the task of persuading dubious Senators that the proposal included adequate safeguards for businessmen and for independent state action.\(^3\) Such extensive revision necessarily changed the original understanding of the enforcement procedures, but a cogent explanation of the policies underlying the compromise was never offered.\(^4\) It is evident nonetheless that Dirksen's amendments altered title VII in two fundamental ways: (1) by separating public prevention from private remedies, and placing more emphasis upon the latter; and (2) by expanding the role of the states, while making federal action generally a spur to and reinforcement of effective activity on a local level.\(^5\)

As originally conceived, title VII would primarily have established a "public right" and only incidentally created a private one.\(^6\) Like the NLRA, title VII was to have been enforced by a federal agency empowered to eliminate discriminatory practices by issuing cease-and-desist orders.\(^7\) Although the new Federal Commission, like the NLRB, would have been able to grant such relief as back pay and reinstatement.\(^8\)

\(^{11}\) The Senate version was examined for one day by the House Rules Committee and passed by the House on July 2, 1964, after an hour of debate.


\(^{13}\) See Kempton, Dirksen Delivers the Souls, The New Republic, May 2, 1964, p. 9.

\(^{14}\) Dirksen's one major speech was devoted entirely to why the Senate had a moral duty to pass civil rights legislation. 110 CONG. REC. 13087 (1964). Because the compromise was reached in secret sessions off the Senate floor there are no committee reports to indicate how the wording was hammered out. Congressional comment is limited because cloture was invoked less than a week after the clean bill was presented. Although several pedestrian memoranda explaining the differences between the House and Senate bills were offered, most of the debate consisted of misrepresentation of the bill by its Southern opponents and futile attempts by its supporters to correct these stubborn misconceptions.

\(^{15}\) See 110 CONG. REC. 12807-17 (1964) for text of the House bill set out with Senate amendments and deletions noted.

\(^{16}\) See, e.g., H.R. REP. No. 914, 88th Cong., 1st Sess. 26 (1963), where the purpose of title VII is defined as "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment."


\(^{18}\) See 110 CONG. REC. 6550 (1964) (remarks of Senator Humphrey). For interpretations of the NLRB authority, see, e.g., NLRB v. Fant Milling Co., 360 U.S. 301, 307-08
private individuals would presumably have had no more control over the settlement of their complaints than do charging parties under the NLRA. The leadership compromise completed the attenuation of the Commission\(^1\) by divesting it of all enforcement power and denying it access to the courts;\(^2\) but in return every grievant was granted the opportunity to seek redress in the federal courts.\(^2\) Lest the public interest suffer from this reorientation, the Attorney General was entrusted with prevention of discriminatory practices by granting the Justice Department full-fledged authority to eliminate "patterns or practices" of discrimination.\(^2\)

The second major change was to shift preliminary enforcement responsibility from federal to state and local authorities. Although the bill always allowed the Federal Commission to cede its jurisdiction to state and local agencies,\(^3\) the leadership compromise also protected state and local procedures by requiring the Commission to delay for at least sixty days if a state or local agency were attempting to settle the dispute.\(^4\) The change presumably reflects a judgment that local persons with a special understanding of the area and of the preventive methods appropriate for it can better cope with discrimination than the federal government.\(^5\) But by leaving cession to the Commission's discretion and allowing the Commission to enter a case if the state or local agency has not adequately remedied the alleged violation, the act plays a sophisticated variation on the familiar carrot-and-stick theme, providing not

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\(^{19}\) Even before the title had left the House it had been cut into so that the agency could no longer issue orders; instead it was granted immediate access to the federal courts, but specifically relieved from "any obligation to bring a civil action" if it would not "serve the public interest." H.R. 7152, 88th Cong., 1st Sess. § 707(b) (1963). The public-private relation had even then begun to break down, for a plaintiff could proceed to court himself when the Commission refused to do so if he could get the permission of just one of the five Commissioners, § 707(c). Even so, it has been said that this section was designed to prevent an arbitrary refusal to sue by the Commission and so was not considered inconsistent with the "public right" rationale. Berg, supra note 3, at 67.

\(^{20}\) Section 706(c). But see note 37 infra for an exception.

\(^{21}\) 110 Cong. Rec. 14191 (1964) (remarks of Senator Javits); Hearings Before the House Committee on Rules on H. Res. 789, 88th Cong., 2d Sess. (1964) (remarks of Representative Celler).

\(^{22}\) Section 707.

\(^{23}\) Section 708.

\(^{24}\) Sections 706(b)-(c). The state authority must, however, meet certain minimal standards. See text at notes 60-69 infra.

\(^{25}\) See 110 Cong. Rec. 12725 (1964) (remarks of Senator Humphrey); 110 Cong. Rec. 13087 (1964) (remarks of Senator Dirksen).
only an incentive for the state and local agencies to be effective but also a threat of intervention if they are not.

The act's utilization of deferral and cession is an ingenious experiment in federal-state relations, and separating private relief from public prevention may be more effective than combining the two possibly conflicting objectives in one agency. But tacking these innovations onto the original fair employment bill has created unfortunate structural ambiguities. In addition, the title shows the strains of a compromise measure. Much of the language is vague; predictable difficulties have not been provided for. Such problems will make implementation of title VII exceedingly difficult.

I. ENFORCEMENT BY ADMINISTRATIVE AGENCY

A. The Equal Employment Opportunity Commission

Under the original House bill the primary responsibility for enforcing title VII would have been lodged in the Equal Employment Opportunity Commission, which was to be endowed with quasi-judicial authority.26 Before the bill reached the Senate the Commission had been limited to a role as prosecutor; in the Senate it was stripped of its last vestige of enforcement authority and was restricted to a role of confidential mediation.27 Title VII continues to reflect, however, the original framework. Individuals who wish federal assistance must in most instances first apply to the Commission.28

Despite the limitation of its function, the structure of the Commission somewhat anomalously remains unchanged from the original House bill. Obviously modeled upon the independent regulatory agencies, the Commission will be composed of five members, no more than three of whom can be chosen from the same political party.29

Limitations upon the Commission's power to seek private remedies are everywhere apparent. Whereas the House bill permitted charges to be


27 The Commission's enforcement power might instructively be measured against recommendations for federal legislation made by two experts from the Research Project on Minority Group Employment at the Industrial Relations Section of Princeton University. The authors urged that a federal commission be empowered to conduct public hearings and issue cease-and-desist orders enforceable in the courts. See NORGREN & HILL, TOWARD FAIR EMPLOYMENT 254-58, 264-65 (1964) [hereafter cited as NORGREN & HILL].

28 Cf. § 706. For a possible exception to this requirement, see text at notes 155-59 infra.

29 Section 705(a). Commissioners will be chosen for staggered five year terms by the President with the advice and consent of the Senate.
filed "on behalf of" aggrieved individuals, the Commission may now accept only charges made in writing and under oath by the person claiming to be aggrieved. Although the Commission may examine witnesses under oath, it must apply to a federal district court for an order directing compliance if the person refuses to appear; even so, "the attendance of a witness may not be required outside the state where he is found, resides, or transacts business." Its request to examine and copy evidence which is relevant to the charge is enforceable by a subsequent court order. Finally, if after preliminary investigation the Commission finds "reasonable cause to believe" that the charge against the respondent is true, it must confine its remedial efforts to "informal methods of conference, conciliation, and persuasion." All conciliation proceedings must remain strictly confidential.

Because the Commission can neither issue orders nor sue in the courts, only informal pressure will be available to reinforce its efforts at voluntary compliance. The Commission is authorized, for example, to recommend to the Attorney General that he intervene in a civil action brought by a grievant for whom the Commission was unable to achieve voluntary settlement within sixty days. It may also advise and assist the Justice Department in subsequent litigation. Whether the Commission may properly assist an individual plaintiff in this manner if the Attorney General fails to intervene is questionable: presumably had such aid been contemplated it would have been outlined in the act just as is the Commission's license to assist the Justice Department. On the other
hand, since the restrictions on publicity apply solely to the original charge and to the conciliation process, the Commission may sometimes choose to release the results of its investigation to an individual plaintiff. Such a possibility may induce some respondents to settle during the conciliation process. But although some state FEPCs have found that publicity lends credibility to their efforts, the Commission's reliance upon it will undoubtedly be extremely limited because it cannot hold open hearings and because criminal sanctions can be imposed upon any Commission employee who releases information that should properly have been kept confidential.

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, 41 Section 706(a). The prohibition against publicizing anything "said or done during . . . such endeavors" should be limited to results of the conciliation proceeding. "Endeavor" takes on connotations of a word of art because it is used previously in the section with specific and sole reference to conciliation and because "said or done" indicates that Congress had mediation rather than investigation in mind.

42 Section 709(e) makes it "unlawful for any officer or employee of the Commission to make public in any matter whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information." If the phrase "prior to the institution" is read as a modification of "make public" rather than "obtained," the Commission should be able to release information after litigation has begun. Congressional intent indicates the section should be given the less restrictive reading; Senator Humphrey stated with respect to the confidentiality required by §§ 706(a) and 709(e): "[T]his is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproved charges." 110 CONG. REC. 12723 (1964). Regardless of how § 709(e) is interpreted, information gathered under § 710(a), which duplicates certain of the § 709(a) investigatory authority and also permits the Commission to examine witnesses under oath, can be made public, apparently at any time, as the § 709(e) strictures are limited to that particular section.


44 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. §§ 44-1001-1004 (Supp. 1961).
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Baltimore and Cleveland confirm that voluntary programs are generally ineffective.45 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.

The Commission's power to initiate investigations may be more effective.46 State FEP agencies have found industry-wide surveys more successful than enforcement on a case-by-case basis.47 The EEOC could adopt a similar approach by utilizing information amassed in the detailed records it can require employers, unions, and employment agencies to keep.48 In addition, the statute places no limitations on the breadth of the charges which the Commission can frame. These two factors alleviate any disability imposed by a Dirksen amendment which sought to eliminate so-called "fishing expeditions" by restricting the Commission's investigatory powers to evidence "relevant to the charge."49 As in its efforts to settle individual complaints, the Commission lacks formal enforcement power, but several avenues are open to it if its investigations disclose evidence of discrimination: (1) it can recommend to any aggrieved person covered by its original charge that he bring a private suit,50 and (2) it can request the Attorney General to initiate an action against a discriminatory "pattern or practice" under his section 707 authority.51 In either instance it should be able to divulge the results of its investigation to the plaintiff.52 The Commission can most effectively fulfill its

46 Section 706(a). An investigation will be undertaken whenever one member of the Commission attests in a written charge that he has reasonable cause to believe a violation of title VII has occurred.
47 See NORGREN & HILL 231-33, 251; Note, 74 HARV. L. REV. 526, 537 (1961).
48 Cf. § 709(c). The comprehensive nature of the records which the Commission can demand is indicated by the extensive requirements specified for reports on apprenticeship programs.
49 Sections 709(a), 710(a). The Senate amendment altered the House bill's broader language, which required only that the evidence sought "relate to any matter under investigation or in question." H.R. 7152, 88th Cong., 2d Sess. § 709(a) (1964).
50 How an individual could otherwise be informed that he was named in a charge is unclear in light of § 706(a)'s express stipulation that no charges are to be made public on pain of criminal sanction. This conflict is further evidence that, to give meaning to the statute, "make public" must be read as "publicize," as in mass media, rather than merely to release information.
51 Section 705(g)(6).
52 It might be argued that § 705(g)(6), empowering the Commission to "advise, consult and assist the Attorney General," conflicts with the confidentiality of information gathered in investigations apparently demanded prior to litigation by § 709(c). A restrictive reading might hamper enforcement: if the Attorney General is not permitted access to evidence collected by the Commission, he may be reluctant to act on its recommendation to sue. The conflict might be resolved, however, by construing "make public" so as not to refer to intra-government communications. Cf. the argument of
statutory responsibility to eliminate discrimination if in addition to its mediatory function it serves as the investigatory arm of a public prosecutor, requesting the Attorney General to sue whenever it collects evidence of an illegal practice which it is unable to eradicatethe.

B. Problems of Overlapping Jurisdiction Between Agencies

Businessmen, as the Chamber of Commerce has complained, may soon be forced to deal with a battery of governmental agencies investigating racial discrimination in employment. Certainly concurrent jurisdiction of some complexity has been created by the Civil Rights Act. Indeed title VII encourages the proliferation of state and local FEP agencies, which are to share their jurisdiction with the EEOC and the Attorney General. The NLRB, the President's Committee on Equal Employment Opportunity, and the Community Relations Service also patrol the field. Some commentators fear administrative chaos.

1. Concurrent Jurisdiction: The EEOC and State and Local Agencies.

The concurrent jurisdiction provided by the act will grow as more states and localities pass FEP laws. If the jurisdiction in which the alleged violation occurred has a law under which charges may be brought and relief granted, the complaint must first be directed to the appropriate state or local authority. The act then requires a delay of at least sixty days before the Commission can investigate the case. Although the Commission is empowered to eliminate such concurrency by signing away its jurisdiction, the standards it should utilize in determining deferral and cession are unclear.

The delay provided by the act is contingent upon certain minimal conditions. The state or local law must not only prohibit the practice alleged but also establish an authority to "grant or seek relief." Although courts will probably not qualify, most other authorities will;

the Department of Justice and the FBI that "divulgence" of information found by wire-tapping in violation of § 605 of the Federal Communications Act has not occurred when one member of the government communicates it to another. See, e.g., Brownell, The Public Security and Wire Tapping, 39 CORNELL L.Q. 195, 197-99 (1954); Rogers, The Case for Wire Tapping, 63 YALE L.J. 792, 793 (1954).

53 For a statement of the hand-in-glove approach anticipated by Senator Humphrey, see 110 CONG. REC. 12724 (1964).

54 57 LAB. REL. REP. 187 (1964).


56 Sections 1104 and 708 protect state and local laws from pre-emption.

57 Sections 706(b)-(c).

58 Ibid.

59 Section 709(b).

60 Sections 706(b)-(c).

61 The state enforcement authorities which merit deferral apparently do not include
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the statute's use of "seek" seems to admit for deferral even those state agencies which can only mediate on a voluntary basis. In a curious deviation from its remedial rationale, title VII also provides that a state or local authority which can institute criminal proceedings will activate mandatory deferral. Apparently old, largely unenforced statutes that make discrimination in employment a misdemeanor and new statutes that fail to afford substantive relief but meet the formal requirements of the act will qualify; perhaps only when giving effect to a state statute would frustrate the purpose of the federal statute will an exception to the deferral requirement be made. Thus, in most jurisdictions grievants will probably not be able to bring an action or obtain federal assistance until sixty days after complaining to the appropriate state or local agency.

After sixty days the Commission is authorized to begin independent investigation, regardless of whether its state or local counterpart continues to handle the case. The language of sections 706(a) and (b) and state courts, which seem to be outside statutory purview here because of the requirement that a "charge" be "filed" with the state or local authority. The existence in twenty-five states of FEP enforcement authorities also seems to indicate that such administrative bodies were what Congress had in mind.

But see United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1954), where the Supreme Court rejected the argument that the administrative remedy offered by the Federal Trade Commission should first be exhausted by finding that "the only function of the Federal Trade Commission ... is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendations need not be followed by any court or administrative or executive officer." Id. at 210.

Sections 706(b)-(c).

E.g., Delaware, Idaho, Iowa, Vermont. Other states which make racial discrimination in employment a criminal offense also have authorities to "grant or seek" relief for the victim. For a survey of how infrequently criminal actions are brought under the misdemeanor laws, see Konvitz, THE CONSTITUTION AND CIVIL RIGHTS 192 (1947).

Senator Clark, a floor manager of title VII, expressed fear that unenforced city ordinances enacted by Southern municipalities solely out of obstructionist zeal would invoke the period of mandatory deferral. 110 CONG. REC. 12595 (1964).


At the date of this writing twenty-one states have enforceable FEP statutes which should definitely qualify for deferral, and passage of more can be expected imminently. Delaware, Nevada, Oklahoma, and West Virginia have statutes without enforcement provisions which may also qualify if "seek" is construed to include voluntary conciliation. See BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 57 (1964). See generally, BUREAU OF NATIONAL AFFAIRS, STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION (1964), and for municipal ordinances, Rhyne & Rhyne, CIVIL RIGHTS ORDINANCES 20-71 (1963).

Section 706(b).

Section 706(b) states only that no charge may be filed until sixty days have passed. After sixty days, therefore, § 706(a)'s broad directive that the EEOC shall investigate "whenever" a charge is properly filed is controlling.
an authoritative statement of legislative intent indicate that concurrent proceedings were anticipated in such circumstances. To construe the act otherwise would render meaningless the section 706(e) provision allowing a court, which can hear a case only after the Commission has essayed voluntary settlement, to stay proceedings pending termination of state or local efforts.

If the Commission is allowed to take a case when other proceedings are pending, it should not be compelled to drop its investigation when a decision is reached in the parallel procedure. Neither should a prior decision by a state or local agency forestall the Commission from hearing a complaint. Even if it were clear that res judicata should apply to administrative decisions, which it is not, frequent application of the doctrine of res judicata seems inappropriate in this context because of the lack of control that the complainant will usually have had over the earlier state FEP proceedings. Therefore the effect to be given to a prior administrative determination may be resolved on the basis of expressions of legislative intent and fairness in particular cases. Although slightly ambiguous, the language of section 706(b) appears to authorize the Commission to enter a case before the sixty day period expires if state or local proceedings have “terminated.” The bill’s floor manager understood this section to authorize the Commission to act whether “termination” had occurred by dismissal of the earlier complaint or by decision on the merits. To decide otherwise would conflict with the

70 Representative Celler stated just before the substitute bill passed the House that the EEOC could take a case after sixty days even if the state commission were nearing an adjustment. Hearings Before the House Committee on Rules on H. Res. 789, 88th Cong., 2d Sess. 14-15 (1964).

71 The stay, moreover, may be for no longer than sixty days, indicating that Congress not only anticipated but desired concurrent proceedings in certain situations.

72 See Davis, Treatise on Administrative Law § 18.02 (1958).

73 For a discussion of the effect of prior state court decisions upon the federal district courts, see text at notes 182-89 infra, where it is argued that res judicata should not apply. The Federal Commission will rarely if ever be confronted with a previous state court decision on the same issue due to the fact that a complaint must be filed with it within ninety days of the time it is brought to the notice of the state or local authority, which is much too short a time for most state agencies to reach a decision and have it judicially reviewed.

74 An unlikely alternative reading of 706(b) is that the clause “unless such proceedings have been earlier terminated” acts on the entire subsection to forbid the filing of a charge with the Commission if the case has already been decided on the state or local level.

75 Senator Humphrey stated that if the grievant does not obtain satisfaction on the state level, he can appeal to the EEOC, and went so far as to suggest that the EEOC might then request the state agency to reconsider its decision. 110 Cong. Rec. 14187 (1964). Humphrey’s understanding was that the state agency would have two
effort in the compromise bill to encourage strong state action by providing a federal remedy whenever state relief is inadequate; instead of spurring enforcement of state fair employment laws, there would be little to discourage state agencies from entering cursory decisions against possibly deserving grievants. Such a result would reduce deferral to de facto cession and make the complex deferral provisions redundant.

Refusal by the Commission to reconsider complaints upon which state or local agencies have rendered decisions would be serious not only because it would deny dissatisfied grievants the Commission’s assistance in mediation but also because it would seem to deprive them of the opportunity to sue in federal courts. The same result would occur when the Commission ceded its jurisdiction to state or local authorities. Such commission action is virtually unreviewable, since the only standard in title VII to guide the Commission is that grants ceding its authority should be “in furtherance of . . . cooperative efforts.”

The Department of Labor, apparently by grafting the standards required for sixty-day deferral onto the question of jurisdictional cession, has announced that twenty-two states already have FEP statutes that warrant relinquishment of EEOC jurisdiction. If, however, the standards for cession and for deferral were meant to be identical, the complex deferral provisions would be surplusage. That this construction was not intended is indicated by the presence of Commission authority to cede its jurisdiction in the House bill long before Senator Dirksen submitted his amendments requiring deferral. Perhaps the most compelling argument against widespread cession is that the Commission’s ability to extend or to limit its jurisdiction provides a powerful lever with which practical alternatives open to it after sixty days: “to adjust the complaint or to terminate proceedings on it.” 110 Cong. Rec. 15866 (1964).

Many state FEP commissioners feel that although they must dismiss 50% of the charges filed, a much higher percentage are legitimate. See Girard & Jaffe, Some General Observations on Administration of State Fair Employment Practice Laws, 14 Buffalo L. Rev. 114, 118 (1964); Note, 74 Harv. L. Rev. 526 (1961). Giving res judicata effect to these dismissals would put even more pressure upon state agencies to dismiss borderline cases in order to forestall federal intervention. If so, charges might be investigated less adequately than they are at present, and encouragement of stronger state and local FEP agencies, the policy underlying deferral, would be impaired.

Cf. §§ 706(c), 709(b).

Section 709(b).

Ibid.

§§ 706(e), 709(b).

Section 709(b).


The Commission’s authority to rescind agreements ceding its jurisdiction at any time gives it considerable maneuverability in inducing state and local agencies to maintain high standards of enforcement. Section 709(b).
to induce states and municipalities to build up their own FEP authorities to high levels of competence and effectiveness.\textsuperscript{83}

State and local agencies have made at most modest progress in eliminating discrimination by employers.\textsuperscript{84} They have exerted even less impact upon discriminatory union practices.\textsuperscript{85} This slow progress is more a result of chronic deficiency in staffing and financing than lack of enforcement power.\textsuperscript{86} It was in part for these reasons that five state FEPC heads testified before the Senate Committee on Manpower and Employment to the need for parallel federal legislation.\textsuperscript{87} Not only will state agencies and the Federal Commission be able to cooperate closely\textsuperscript{88} and perhaps even to pool their finances,\textsuperscript{89} but also the threat of having to account to two agencies may induce businessmen and labor leaders to arrange to deal with only one.\textsuperscript{90} The power of the EEOC to condition ceding its jurisdiction upon a showing that a state FEP agency is adequately financed could be a strong inducement for generally conservative

\textsuperscript{83} See text at notes 23-25 \textit{supra} for analysis of how this inducement to state and local activity was written into the act by the Dirksen amendments.

\textsuperscript{84} See \textit{Norgren & Hill} 230. See generally id. at 114-48; Girard & Jaffe, \textit{supra} note 76, at 115; Hill, \textit{Twenty Years of State Fair Employment Practice Commissions}, \textit{14 Buffalo L. Rev.} 22 (1964).


\textsuperscript{87} See 110 Cong. Rec. 13080-81 (1964) (remarks of Senator Clark). Several of the reasons cited to demonstrate why a concurrent federal law was necessary even in northern states which already had enforceable FEP statutes go also to the disadvantages of cession: Senator Humphrey emphasized the unequal coverage and effectiveness of the various existing statutes, and the difficulties which state and local agencies had encountered in policing interstate business operations. 110 Cong. Rec. 6549-50 (1964). See also \textit{Norgren & Hill} 333-34; Note, \textit{State Fair Employment Practice Acts and Multi-State Employers}, \textit{36 Notre Dame Law.} 189 (1961).

\textsuperscript{88} Section 709(b) authorizes the Commission to utilize the services and personnel of state and local agencies if it can attain their consent.

\textsuperscript{89} Section 709(b) permits the Commission to reimburse state and local agencies for services rendered. It has been suggested that the language allows the Federal Commission to pay state agencies for handling classes of cases over which it has relinquished federal jurisdiction. See Berg, \textit{supra} note 3, at 91-92. But the language of the statute and its legislative history belie this suggestion. Although the powers to reimburse and cede are in the same subsection, they are conferred in separate sentences which fail to connote that the reimbursement power has been carried over into the cession authority. In the House bill the two authorities were, in fact, in altogether separate sections which operated only in mutually exclusive situations. See H.R. 7152, 88th Cong., 2d Sess. §§ 708(b), 709(b) (1964).

\textsuperscript{90} One of the most frequently voiced objections to the bill was that it would subject businessmen to inconvenient record-keeping and unnecessary harassment by duplicate authorities. See, \textit{e.g.}, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (additional minority views of Representative Meader).
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lobbies in a state legislature to pressure for larger appropriations for the state FEP agency. An alternative method of achieving the same result would be for local companies to press for effective fair employment ordinances in their own municipalities. Such approaches would further title VII's concern to encourage decentralized adaptation to regional problems and experimentation with different methods of preventing discrimination by enlisting voluntary effort within individual communities to achieve compliance with the law.

2. Jurisdictional Conflict Between the EEOC and the NLRB. Troublesome jurisdictional overlap will occur if the NLRB continues to concern itself with complaints of racial discrimination. By judicially-created doctrine a labor union has a fiduciary duty to represent all employees in its bargaining unit "without hostile discrimination, fairly, impartially, and in good faith." Delay and expense have discouraged private litigation, however, and commentators have urged the NLRB to take jurisdiction over complaints of racial discrimination. Thus, it is argued that the duty of fair representation derived from section 9(a) of the National

91 Conspicuously absent from the organizations which fought passage of the Civil Rights Act were such major business lobbies as the National Association of Manufacturers and the Chamber of Commerce. See Cong. Q. Weekly Report, Feb. 21, 1964, p. 366. This may be an indication that the larger companies, whose lobbying activities can be particularly influential on the state level, no longer have an inordinate distrust of FEP legislation. Since most businessmen would presumably rather deal with state than federal officials, it may not be far-fetched to attempt to interest them in procuring larger appropriations to state agencies.

92 At least one municipal FEP agency, in Philadelphia, has enjoyed substantial success and should merit serious consideration when the Commission decides to which agencies it will delegate its powers. See Norgren & Hill 101-02, 111-13. For discussions which touch upon possible home rule problems, see Rice & Greenberg, Municipal Protection of Human Rights, 1952 Wis. L. Rev. 679; Note, 74 Harv. L. Rev. 526, 581-84 (1961).

93 See 110 Cong. Rec. 12580 (1964) (remarks of Senator Humphrey); 110 Cong. Rec. 13087 (1964) (remarks of Senator Dirksen).


95 So discouraging to grievants are considerations of delay and expense in litigation that it has been estimated an average of less than one case a year has been brought under the Fair Representation doctrine. See Sovern, Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda, N.Y.U. 16th Conf. on Labor 3, 7 (1963). See also Albert, NLRB—FEPC, 16 Vand. L. Rev. 547, 557-58 (1963); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1339 (1958).

Labor Relations Act\(^97\) can be read as implicit in section 7,\(^98\) the violation of which is an unfair labor practice under section 8(b)(1)(A).\(^99\) Furthermore, until recently it was felt that the NLRA should “be exploited to its utmost”\(^100\) since prior to the passage of the Civil Rights Act Congress had failed to provide an alternative remedy.

Although the *Miranda* decision\(^101\) foreshadowed the use of the NLRA as a weapon against racial discrimination, not until the day before Congress passed the Civil Rights Act of 1964 did the NLRB actually find that racial discrimination constituted an unfair labor practice. A unanimous Board held in *Independent Metal Workers (Hughes Tool Co.*)\(^102\) that a local’s refusal to process a Negro’s grievance was illegal coercion of an employee in violation of section 8(b)(1)(A). A three-member majority went further and found a violation of section 8(b)(2)\(^103\) because the union caused the company to discriminate against the employee and a violation of section 8(b)(3)\(^104\) because its failure to process the grievance was a refusal to bargain collectively with the company. That the NLRB will adhere to *Independent Metal Workers* despite the passage of the Civil Rights Act is indicated by a subsequent decision in which section 8(a)(3) was also relied upon to forbid racial discrimination by an employer.\(^105\)

The General Counsel of the NAACP hailed the *Independent Metal Workers* decision as a step forward of “almost revolutionary proportions” for the civil rights movement.\(^106\) But whereas the arguments for assump-

\(^98\) 29 U.S.C. § 157 (1958): “Employees shall have the right . . . to bargain collectively through representatives of their own choosing.”
\(^100\) Sovern, *supra* note 99, at 631.
\(^102\) 147 N.L.R.B. No. 166 (1964).
\(^103\) 29 U.S.C. § 158(b)(2) (1958), making it an unfair labor practice for a labor organization “to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8(a)(3)] . . . .” Section 8(a)(3) in turn provides that it shall be an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (Supp. 1964).
\(^104\) 29 U.S.C. § 158(b)(3) (1958): “It shall be an unfair labor practice for a labor union or its agents— . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . . .”
\(^105\) Local 1367, Int’l Longshoremen’s Ass’n, 148 N.L.R.B. No. 44 (1964). Union enforcement of a work distribution ratio between Negro and white locals and of a “no doubling” arrangement forbidding white and Negro gangs from working together was found by a unanimous Board also to violate §§ 8(b)(1)(A) and 8(b)(2).
ENFORCEMENT OF FAIR EMPLOYMENT

The attractiveness to grievants of the NLRB alternative fails to support extended NLRB jurisdiction; Congress probably would not have designed such elaborate procedures in title VII if it had expected them to be frequently circumvented by the NLRB alternative. Although technically NLRB jurisdiction over racial discrimination is protected by the act, it was undoubtedly only because the NLRB had never exercised such jurisdiction when the Civil Rights bill was being drafted that the concurrency problem was not provided for. Even though allowing NLRB jurisdiction would probably not result in pre-emption of state and local agencies, conceivably the NLRB, already overbur-

107 The court-appointed attorney and waiver of costs provided by §§ 706(e) and (k) is discretionary with the district judge.

108 The prediction was made even before the provisions for deferral were written into title VII that grievants might have to wait over two years for relief. H.R. Rep. No. 914, 88th Cong., 1st Sess. 41 (1963) (additional majority views of Representative Kastenmeier).

109 Technically § 1103, which protects existing rights of federal agencies, should apply to NLRB jurisdiction over racial discrimination, even though it did not exist when the bill was drafted and debated, because the Independent Metal Workers decision was announced the day before the Civil Rights Act was finally signed into law.

110 One of the few Congressional references to the possibility of concurrent jurisdiction between the EEOC and the NLRB was a memorandum prepared for Senator Clark by the Department of Justice which indicates how little foreseen was Independent Metal Workers: "Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705 [subsequently renumbered 703 and 704]. Of course, title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207 (1964).

111 Immediate NLRB jurisdiction could conceivably create a problem with the state and local authorities protected by title VII, for the Supreme Court has carefully protected the NLRB by pre-empting state authority in broadly defined areas of Board competence. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); see generally Meltzer, The Supreme Court, Congress and State Jurisdiction over Labor Relations, 59 Colum. L. Rev. 6, 269 (1959). If alternative access to the NLRB meant that grievants complained directly to the Board, state and local agencies could be prevented from exercising the jurisdiction supposedly guaranteed them for at least
dened with a backlog of charges, would find itself flooded with cases outside its area of special competence while relatively few complaints trickled into the EEOC or state and local agencies. The NAACP has in fact advised grievants to complain directly to the NLRB rather than to the EEOC.\textsuperscript{112}

Practical considerations aside, judicial reaction indicates that by reading section 8 to forbid racial discrimination the NLRB has exceeded its statutory authority.\textsuperscript{113} It has been persuasively argued that the weight of authority in the cases and legislative history demonstrates that sections 8(a)(3) and 8(b)(2) refer solely to discrimination resulting from union activity.\textsuperscript{114} The Board's technique of reading the section 9 right to fair representation into section 7 has also been questioned, for legislative intent and twenty-nine years of history give little support to this interpretation of the statute.\textsuperscript{115}

A supplementary tactic utilized by the Board in \textit{Independent Metal Workers} was to revoke the union's certification. Such action, which the sixty days by sections 706(b) and (c). But state jurisdiction has been permitted to prevail in the past where a "compelling state interest" was at stake. Violent conduct and mass picketing, for example, are subject to state regulation even when such actions are unfair labor practices. Protection of its citizens' civil rights might also be considered a "compelling state interest." \textit{Cf.} Meltzer, \textit{supra}. The \textit{Garmon} rule preempting state courts depends in part on the argument that they should not be permitted to interfere with "conduct so plainly within the central aim of federal regulation . . . \textit{[under the NLRA].}" 359 U.S. at 244. In title VII there is, however, the clearly expressed intent that state jurisdiction should not be unnecessarily dislodged. Hence the NLRB should definitely not be permitted to pre-empt state and local FEP agencies.

\textit{Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690, 696 n.7 (1962).}

\textsuperscript{112} N.Y. Times, July 5, 1964, p. 1, col. 6. There has, however, been no immediate increase in the volume of complaints of racial discrimination filed with the NLRB. 57 LAB. REL. REP. 183 (1964).

\textsuperscript{113} In \textit{Miranda Fuel Co.}, where racial discrimination was not in issue, the NLRB found that any "hostile" union action against one of its members "for irrelevant, unfair, or invidious reasons" constitutes an unfair labor practice. 140 N.L.R.B. 181, 185 (1962). In an atmosphere charged by the recognition that such a rule could be directed against racial discrimination, the Second Circuit denied enforcement. NLRB v. \textit{Miranda Fuel Co.}, 326 F.2d 172 (1963). Consequently the question of whether the NLRB should redress racial discrimination under §§ 8(a)(3) and 8(a)(2) is only one aspect of a major definitional problem, which will probably not be resolved until the limits of the Board's jurisdiction are clarified by the Supreme Court. But in a case in which it need not have even mentioned \textit{Miranda}, the Supreme Court went out of its way to state that it was reserving the NLRB's arguments in \textit{Miranda} for later consideration. \textit{Local 100, United Ass'n of Journeymen v. Borden}, 373 U.S. 690, 696 n.7 (1962).


\textsuperscript{115} \textit{See} Note, \textit{supra} note 114, at 716-25; \textit{Note, 78 HARV. L. REV. 679 (1965). But see note 96 supra; Comment, Racial Discrimination and the Duty of Fair Representation, 65 COLUM. L. REV. 273 (1965); Note, 42 TEXAS L. REV. 917 (1964).}
Board had frequently threatened in the past,\textsuperscript{116} seems clearly authorized if the offending union fails to conform to the standards imposed by section 9 for certification.\textsuperscript{117} Should the Attorney General fail to prosecute under section 707, or should a supplementary sanction against a recalcitrant union be needed, decertification by the Board might well be useful. Its general efficacy, however, is questionable because many unions are uncertified and because many labor organizations, particularly craft unions and those in the building trades, are not dependent on NLRB certification procedure for maintenance of their representative status: employers would often continue to be under a duty to bargain merely because such unions enjoy majority support.\textsuperscript{118}

In the area of civil rights, Board regulation is peripheral at best. If the NLRB continues to assert jurisdiction, therefore, state and local agencies should not be pre-empted. Arbitration proceedings under the NLRA provide an analogy:\textsuperscript{119} the NLRB should require complaints first to be referred to state and local agencies, and next to the EEOC. If the complainant perseveres, or if the EEOC enlists its assistance, the NLRB might then respond, utilizing such weapons as decertification and institution of closed shop complaints against unions which exclude Negroes. Although the NLRB can play a useful role in the eradication of racial discrimination, it should be a supplementary one at a late stage in the enforcement process.\textsuperscript{120}

3.\textit{ Concurrency Among Agencies: A Summary}. The Commission should be able to make a significant contribution to the effort to eliminate employment discrimination by cooperating with other agencies and serving as a national FEP clearing-house. Possibilities for cooperation with the President's Committee on Equal Employment Opportunity provide a good example of how what might otherwise be wasteful duplication can be turned to good advantage.

The President's Committee on Equal Employment Opportunity, first created by executive order in 1941 and since continued on slightly


\textsuperscript{118} See \textit{Norgren \& Hill} 217; Sovern, \textit{supra} note 95; Comment, 50 \textit{Va. L. Rev.} 1221, 1222-23 (1964).

\textsuperscript{119} See Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir. 1958); see also Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 455-57 (1957).

\textsuperscript{120} In most instances the EEOC will have made at least initial efforts at voluntary settlement before the NLRA's six month statute of limitations has run. \textit{Cf.} § 706(d).
revised bases by subsequent administrations, covers approximately one quarter of all persons working in non-agricultural industries. It is empowered to terminate the government contracts of employers whom it has found to have discriminated on the basis of race, color, religion or national origin. It may also publish the names of non-complying contractors and disqualify them from future government contracts. The Commission and the President's Committee can complement one another's activities in many ways; for example, a suggestion by the Commission that it will refer a case involving a government contractor to the President's Committee with a recommendation that the Committee impose all sanctions at its disposal would be a forceful lever in the conciliation effort. But, the Justice Department, apparently impressed by the fact that much of the coverage of the President's Committee will be duplicated by title VII, has announced that the Committee will probably be phased out of existence by 1968. The potential future efficacy of the Committee suggests, however, that it should be retained. There are, indeed, specific references to it in title VII which apparently presuppose its continuing existence.

Although jurisdictional overlap may sometimes cause troublesome friction between agencies, proliferation of agencies is not, in general, to be discouraged. Agencies should often be able to cooperate to good advantage; hence the EEOC should make use of the special resources offered by the President's Committee and the NLRB to lend credibility to its efforts as mediator. In the interest of coherent administration on the federal level, individual complaints should first be referred to the EEOC. The EEOC should also be chary of dispersing its authority to any but the most effective state and local FEP agencies, for its very presence, weak as the Commission is, will serve as a catalyst to stronger

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122 Coverage has been variously estimated at between 15 and 18 million employees. See NORGREN & HILL 153 n.6, citing U.S. Dept. of Labor statistics; Powers, supra note 121, at 484-85.

123 A clause forbidding discrimination is written into all government contracts. See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (federal government entitled to do business with contractors and suppliers on its own terms).


126 Sections 709(d) (records required under Exec. Order No. 10925, creating Kennedy Committee, need not be duplicated for EEOC), 716(c) (President's Committee members to be invited to attend coordinating conference; see text at note 128 infra). See also § 701(b) (proviso directing President to "utilize his existing authority" to prevent discrimination in federal employment).
state and local enforcement. Informal working arrangements should be sufficient to eliminate unnecessary duplication of agency effort; to this end the national conference which title VII directs the President to convene should be held as soon as possible to initiate efforts to achieve coordinated administration.

II. Enforcement by the Executive

When the EEOC was stripped of its enforcement powers, a compromise gave the Attorney General authority to intervene in private suits and to initiate civil actions. Thus the Justice Department now possesses many of the powers originally vested in the Commission.

The sole condition imposed upon the Attorney General's intervention in individual suits is that he certify cases to be of "general public importance." Since "public importance" is an imprecise qualification, courts may usually be expected to grant a request to intervene. The EEOC is authorized to "advise, consult and assist" the Attorney General in the litigation and to permit him access to the results of its investigation. Although the case is to be docketed by the federal district court as an ordinary civil suit, the Attorney General's intervention will assist the plaintiff by shifting the burden of litigation from his shoulders.


128 Section 716(c). Vice-President Humphrey has been appointed coordinator of the government's civil rights programs. N.Y. Times, Dec. 11, 1964, p. 1, col. 6. Subsequently a coordinating Council on Equal Opportunity, which Humphrey is to head, has been created by executive order, 58 Lab. Rel. Rep. 139 (1965).


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129 The arrangement was generally regarded as a quid pro quo which, although weakening the enforcement of the bill, made some concession to the bill's liberal supporters. See Hearings Before the House Committee on Rules on H. Res. 789, 88th Cong., 2d Sess. 23 (1964); 110 Cong. Rec. 14220 (1964).

130 Section 706(e).

131 "Public importance" for a case might take the form of creating judicial precedent or merely of breaking a pattern of discrimination in a particular industry. The Attorney General's certification will nevertheless be subject to review by the court, which "in its discretion" may refuse to permit intervention. Section 706(e). Congressional understanding was that such intervention would generally be allowed. See, e.g., Hearings Before the Committee on Rules on H. Res. 789, 88th Cong., 2d Sess. 21, 25-26 (1964).

132 Section 705(g)(6).

133 See notes 52-53 supra and accompanying text.

134 Sections 706(e)-(f). There is no expediting provision or opportunity for a three-judge court in private suits under § 706.

135 Although § 706(e) permits the district court to appoint an attorney and to allow the action to begin without payment of fees, costs or security, the exercise of such power is discretionary and will probably be infrequent in some districts. Consequently
More importantly, "whenever" the Attorney General "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title" he may bring a civil action himself. The procedural requirements placed upon the Attorney General in such suits are the least onerous in title VII. "Whenever," by its plain meaning, indicates that he need not wait for state or federal administrative remedies to be exhausted. A difficult hurdle will be to show that he has "reasonable cause to believe" the requisite violations exist, for if he cannot demonstrate this his complaint will be summarily dismissed. Since he will generally have to allege a number of distinct acts to support his belief that a "pattern or practice" exists, tactically it might be easiest for a defendant to win his case on the pleadings. But it should not be necessary to allege very many distinct elements to indicate the probable existence of a "pattern or practice." The language of the act specifies that "pattern or practice" was meant to encompass a series of discriminatory acts by a single individual; the use of "practice" makes it arguable, a plaintiff may risk substantial expense if he undertakes litigation himself. Even if the court appoints an attorney and delays court costs, there will be miscellaneous expenses difficult for an unemployed grievant to bear. An award of costs may include a reasonable attorney's fee, but of course this will be available only to the prevailing party. Section 706(k).

Section 707(a).

Senator Humphrey's understanding confirms this reading: "There is no requirement for exhaustion of administrative remedies prior to exercise of this authority by the Attorney General and there is no requirement of prior referral to Federal, State or local agencies, though the Attorney General would remain free to make such referral if he deemed it useful." 110 Cong. Rec. 12724 (1964); see also Hearings Before the House Committee on Rules on H. Res. 789, 88th Cong., 2d Sess. 19 (1964) (memorandum submitted by Representative McCulloch).

The stipulation that the Attorney General must find "resistance to full enjoyment" apparently is legislative gloss. It means "no more than refusal to comply with titles II or VII of the act: that is, engaging in any prohibited discrimination." 110 Cong. Rec. 15895 (1964) (remarks of Representative Celler).

The bill's floor manager in the House thought otherwise: "the statute contains the usual directive to the Attorney General that he should have a reasonable case before he sues, but of course, he—not the court—decides whether reasonable cause exists, and the issue of reasonable cause does not present a separate litigable issue." 110 Cong. Rec. 15895 (1964) (remarks of Representative Celler).

The Federal Rules of Civil Procedure, however, dispense with fact pleading for the minimal requirement that there be "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Hence the defendant's motion for dismissal under rule 12(b) would have to be predicated upon the Attorney General's failure to state "a claim upon which relief can be granted," and once an allegation of a discriminatory pattern or practice is made a court is unlikely to dismiss. Cf. Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

Section 707 refers to "any person or group of persons," envisaging both individual and class actions.
although unlikely, that one act involving the participation of several individuals might also be included.\textsuperscript{142} How many instances may be necessary to establish a pattern or practice is, however, unclear;\textsuperscript{145} it may be justifiable to read into “pattern or practice,” when taken with the verb “is engaged,” a requirement that the conduct have been regular and continued over a period of time.\textsuperscript{144}

The Attorney General’s initiation of a civil action brings with it advantages which are not available in private suits. The case can be heard by a three-judge court,\textsuperscript{145} which may be all but essential to success in some southern districts.\textsuperscript{146} The case must also be “in every way expedited,”\textsuperscript{147} a particularly compelling consideration for those grievants who are unemployed.\textsuperscript{148} Accordingly, if the Attorney General, upon the recommendation of the EEOC, plans to intervene in a case if it is privately brought, the Justice Department might consider initiating the case itself instead. This approach would guarantee a grievant immunity from attorney’s fees or court costs, which a judge might impose in a private action.\textsuperscript{149} For many individuals such procedural advantages will outweigh the probability that only impersonal relief in the form of a general prohibitory injunction will be granted in a suit initiated by the Attorney

\textsuperscript{142} Such a construction would give “practice” a meaning distinct from “pattern” and so prevent its being considered surplusage. It is arguable that the word “practice” is used in § 707 as a term of art identical to “unlawful employment practice” but its usage here in conjunction with “pattern” suggests that the collective meaning was intended.

\textsuperscript{143} Congressional comment confirms the obvious limitation that the Attorney General will be unable to sue a single firm for an “isolated or sporadic act.” 110 CONG. REC. 15895 (1964) (remarks of Representative Celler); 110 CONG. REC. 14239, 14270 (1964) (remarks of Senator Humphrey).

\textsuperscript{144} Such descriptive adjectives as “repeated,” “regular,” and “consistent” were frequently used to qualify the scope of § 707 in congressional debate. See, e.g., 110 CONG. REC. 14239, 14270 (1964) (remarks of Senator Humphrey).

\textsuperscript{145} Section 707(b). The section is identical with § 206, which was derived in turn from 15 U.S.C. § 28 (1958) (civil antitrust). Whether to resort to a three-judge court is entirely within the discretion of the Attorney General; the chief judge of the court of appeals designates a panel immediately upon receipt of the Attorney General’s request.


\textsuperscript{147} Section 707(b). The expediting clause applies even if the Attorney General does not request a three-judge court.

\textsuperscript{148} The expediting provision was inserted in full recognition of the major problem posed by judicial delay, as Representative Celler explained when stating the rationale for an identical clause in title II: “Some judges in the South on ... civil rights cases ... are dragging their feet.” 118 CONG. REC. 1595 (1964). For a detailed description of how a federal district judge can discourage any but the most determined plaintiff by consistently finding grounds for procedural delays, see Judge Mize’s handling of Meredith v. Fair, 305 F.2d 343 (5th Cir.), \textit{cert denied}, 372 U.S. 916 (1963), reported in \textit{BARRETT, INTEGRATION AT OLE MISS} (1965).

\textsuperscript{149} Section 706(e). See note 135 \textit{supra}. 
General; this would be particularly true when, for example, a grievant has applied repeatedly for a job with a company and thinks that threat of a contempt citation might change an employer's hiring policy. It may sometimes be in an individual's interest immediately to bring his complaint to the attention of the Attorney General, for he might thereby avoid the delay necessitated by the Commission's mandatory deferral and conciliation process.

If it becomes the practice for the courts to grant direct relief to an individual when the Attorney General has successfully prosecuted a civil action, grievants will benefit substantially. The statute authorizes the Attorney General to request "such relief, including . . . a permanent or temporary injunction, restraining order or other order . . . as he deems necessary to insure the full enjoyment of the rights herein described."150 "Other orders" might be interpreted to include orders to hire and reinstate specific individuals.151 Since reparation is within the equitable jurisdiction,152 the phrase might also encompass awards of back pay.153 Furthermore, the omission of "preventive" in describing the relief available in section 707, which otherwise conforms precisely to section 206 upon which it was modeled, may indicate congressional intent to give the courts powers of redress when the Attorney General sues under section 707.

Practical considerations may, however, dissuade courts from granting direct relief to grievants who are not formal parties to the Attorney General's suit. For example, ordering an employer to hire a specific individual may be unnecessary if he has in the interim found another job, but without introducing peripheral issues the court could not properly explore his current status.164 Hence a convenient procedure might be for the aggrieved individual to join or even to intervene in the Attorney General's suit. This tactic could be disallowed on the ground that such intervention might hamper the Attorney General in conducting the case.155

150 Section 707(a).
153 A provision delineating identical decrees in the Emergency Price Control Act has been held to authorize a court order to repay illegally collected rent. Ibid.
154 A Connecticut court in this situation refused to order an employer to hire a specific individual, but did order the employer not to discriminate against the same applicant if he applied again. Draper v. Clark Dairy, Inc., 17 Conn. Supp. 93 (Super. Ct. 1950).
155 See United States v. American Soc'y of Composers, Authors & Publishers, 11 F.R.D. 511 (S.D.N.Y. 1951) (dictum), where intervention in the Attorney General's antitrust suit was denied, the court stating that sound public policy requires the government to be free from interference by private citizens when it litigates in the public interest.
or unduly delay the original suit. In addition the act provides a specific alternative course for an individual to pursue if he desires relief. Other policies, however, favor intervention. The requirement of the Federal Rules of Civil Procedure that the applicant's claim and the main action have a question in common would seem to have been met if the individual claims that the same pattern or practice of discrimination alleged by the Attorney General was directed in part against him. With this pre-condition satisfied, considerations of judicial economy, such as avoiding a multiplicity of suits, disposing of the complete controversy existing between the parties, and saving time consumed in trials, support intervention.

Whether or not private individuals are permitted direct relief under section 707, the Department of Justice retains significant enforcement power. Implicit in the wording "pattern or practice," and in section 707 in general, is the expectation that the Attorney General will combat illegal discrimination on the wide-ranging basis successfully adopted by several state FEP agencies. In conjunction with the EEOC the Attorney General will be able to initiate broad investigations and enforcement proceedings. But all of this power is discretionary with the Attorney General: whether title VII is effectively enforced will therefore depend largely upon the policy which the Executive adopts on civil rights.

III. Enforcement by the Judiciary

Substantial litigation under title VII may be anticipated; the small amount which has arisen from state FEP statutes provides an unreliable

156 Ibid.
157 See United States v. 1830.62 Acres of Land in Botetourt County, 51 F. Supp. 158 (W.D. Va. 1943) (intervention may be denied whenever applicant has potential remedy in another action).
159 For a much quoted statement of the above-mentioned policies, see Shipley v. Pittsburgh & L.E.R.R., 70 F. Supp. 870, 876-77 (W.D. Pa. 1947), where the plaintiff sued for compensation and the applications of eighty-seven others to intervene were granted. See also Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 506 (1941), where Mr. Justice Frankfurter upheld intervention in an anti-trust case when "the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree." Intervention has been permitted even when the intervener had no direct personal or pecuniary interest in the litigation. SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940); cf. Textile Workers v. Allendale Co., 226 F.2d 765, 769 (D.C. Cir. 1955) (alternative holding).
160 See Hearings Before the House Committee on Rules on H.R. 7152, 88th Cong., 2d Sess. 238 (1964) (comparison by Representative McCulloch of nearly identical provision in § 206 to powers of the Attorney General under antitrust acts).
161 In the twelve states with the most effective FEP laws only eighteen court actions
index since Congress departed from prior experience by weakening the administrative remedy and making de novo trials available to grievants. Experience under the Fair Representation doctrine indicates, however, that if the courts do not liberally exercise their statutory discretion to waive court costs and appoint attorneys, private parties will be discouraged from bringing suits; but even so, suits brought by the Attorney General should account for a fair amount of litigation.

Since cases will generally be heard by judges sitting without juries in their equitable jurisdiction, the enforcement of title VII has been thrust squarely upon the federal judiciary. Furthermore, the success of the title will hinge largely upon judicial determinations of the extent of the jurisdiction to be assumed by the federal courts and the nature of evidence considered to be probative, as well as the versatility of the judicial approach to the granting of relief. Because relevant precedent is scarce, the courts must fashion a new body of federal case law with but imperfect analogies in such areas as labor-management relations to guide them. Approaches adopted by state FEP commissions and decisions of state courts in their review will hence carry weight if only because that experience will often be directly in point.

A. Prerequisites for Judicial Intervention

Most fair employment cases that are heard by federal district courts will have first been referred to the EEOC in an effort to achieve volun-


162 See note 95 supra.


164 Decisions of state courts have been shaped largely by procedures followed on the administrative level, since they have generally limited their review to “whether the findings are, upon the entire record, supported by evidence so substantial that from it an inference of the existence of the fact found may be drawn reasonably.” Holland v. Edwards, 307 N.Y. 88, 44, 119 N.E.2d 581, 584 (1954); see also Lesniak v. FEPC, 364 Mich. 495, 504, 111 N.W.2d 790, 795 (1961), where legislative authorization of trial de novo was struck from the statute on the ground that it was inconsistent with the “elaborate machinery to perform a specific administrative and quasi-judicial function” also created by the statute. Since state courts have not originated the procedures devised, when federal suits are heard de novo the judiciary may accord even less weight to state precedents than they generally give to state law. But since the procedures worked out are experimental techniques in a very new area which offers few guidelines upon which to rely, the federal courts may well, by observing state agency and judicial experience, learn from error if not from intelligent precedent. For useful summaries of state FEP litigation see Note, The Operation of State Fair Employment Commissions, 68 HARV. L. REV. 689 (1955); Note, Anti-Discrimination Commissions, 5 RACE REL. L. REP. 1085 (1958); Note, Employment Discrimination, 5 RACE REL. L. REP. 569 (1960); and for a survey which has periodically been revised, Annot., 44 A.L.R.2d 1138 (1955).
Enforcement of Fair Employment

Tary compliance with the law. If after sixty days the EEOC has been unable to achieve conciliation, the grievant is entitled to bring a civil action; but the suit must be brought in the judicial district where the alleged practice was committed, where relevant employment records are kept, or where the grievant would have worked had he received the employment desired. Most actions brought by the Attorney General will also have originated in the Commission and will presumably be subject to similar jurisdictional requirements.

Any person who can claim to have been aggrieved is entitled to sue. Since “person” is broadly defined to include one or more individuals, associations, and unincorporated organizations, even a group should have standing to sue if it can demonstrate that it has been injured. Whether class actions are permissible is unclear; both section 706(g), which envisages injunctions broader than a specific order to hire, and the traditional considerations of judicial economy and convenience to

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165 Section 706(e) permits the court to stay proceedings an additional sixty days pending state, local or EEOC proceedings. Whether a motion for such a stay by the defendant can be honored, or whether it must be made by the agency in question, is unclear: the language says “upon request” but fails to delineate by whom.

166 Section 706(e).

167 Section 706(f). Only if the respondent is not found in any of the three districts may the action be brought where he has his principal office. Thus forum shopping is curtailed.

168 Section 707(a) states that the Attorney General “may bring a civil action in the appropriate district of the United States.” Although it is not certain, the word “appropriate” presumably refers back to § 706(f). See note 167 supra.

169 The statute refers variously to “person aggrieved” and “person claiming to be aggrieved.” See §§ 706(a)-(e). Use of the latter term to describe who can sue may indicate that claimants should generally be given a trial on the merits without careful scrutiny of their qualifications for standing; “person aggrieved” has received broad construction in prior FEPC experience. See Note, 68 HARV. L. REV. 685, 689 (1955). The juxtaposition and apparent interchangeability of the two terms seem to indicate that no distinction was intended and that standing requirements should be liberally construed.

170 See Section 701(a).


172 Individual relief is embodied in the clause permitting orders of “affirmative action,” whereas the authorization to “enjoin . . . from engaging in such unlawful employment practice” seems to include broader injunctions to benefit persons other than the original litigant. See also § 706(i), authorizing the Commission to sue to compel compliance with any order issued in an individual’s suit under § 706(e); if the court order affected solely the original grievant, he could be expected to return to court for its enforcement and so § 706(i) would be needless. There would be far more reason for intervention by the Commission to see that an order was enforced if it concerned a class of individuals similarly situated.
litigants suggest it is feasible to use them. Even if class actions are not permitted, an individual plaintiff might successfully request a court order framed broadly enough to benefit others than himself. In any case, elimination by a Dirksen amendment of the right to bring a suit "on behalf of" an injured individual should not prove restrictive: an organization will still be able to shoulder much of the burden of prosecution if the injured party is the nominal plaintiff.

Apparently an individual grievant will have access to the federal courts only after having applied for assistance to the Commission. Nevertheless the understanding of the bill's floor manager in the Senate was that "the individual may proceed [to the courts] in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court." Only if the plaintiff's theory is in tort with only collateral reference to the statute is this interpretation likely to prevail. Otherwise the fact that the act on its face provides for litigation only after elaborate conciliation procedures indicates that Congress did not intend grievants to have immediate access to the courts. But for thirty days after the Commission has notified him that it was unable to achieve a voluntary settlement, the grievant has "an absolute right to go into court" which exists regardless of Commission approval.

There will be temptation to cut into this "absolute right" if a state authority has reached a decision on the same charge before the grievant files in federal court. Principles of comity, which usually prevent parallel actions in different jurisdictions between the same parties, would seem to suggest that the federal courts should dismiss the complaint. Considerations of judicial economy and prevention of harassment bolster this interpretation. Finally, fulfillment of title VII's purpose might be
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curtailed if state agencies failed to exert their most strenuous efforts because they felt that impending federal action impaired the atmosphere necessary for adjustment.

In any conventional procedural situation these arguments would be compelling. In this instance there is, however, a danger that a grievant who has been required to apply first to a state agency for relief will be frozen into the earlier procedure with little chance of adequately satisfying his claim. In most states a grievant has little control over his case;\(^1\) the FEP agency investigates his complaint and handles subsequent prosecution.\(^2\) Since title VII requires preliminary solicitation of state agency assistance the plaintiff cannot be said to have chosen the remedy initially sought. Given such a situation, perhaps it is fortunate that comity is a creature of judicial discretion.\(^3\) Indeed, conflicting judgments and parallel remedies in identical causes of action have been upheld in other areas of the law.\(^4\)

The need to rehear a case will be most clear-cut when the state law in question differs substantively or procedurally from the federal.\(^5\) For example, some state laws do not authorize monetary compensation as a remedy;\(^6\) it would be anomalous to deny a grievant what might rightfully be his under the federal law because the act requires temporary deferral to the state. A plaintiff might also be severely prejudiced if state law did not afford assistance written into title VII, such as court-appointed counsel.

Complaints that, by permitting a second trial, federal courts are subjecting employers and unions to unfair harassment can be vitiacted by refusing to grant a plaintiff double relief for the same injury.\(^7\) Furthermore, it can be argued that two suits are justified because the alleged action has violated two distinct laws;\(^8\) on a federally-created cause of action a grievant deserves a federal hearing even if state laws cover the same transaction. Finally, title VII not only anticipates the possibility


\(^3\) See Note, supra note 184, at 523-24.

\(^4\) Cf. Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928); see also RESTATEMENT, JUDGMENTS §§ 61-67 (1941).


\(^7\) See, e.g., Wis. ANN. STAT. tit. 13, § 111.36 (Supp. 1965).

\(^8\) Cf. Note, supra note 184, at 523-24.

\(^9\) See, for an analogy in criminal law where the disadvantages to the defendant are more acute, the "dual sovereignty" doctrine as expressed in Bartkus v. Illinois, 359 U.S. 121 (1959).
that parallel actions may be brought simultaneously, but also expressly forbids federal courts to stay proceedings more than sixty days in such circumstances.¹⁸⁹

B. Problems in Proof of Discrimination

The standards required for proof of discrimination will substantially determine how effectively the rights secured by title VII are enforced. On the one hand, certain unlawful actions will be on their face indistinguishable from perfectly legal conduct. On the other, conduct motivated by legitimate business considerations may fall within the broad prohibitory language of the statute since any action taken even partially¹⁹⁰ "because of . . . race, color, religion, sex or national origin" will in theory violate the act.¹⁹¹ Hence to determine governing standards of proof the courts must strike a delicate balance between protecting the innocent defendant and enabling the legitimate grievant to obtain relief without undue difficulty. The problems of proof are exacerbated by the fact that the conduct proscribed is vaguely defined, even though the area of activity in question involves sensitive issues of traditional management decision-making. The nature of these problems makes it impossible to define comprehensive evidentiary rules; certain guidelines may be suggested, but even these must be flexibly applied. The critical factor will always be the situation sense of the trier of fact.

The simplest method of establishing discrimination will be to show that the defendant himself has indicated that one of the forbidden criteria motivated his action.¹⁹² State experience has shown, however, that this method will not often be available; once the sanctions of the law become known, discrimination will seldom be evinced by either word or personal conduct.¹⁹³

1. Proof of Intent. Title VII differs from most state FEP statutes, moreover, because it explicitly requires proof of intent to discriminate.¹⁹⁴ This stipulation was incorporated into the bill late in the Senate debate when amendments to the wording of sections 706(g) and 707 were offered from

¹⁸⁹ Section 706(e).
¹⁹⁰ An attempt to insert "solely" before "because of such individual's race, color," etc., in § 703 was unsuccessful. 110 CONG. REC. 13838 (1964) (amendment offered by Senator McClellan).
¹⁹¹ Sections 703(a), (b), (c).
¹⁹² Manifestation of a hostile attitude toward an employee or deprecatory comments about a plaintiff's race would be sufficient. Cf. Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954), where evidence that an employment agent had asked if a job applicant had changed her name and on being told, had commented, "What sort of a name is that?" afforded inference of discrimination.
¹⁹⁴ Sections 706(g), 707.
the floor.\textsuperscript{195} The additions were accepted only because the bill's sponsors understood them to be surplusage since section 703 defines an unlawful employment practice as an action taken "because of" the forbidden considerations.\textsuperscript{196} Although intent may be inferred from circumstantial evidence,\textsuperscript{197} difficulties will arise in determining in which cases the inference is justifiable. Plainly intent can sometimes be inferred from the defendant's treatment of the plaintiff.\textsuperscript{198} When the defendant's action is neutral, as when the plaintiff is one among many applicants denied a job, other extrinsic evidence such as that of an apparently discriminatory hiring pattern can provide the inference, although the specific circumstances of the act may not alone permit it. Hence proof of intent might cease to be, in practice, a separate element necessary to the plaintiff's case.\textsuperscript{199} Any other solution would require that a plaintiff, whose knowledge of the defendant's affairs and motivation will usually be severely limited, carry an impossibly onerous burden and might well contravene the broad remedial policy of the act.\textsuperscript{200}

The intent requirement may serve a valuable function as an affirmative defense, for even if the plaintiff has been subjected to de facto discrimination the defendant should prevail if he can prove that the discrimination was not purposeful.\textsuperscript{201} Such a defense, however, will necessarily depend

\begin{itemize}
  \item \textsuperscript{195} 110 Cong. Rec. 12723-24 (1964) (remarks of Senator Humphrey).
  \item \textsuperscript{196} Ibid.
  \item \textsuperscript{197} See, e.g., ibid.
  \item \textsuperscript{198} Of course if specific intent is proved, violation can be found even if a discriminatory purpose cannot be inferred. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963).
  \item \textsuperscript{199} The development of the treatment of intent under the labor statute may provide a parallel. Although the act does not on its face require it, the Supreme Court has frequently declared that intent is a necessary element of proof of a § 8(a)(3) violation. See, e.g., NLRB v. Erie Resistor Corp., supra note 198; Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937). However, the Court has also held that "proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954). For similar language in a more recent case, cf. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961). As a result, the intent requirement has become so diluted that it no longer constitutes an obstacle to a charging party's case. See generally Comment, 32 U. Chi. L. Rev. 124, 126-30 (1964).
  \item \textsuperscript{200} Cf. Judge Fuld's perception of the innate difficulties involved: "One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive . . . ." Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954). See also Bailey v. Washington Theatre Co., 112 Ind. App. 336, 344, 41 N.E.2d 819, 821-22 (1942).
  \item \textsuperscript{201} If the requirement of intent had not been added to the bill a strong case could have been made that since the statute's general policy is remedial and preventive,
largely upon what estimate is made of the defendant's credibility. The 
traditional problems attendant upon use of character and similar fact 
evidence will be present; the decision of the trier of fact on such issues 
will be difficult to review on appeal. 202 Because of the discretion accorded 
to the court of first impression, defendants will often be well advised 
not to base their cases entirely on intent but to bring in other issues 
as well.

2. Proof by the Attorney General: Pattern or Practice. When the Attor-
ney General initiates a suit he must prove the existence of a "pattern or 
practice of discrimination." 203 The most persuasive approach will be for 
him to submit evidence of several distinct acts of discrimination and 
thereafter to allege that these constitute a "pattern or practice." 204 But 
the act would also seem to permit use of evidence of statistical probability 
to infer the existence of a pattern or practice of discrimination.

When Negroes in considerable number have applied to an employer 
and all have been rejected while whites have simultaneously been hired, 
use of probability evidence might afford a strong inference of discrimina-
tion on the assumption that at least one of the Negroes would have been 
as qualified as one of the whites. When possible variable factors are few 
in number, as in questions of work conditions or discharges, the inference 
that a pattern of discrimination exists is especially strong. The courts 
have, for example, relied heavily on probability evidence to find a con-
stitutional violation when a pattern of wages lower for Negro school 
teachers than for white was established, 205 and the NLRB has found a 
heavy inference of anti-union discrimination when the proportion of 
union members laid off exceeded the proportion existing in the group 
from which selection was made. 206

But evidence of statistical disproportion in a work force or union does

202 Appellate court reluctance to interfere with credibility determinations under 
the NLRA may provide an analogy. Cf. NLRB v. Walton Mfg. Co., 368 U.S. 810 
(1961).

203 See text at notes 141-44 supra for discussion of "pattern or practice."

204 As this would probably necessitate putting several complaining witnesses on the 
stand, proof of discrimination against them might well entail the problems which will 
confront an individual who brings a case himself. See text at notes 213-29 infra.

205 Freeman v. County School Bd., 82 F. Supp. 167 (E.D. Va. 1948); Davis v. Cook, 

not necessarily support the inference that a pattern of discrimination exists. For example, evidence that there are no Negroes in a work force may not indicate that discrimination in hiring because of race has occurred; the plausibility of the inference depends upon other variables. Obviously, when a large company in an area with a diverse population is found to have no Negro employees, even though it hires new men regularly and has standard job requirements, the inference of discrimination is reasonable. A similar inference in the case of a small company with limited hiring might well be unjustified.

Proof largely dependent upon probabilities was accepted by the Supreme Court in the Jury Selection Cases: the habitual absence of Negroes from juries, coupled with presence in the district of Negroes qualified to serve, was held to be ground for retrial when the state failed to introduce contrary evidence.207 The statistical technique upheld in the Jury Selection Cases may not, however, permit of ready transposition to employment cases, because jurors are conscripted and there are many more variable factors necessarily present in employment. Estimation of how many of a district’s Negroes meet the relatively simple standards imposed upon jurors is far easier than calculating the number of Negroes in an area competent to perform jobs of a certain difficulty; in employment cases the number of Negro applicants and the rate of job turnover must usually be considered as well.208 Nevertheless the Attorney General of one state with an FEP statute similar to title VII has stated in a written opinion that any work force composed solely of individuals of one color or race is prima facie discriminatory.209

Fears that statistical evidence of employment patterns might be sufficient to establish a prima facie case of discrimination have contributed to complaints that businesses will be forced to favor minority groups in hiring. To alleviate just such fears, the Senate added a provision which states specifically that none of the persons covered by title VII need grant preferential treatment to any individual or group simply because a race or class is proportionally under-represented in any geographical area or its available work force.210 Conversely, an explicit attempt either to prefer a racial or religious group, or to hire in accordance with quotas, would be contrary to congressional intent211 and would undoubtedly be

210 Section 703(j).
211 The floor managers of title VII in the Senate stated legislative intent clearly:
held unlawful by the courts.\textsuperscript{212} Hence some employers will in effect be locked into past employment patterns which they will be unable to alter deliberately by selective hiring on the basis of race, color, religion, sex or national origin. But even these employers will be protected, for when such patterns are attributable to employment practices before the Civil Rights Act they should not be permitted to raise the inference that discrimination was practiced subsequent to its passage.

3. \textit{Proof by Individual Litigants}. Often evidence available to an individual plaintiff will be limited to two principal types: (a) that a pattern from which discrimination may be inferred exists, and (b) that he is qualified for the employment in question. It is suggested that introduction of both types of evidence should be sufficient to shift the burden of coming forward to the defendant and to warrant a directed verdict for the plaintiff if the defendant fails to reply. Introduction of evidence of either a discriminatory pattern or of individual competence may also in some cases be sufficient to overcome a motion to dismiss.

It has long been recognized, as the Supreme Court stated in 1957, that

"Any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.\" \textsuperscript{110} Cong. Rec. 7213 (1964) (memorandum submitted by Senators Clark and Case).

\textsuperscript{212} In a case decided before either the federal government or the state involved had a FEP law, a store with a 50\% Negro clientele sued to enjoin a civil rights group from picketing because it employed only white clerks. The California Supreme Court allowed the injunction on the grounds that the group's declared purpose of inducing the retail establishment, in the course of personnel changes, to hire Negro workers in proportion to Negro patronage was illegal because the picketers' aim, if realized, would have instituted a closed shop for Negroes. Hughes v. Superior Court, 32 Cal. 2d 850, 198 P.2d 885 (1947). Justice Traynor dissented because he did not agree that a closed shop would result, but added: "Had California adopted a fair employment practices act that prohibited consideration of the race of applicants for jobs, it might be said that the demand for proportional hiring would be a demand that Lucky [Stores] violate the law." \textit{Id.} at 869, 198 P.2d at 896. The Supreme Court affirmed, following the California court's reasoning that picketing for such a purpose was illegal even without an FEP law. Hughes v. California, 339 U.S. 460 (1950). With Judge Traynor's condition met by the enactment of both state and federal statutes, \textit{Hughes v. California} stands more strongly than ever before. In a 1964 case, the Indiana Supreme Court relied heavily upon it. Fair Share Organization, Inc. v. Mitnick, 198 N.E.2d 765 (Ind. 1964).

This will create problems for activist civil rights groups which have made demands for preferential hiring. It may also discourage well-meaning corporation executives who wish to begin to employ more Negroes for humanitarian reasons, and other employers who merely wish to be able to point to a visible percentage of minority group members in their work forces if a title VIII charge is levied against them. If, however, an employer does not reject a person of greater ability in order to employ a member of a minority group his choice will be legal. Those organizations which wish to see more Negroes employed in certain industries might therefore urge intensive recruitment among minority groups so that employers who are willing to hire Negroes will legally be able to do so by having well-qualified candidates from whom to choose.
"the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." In certain areas of the law, such as prosecutions brought under state licensing statutes and tax delinquency charges based upon the net-worth theory, the courts commonly shift the burden of coming forward. In arbitration over discharge disputes the burden has generally been shifted to the employer, and appellate courts have tended to follow suit implicitly in a wide range of cases. It has been pointed out that otherwise the plaintiff would initially have the onerous task of rebutting every possible justification which the respondent might advance for his allegedly discriminatory action. Against the institution of a comparable procedure in title VII cases, however, the argument will be made that it was apparently the legislative intent to keep the burden of proof on the plaintiff. But to be fair to the grievant and to give effect to the purposes of the act, as soon as the plaintiff shows that one of the forbidden criteria offers a reasonable explanation for the defendant's conduct, the burden of coming forward should be shifted to the defendant so that he is required to demonstrate that he was motivated by lawful considerations.

In some cases the use of evidence of discrimination against a group to establish the probability of discrimination against an individual will be persuasive, although generally the inference it provides should not be conclusive. Hence the floor managers of title VII in the Senate described "the presence or absence of other members of the same minority group in a work force" as a "relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race," but as only "one factor" and not a controlling one. Nevertheless if a defendant
ant introduces probability evidence comparable to that upon which the Attorney General could justifiably rely, he might well be considered to have met his initial burden. Any complaints of injustice on the grounds that he has not shown that the alleged discrimination was directed toward him are vitiated by the circumstance that if the Attorney General were suing such evidence could stand by itself.

Another method of establishing a strong inference of discrimination would be to prove that the grievant was qualified for the job in question. In many cases it may be relatively simple for an individual to prove his competence; a Connecticut court found prima facie discrimination against a Negro job applicant when the company's sole stated conditions were that employees be over eighteen and able to work nights. For more skilled positions, of course, the burden upon the complainant of proving sufficient expertise will be heavier.

Evidence of competence seems particularly attractive because it not only imposes a considerable burden upon the plaintiff but also offers the defendant ample opportunity to meet the plaintiff's contention on its own ground; for example, if the plaintiff's competence is alleged, it should not be difficult for the defendant to prove the contrary if the man does not possess the requisite qualifications. Such an approach would encourage employers to keep records supporting their decisions; once a man is hired, seniority, merit, and piecework systems, which have been expressly safeguarded in the act, would also be useful in comparing the plaintiff's work record to those of other employees. The act also permits use of "any professionally-developed ability test [which] . . . is not designed, intended or used to discriminate." If the defendant cannot

222 This approach will be most useful for individual plaintiffs, for proof that each member of a class is competent to perform any but the most menial tasks may be onerous.
225 Section 703(h).
226 The plaintiff's natural counter-argument would be that the system was not "bona fide." But even if the system itself is "bona fide," an employer's management of it may be held discriminatory. Cf. Delaney v. Conway, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (Sup. Ct. 1963) (plaintiff's complaint that his seniority rights were transferred because he had been active in civil rights activities upheld).
227 Section 703(h). This safeguard was not included in the act until Senator Tower won its adoption as an amendment in the last days of Senate debate. 110 Cong. Rec. 13724 (1964). Tower's amendment was prompted by the holding of an Illinois FEP hearing examiner that a professionally developed test in general use by many employers was inherently discriminatory to culturally deprived Negroes. On review, the full FEP Board decided the case against the employer on other grounds. Myart v.
offer particular evidence to demonstrate that an applicant was unqualified for a job, a logical inference might well be drawn that he has illegally discriminated. But even so, direct refutation of the plaintiff's demonstration of competence need not exhaust the possibilities of defense. An employer might, for example, prove that although the plaintiff was competent, other applicants were better qualified, or he might merely show that for economic reasons he had decided to take on no new men at the time of the plaintiff's application. Even if the plaintiff clearly had been rejected for reasons of religion, sex, or national origin, a narrow escape clause still exists: an employer can indicate that the factor constituted a "bona fide occupational qualification reasonably necessary to the normal operation of . . . [his] particular business or enterprise."228

If a requirement that a plaintiff make out a case of prima facie qualification became a *sine qua non* for FEP litigation, employers, unions and employment agencies would be adequately protected from harassment by undeserving complainants. And if it became the practice to shift the burden of coming forward upon the introduction of such evidence, deserving grievants should also benefit substantially. The plaintiff’s

Motorola, 55 Lab. Rel. Rep. 372 (1964), aff'd in part, 58 Lab. Rel. Rep. 2573-78 (Cir. Ct. Cook County 1963) text of examiner’s report reprinted in 110 Cong. Rec. 5662-64 (1964). If Tower’s intent was to ensure that a court could not declare a test discriminatory on its face, he failed because the court may still declare it unlawful if it finds that it was designed to discriminate. Section 703(h) also allows a court to hold that the use of even an unbiased professionally developed test was discriminatory.

228 This exception is unlikely to permit of much abuse, as even economic necessity cannot justify discrimination on the basis of race or color. See *Hearings on Equal Employment Opportunity Before Subcommittee on Employment and Manpower of Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 203 (1963). The courts, upon reference to the judicial interpretations which Congress tacitly adopted along with the wording of the state statutes, will also find that the exception has been narrowly construed in the past to include only those attributes necessary for performance of the work itself. Hence state commissions have refused to accept requests for exceptions based on the desires of co-workers, preference of customers, preservation of a traditional religious or national atmosphere, or maintenance of customary patterns of employment. See Note, 74 Harv. L. Rev. 526, 560 (1961); Note, 68 Harv. L. Rev. 685, 688 n.17 (1955). For example, the decision of the New York Commission on Human Rights to allow the Arabian American Oil Co. to enquire into the religion of job applicants because Saudi Arabia, the country in which it was doing business, would not grant visas to Jews, was reversed on appeal and eventually remanded by the New York Court of Appeals to the Commission with orders to arrange a settlement without allowing a formal exception. American Jewish Congress v. Carter, 100 App. Div. 2d 833, 199 N.Y.S.2d 157, aff'd, 9 N.Y.2d 223, 213 N.Y.S.2d 60 (1961), final panel opinion and stipulation reported in 8 Race Rel. L. Rep. 276 (1963). Religion has been rejected as a bona fide occupational qualification for probation officers although the law permitted children to be supervised by an officer of own faith, American Jewish Congress v. Hill, reported in 1 Race Rel. L. Rep. 971 (1959), and for employees although the jobs in question had to be performed on religious holidays, see Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 Buffalo L. Rev. 79, 89-90 (1964).
strongest case, which should definitely justify the judge in finding for him if the defendant fails to come forward with evidence of his own, will be to combine proof of his own individual competence with evidence of a pattern of discrimination against his class.\textsuperscript{229}

C. Relief Available Under Title VII

A final and crucial factor determining how effectively title VII is enforced will be the relief the courts authorize under it. The enabling language is broad: "The court may . . . order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . ."\textsuperscript{230} But this section was originally drawn to authorize relief of an incidental nature when title VII was still conceived to be creating primarily a "public right"; when the theory was altered to create a private right the language was changed only slightly. Whether courts will interpret the broad language restrictively after the original understanding or to its full capacity in view of the new theory will be of vital importance.\textsuperscript{231} If awards are inadequate, few grievants will bother to sue.

Criteria for determining appropriate relief were originally meant to be drawn from judicial and administrative interpretations of the similar NLRA provision.\textsuperscript{232} Most readily analogous is back pay, since the phrasing is identical and the purpose of each provision is to compensate a person for the time he has been unlawfully deprived of employment. Although frequently granted by the NLRB,\textsuperscript{233} back pay as a remedial device has seldom been utilized by state FEPCs.\textsuperscript{234} The federal courts would serve both the remedial and preventive purposes of title VII by conforming to the NLRB practice. Actual losses should be made good,

\textsuperscript{229} See St. Paul FEPC ex rel. White v. Midwest Bldg. Servs., Inc., reported in \textit{9 RACE REL. L. REP. 385} (1964) (coincidence of three forms of proof found conclusive: (1) general employment pattern, characterized by unexplained absence of Negroes as patrolmen while many were employed as custodial servicemen although the employer was in both instances "tapping the same labor supply"; (2) qualifications of complainant, which respondent stipulated to be "impeccable"; (3) reasons given by respondent for failure to hire neither substantial nor apparently bona fide).

\textsuperscript{230} Section 706(g).

\textsuperscript{231} See text at notes 16-22 supra.

\textsuperscript{232} See 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey). Section 10(c) of the NLRA authorizes the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . ."

\textsuperscript{233} See, e.g., Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) (union which had not been joined as respondent compelled to pay back wages); NLRB v. West Coast Casket Co., 205 F.2d 902 (9th Cir. 1953) (back pay required in absence of order to reinstate).

with deductions for earnings by the worker and for losses which he willfully incurred.\textsuperscript{235} The plaintiff should not, however, be required substantially to “lower his sights” when seeking alternative employment.\textsuperscript{236}

An important form of redress derived from NLRA experience will be orders to reinstate and to hire. Reinstatement is a remedy familiar from labor law, but orders to hire have been utilized less frequently.\textsuperscript{237} But courts need not hesitate to grant hiring orders because of reluctance to force unwanted personal associations, since Congress has taken care to prevent this by refraining from covering employers with less than twenty-five employees.\textsuperscript{238} Other NLRA relief which courts may find appropriate might include orders to grant union membership and back seniority, and, as incremental financial compensation, orders to pay bonus or incentive earnings, vacation allowances, tips, interest on the loss incurred and fringe benefits.\textsuperscript{239}

The change from public rights to private remedies in the act’s orientation raises the possibility that broader relief than that granted under the NLRA should be made available. In construing the authorization to “order such affirmative action as may be appropriate,”\textsuperscript{240} the phrase “affirmative action” may be read broadly on the supposition that the clause following “appropriate” was not meant to exclude remedies which were not specified. This construction would justifiably permit unusual equitable relief, although the language of the act would be strained if tort damages were included as well.

Additional awards in tort, however, may be essential to encourage individual grievants to litigate their claims. By recognizing the existence of a cause of action based upon unlawful interference with prospective economic advantage, exemplary damages or compensation for mental suffering could be permitted without doing violence to legislative intent. Joinder of dual claims would permit plaintiffs to rely upon this cause of action in conjunction with their formal title VII complaints, although juries would probably be necessary to try the issues

\textsuperscript{235} Cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
\textsuperscript{236} Cf. Harvest Queen Mill & Elevator Co., 90 N.L.R.B. 320 (1950).
\textsuperscript{237} But see Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
\textsuperscript{238} Sections 701(b), (e). See 110 CONG. REC. 13088 (1964) (statement of Senator Humphrey that at 25 employees, concerns “lose most of whatever intimate personal character they might have had”).
\textsuperscript{239} Cf., e.g., Omar Constr. Corp., 144 N.L.R.B. 1534 (1963) (Christmas bonus); Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962) (interest at 6%); Brown & Root, Inc., 132 N.L.R.B. 486 (1961) (necessary expenditures while seeking other work, such as travel, moving expenses for family, etc.); Aerosonic Instr. Corp., 128 N.L.R.B. 412 (1960) (bonus or incentive earnings); Home Rest Drive-In, 127 N.L.R.B. 635 (1960) (tips).
\textsuperscript{240} Section 706(g).
of tort involved.\textsuperscript{241} Even before the Civil Rights Act it was suggested that discrimination in employment might be an emerging tort;\textsuperscript{242} reference to title VII and the Fair Representation doctrine would serve to substantiate an employer's or union's duty not to interfere with economic advantage by unfair discrimination.\textsuperscript{243} Any judicial reluctance to award such relief should be lessened because intent would necessarily be an integral facet of proof.\textsuperscript{244} Recent recognition of other private causes of action in the general civil rights area, both by reliance on fundamental rights secured in statutes\textsuperscript{245} and by implication from newly-created statutory rights,\textsuperscript{246} would afford strong precedent for recognition of such a private right here.

Within the domain of the public right Congress, as in earlier legislation, has left the task of formulating standards of relief to "the judicial process of adapting appropriate equitable remedies to specific solutions."\textsuperscript{247} So open-ended is the statute that only the prior case law will limit the breadth\textsuperscript{248} and vagueness\textsuperscript{249} of court orders. Orders requiring specific affirmative action are possible. That such orders can be more effective to end discrimination than general prohibitory injunctions


\textsuperscript{242} See GREGORY & KALVEN, CASES ON TORTS 842 (1959).

\textsuperscript{243} See the argument of the Michigan Supreme Court that the purpose of the Michigan FEPC law is solely "to extend and make more specific" rights which an individual possessed previously. Highland Park v. FEPC, 364 Mich. 508, 111 N.W.2d 797 (1961). Title VII seems also to be based on this rationale, as § 707 refers to "rights secured" rather than "created" by the title.

\textsuperscript{244} See Bachrach v. 1001 Tenants' Corp., 41 Misc. 2d 512, 245 N.Y.S.2d 912 (Sup. Ct. 1963).

\textsuperscript{245} Ibid.; see also Fitzgerald v. Pan American World Airways Inc., 229 F.2d 499 (2d Cir. 1966); Note, Anti-Discrimination Law as a Vehicle for a Private Civil Action, 17 VAND. L. REV. 1506 (1964).


\textsuperscript{247} Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

\textsuperscript{248} Cf. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 126 (1948); Russell C. House Transfer & Storage Co. v. United States, 189 F.2d 349, 351 (5th Cir. 1951). For resumé of pre-1945 decisions, see May Dept' Stores Co. v. NLRB, 326 U.S. 376, 388-90 (1940); for more recent cases, MOORE, FEDERAL PRACTICE, ¶ 65.11, at 1665 (2d ed. 1955).

\textsuperscript{249} The injunction must not be "so vague as to put the whole conduct of the defendant's business at the peril of a summons of contempt." NLRB v. Express Publishing Co., 312 U.S. 426, 433 (1941) citing Swift v. United States, 196 U.S. 375, 396 (1905).
is illustrated by the approach taken by the New York Supreme Court to fashion non-discriminatory methods of designating apprentices in the sheet metal trade.\textsuperscript{250} The possibilities offered under the statute's permissive wording for tailoring remedies to the specific circumstances of each case should give the judiciary ample opportunity to experiment with variant methods for ensuring compliance with title VII.

**CONCLUSION**

Despite the problems inherent in implementing any fair employment legislation, it should be possible to enforce title VII. In important respects the Dirksen amendments have augmented the act's potential effectiveness. It is questionable whether even the powerful quasi-judicial administrative agency originally envisaged would have been an appropriate enforcement mechanism. Past experience indicates that it would have engendered substantial bureaucratic delay,\textsuperscript{251} which would undoubtedly have dissuaded many unemployed grievants from pressing their complaints. Although the procedures of referral required by the amended act seem labyrinthine, the short time limitations imposed upon each stage assure a grievant that he will be able to file his case for final judicial enforcement within six months.\textsuperscript{252} Furthermore, compelling incentives now exist for speedy local solutions to problems which admit of more sensitive treatment by state administrators than by a federal bureaucracy. Such decentralized action may strengthen the moral teaching of the law and help to create the consensus essential to the achievement of non-discriminatory employment.

If progress toward consensus lags, title VII can serve to spur it. Under title VII individual citizens are offered a way of pressing directly for judicial enforcement of the right to equal treatment. The Federal Executive, through its authority to initiate and intervene in litigation, can also assume the task of presenting a coherent program for enforcement to the courts. Few precedents exist for the broad discretionary power given to the Justice Department; states generally have denied their Attorneys General such license in FEP cases, preferring instead to grant remedial and preventive power to nonpartisan commissions. Recently certain civil rights spokesmen have expressed dissatisfaction with such nonpartisan efforts,\textsuperscript{253} and others have urged that the movement


\textsuperscript{251} Cf. 27th NLRB ANN. REP., 268-69 (1962); Rabkin, Enforcement of Laws Again' Discrimination in Employment, 14 BUFFALO L. REV. 100, 104 (1964).

\textsuperscript{252} But see note 108 supra.

\textsuperscript{253} See Hill, supra note 284.
they lead be redirected from its early protest orientation. Such is the structure of title VII that minority group pressure applied directly upon the federal government through traditional political channels could now, for the first time, lead to significant progress in enforcement of fair employment law.