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Deficiencies in the Civil Rights Act of 1964 Title VII, Equal Employment Opportunity

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"Freeing the accused on a police citation to appear for arraignment or trial in a simple misdemeanor case can avoid jail altogether. It also frees the police officer to remain on his beat. Released defendants are warned that in the case of default, a bench warrant will be issued."[23]

The last suggestion I will discuss is known as the "credit against sentence" concept. Recognizing the injustice and inequality wherever discretionary credit is not given, some legislatures have taken action to correct this deficiency. In 1960, Congress amended U.S.C., Title 18, section 3568, to provide for a mandatory credit for any days spent in custody prior to the imposition of sentence . . . for want of bail. However, the amendment is limited to offenders sentenced under laws which require the imposition of a mandatory minimum sentence.

I must point out, however, even with this widespread movement for change in our present system of bail, it remains generally true that persons arrested, who can afford to post a bail bond are able to enjoy freedom, while the indigent must remain in jail. Under the existing law the mere fact that bail has been set for a penniless person does not establish that the bail is excessive. A passage which I feel adequately sums up the bail system today comes out of the Butler Case:

> The theoretical equality of the right to bail when all are not financially equal thus has become in reality a deep and wounding social inequality, increasingly oppressive to the poor and the vagrant. It brings to mind Anatole France's ironic epigram that the law in its majestic impartiality forbids the rich and poor alike to sleep under bridges.[24]

Deficiencies in the Civil Rights Act of 1964 Title VII, Equal Employment Opportunity

Introduction

The dramatic events erupting from our Negro ghettos in the past and threatening to erupt in the future are pointers to the fundamental alienation of working class Negroes from society. An alienated man is often an irrational man, and, in the case of the Negro, there is one main cause of the alienation—the lack of productive and meaningful employment.

Western civilization has developed an achievement-oriented society

[23] A Report to the National Conference on Bail and Criminal Justice, Bail in the U.S., Washington, D.C. (May 27-29, 1964).

[24] Butler v. Crumlish, 229 F. Supp. 565, 568 (E.D. Pa. 1964).

with occupational achievement determining who has a high status and who will lead.[1] Mr. Don M. Stocks pointed out, as Law Day speaker at North Carolina College at Durham on May 1, 1968, that there is a crisis in Negro leadership. I feel part of the reason is the present lack and past lack of an indigenous hierarchy with constructive feedback for the Negro community. Most hierarchies in a community emerge from the meaningfully and productively employed. Many Negro hierarchies, however, have been structured by the white power elite through economic or other sanctions. Freud's observation that "work is the chief means of binding an individual to reality" still has clear implications for us, since the conditions of life for the Negro wage earner are threatening to push the democratic process irretrievably beyond the peaceful "perpetual revolution" stage. Mr. Herbert Hill points out that "the Negroes who revolted in Watts and elsewhere were not only the long term unemployed, but also the underemployed and working poor, as well as the significant number of young Negroes who have never entered into the labor force."[2]

The affluence of the white American reality is obvious to the Negro through our mass media while the impoverishment of the Negro American reality is not seen by the white man because of suburban isolation. This disparity, as seen by the Negro, leaves little solution except frustration and possibly violence.

Background of the Act

The history of Civil Rights legislation prior to 1964 was characterized by repeated letdowns for Civil Rights advocates. The Civil Rights Acts of 1957 and 1960 dealt mostly with protections of the right to vote and created the Civil Rights Commission and the Civil Rights Division in the Department of Justice, but a more comprehensive bill was needed.

In the spring and early summer of 1963, disorders sprang up in many parts of the country and in June, President Kennedy spoke to the nation on the "growing moral crisis in American race relations" and warned of "the rising tide of discontent that threatens the public safety." Then on June 19, 1963, he sent a proposed Civil Rights Act of

[1] Arthur M. Ross, "Will the Negro Succeed?" *Employment, Race and Poverty,* ed. Arthur M. Ross and Herbert Hill (New York: Harcourt, Brace and World, Inc., 1967), p. 578.

[2] Herbert Hill, "The Role of Law in Securing Equal Employment Opportunity: Legal Powers and Social Change," 7 BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW 625 (Spring 1966).

1963 to Congress with a prophetic message calling for its passage, in which he said:

> The venerable code of equity law commands "for every wrong, a remedy," but in too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens for which no effective remedy at law is clearly and readily available. The results of continued Federal legislative inaction will be continued, if not increased, racial strife-causing the leadership of both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence, endangering domestic tranquility, retarding our nation's economic and social progress and weakening the respect with which the rest of the world regards us.[3]

But little was done until after President Kennedy's assassination. So President Johnson, addressing the Joint Session of Congress on November 27, 1963, made it clear he believed prompt passage of the Civil Rights Bill was essential: "We have talked long enough in this country about equal rights. We have talked for 100 years or more. Yes, it is time now to write the next chapter—and to write it in the books of law."[4]

Then it took a renewed bipartisan effort to get the bill past the House in February and past the Senate in June 1964, with the President signing the bill July 2, 1964.

The Act

The provisions of Title VII of the Civil Rights Act of 1964[5] established the following seven employment practices as illegal:

1. Discrimination in hiring, compensation or other terms, conditions and privileges of employment;
2. Segregation or classification of employees which affects their employment opportunities adversely;
3. Discrimination by employment agencies by refusal to refer for employment;
4. Exclusion from union membership, and limitation, segregation or classification of members by labor organizations which affects employment opportunities adversely;
5. Discrimination in training apprenticeship, retraining, or on-the-job training programs;

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[3] Barefoot Sander, "Civil Rights Act of 1964," 27 TEXAS BAR JOURNAL 931 (December 1964). Mr. Sanders discusses the background of the Act.

[4] *Ibid.*

[5] 78 Stat. 241, July 2, 1964, 28 U.S.C. § 1447, Subsec. d., 42 U.S.C. § 1971, 1975a *et seq.* (1964).

6. Retaliation for making an unlawful employment practice charge or for testifying or participating in proceedings hereunder; and
7. Publication of any notice or advertisement indicating a preference or limitation in employment based on race, color, religion, sex, or national origin.[6]

The charges of violation of these seven provisions are to be brought before the Equal Employment Opportunity Commission which was created by the Act. The Commission can receive and investigate complaints, it can require the keeping of records, and issuing of reports, and it can make recommendations to the Department of Justice. Other than this, the Commission is very limited. It has no power to make an interpretation of the law which is binding on anyone, nor has it the power to determine that anyone has or has not violated the law. It cannot order anyone to cease an act or even bring, of itself, any action against an employer, union, or employment agency which it believes to have violated the law.

The enforcement of the Act is through the Courts, with a complainant bringing his own action or the Department of Justice bringing a civil action if there is a pattern of intentional violation of the law. This enforcement, however, leaves several deficiencies in the Act:

1. The Act is limited to forbidding particular acts of discrimination. Many of the proponents of equal employment opportunity felt the law should compel affirmative programs to create better opportunities of employment.
2. Instead of allowing a remedy through an administrative agency, the act is set up to seek an individual remedy through court litigation, which is timely and costly to the complainant.

Many of the deficiencies in the Act result from the allowed exceptions:

1. The employer exception that one must be "a person engaged in an industry affecting commerce who has 24 or more employees" means that a large number of employees are excluded from coverage.
2. The bona fide occupational qualification exception allows discrimination on the basis of religion, sex or national origin where these are bona fide occupational qualifications reasonably necessary to the normal operations of that particular business, which means that not only traditional jobs are taken away from Negroes, but this allows labor unions and employment agencies to classify members or applicants. With

[6] R. H. Coleman, "Civil Rights Act of 1964: A Synopsis," 28 KENTUCKY STATE BAR JOURNAL 14 (November 1964).

unions and employment agencies being big suppliers of labor, the process of discrimination is simplified by allowing classification.

3. The bona fide seniority system exception which states that the title will affect only prospective seniority rights means that established seniority rights or the past wrongs are unaffected.

4. The merit system exception is also suspicious, since it just complicates the matter by allowing an employer to use a "merit system which is not the result of an intention to discriminate." This complication can be a coverup for racial discrimination.

5. Legal differentials in earnings measured by quantity or quality of production are also loopholes for those who want to discriminate racially.

6. The investigation of the Motorola decision shed light upon the professionally developed ability test exception.[7] But can a test be developed that is culturally neutral?

7. The racial imbalance qualification states that Title VII shall not require an employer to grant preferential treatment to any individual because of race, color, religion, sex, or national origin, so the Act cannot require affirmative action to alleviate past and present ills.

8. The Communist Party membership exception was drafted so poorly that it comes out saying the employer is not required to hire someone who does not have security clearance instead of saying someone who cannot obtain security clearance. So there is another opportunity to discriminate racially against those who may have had no previous opportunity to seek clearance.

9. The Civil Rights Act does not apply to the states as employers. This is one of the biggest mistakes of the Act. Southern states are among the most discriminatory employers and their employees are in a position of status in many communities.[8]

Since many of these exceptions and qualifications have had little definition in the Courts, we can hope that the Courts will not allow these provisions to render unattainable the intent of the Act.

Also, we can hope that the Civil Rights Act of 1964 will continue to be supplemented with more governmental action, such as Executive Order Number 11246 which was effective October 24, 1965. This order shifts to the Department of Labor the duty of enforcing the rules against racial discrimination by government contractors, subcontractors, and contractors on federally financed projects. The Secretary of Labor can use affirma-

[7] Commission Decision on Review, Charge No. 63C-127, State of Illinois FEPC (November 18, 1964).

[8] Carl Rochlin, "Title VII: Limitations and Qualifications, 7 BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW 473 (Spring 1966).

tive action originally, which means he can attack racial discrimination in some areas.[9]

Conclusion

All in all, the Civil Rights Act of 1964, Title VII, offers something to everyone and very little to anyone. It is especially inadequate to meet the minimum demands of the Negro. As Mr. Schmidt, in his article "Title VII: Coverage and Comments," says:

> The problem in Civil Rights is the Negro—the problem in job discrimination is the Negro—the problem in unemployment is the Negro—the problem in job referrals and promotions is the Negro—the internal national force that threatens to extinguish this nation is the Negro, and extinguish it he will unless his demands for jobs, employment and training are fulfilled immediately—without question, without debate, and without qualification.
>
> However, Title VII does not exclusively focus upon the Negro. In fact, some have even expressed this lack of focus as being one of the outstanding virtues of the title. They argue that by requiring merit employment and nonrestrictive membership provisions along very broad lines, i.e., national origin, sex, and religion, as well as race and color—that we may package the American ideal of equal opportunity into one convenient container.[10]

As a consequence, we find that the Civil Rights Act of 1964 which started out to be a racial discrimination law is about as much as a sex discrimination law. This is pointed out by Mr. Anderson when he says:

> There is probably a foretaste of the nature of litigation to come in the fact that during the first six months, approximately 20% of the charges alleged discrimination on the basis of sex. By the end of the first year, the total for the year had risen to 2,031 or 33.7% of the charges filed. This contrasts with 3,008 or 49.9% based upon alleged discrimination against employees because they were Negroes.[11]

So again we have an act which is inadequate to meet the demands of the Negro. The Equal Employment Opportunity Commission must have the authority to go beyond mediation, conciliation, and admonishments, since we need a change in attitude by the vast majority of our population

[9] Frederic D. Anderson, "Civil Rights and Fair Employment," 22 BUSINESS LAWYER 513 (January 1967).

[10] Charles T. Schmidt, Jr., "Title VII: Coverage and Comments," 7 BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW 459 (Spring 1966).

[11] Frederic D. Anderson, "Civil Rights and Fair Employment," 22 BUSINESS LAWYER 526 (January 1967).

and we need communication which is not there between the Negro of the ghetto and the employers, unions, employment agencies, and the majority of Negro spokesmen. Therefore, I feel something more than this Act needs to be done. I agree with Mr. Schmidt when he says to obtain the necessary job opportunities for the majority of American Negroes there:

> . . . appear two, and only two, alternatives—short of social insurrection. First, the federal government could simply require private industry and labor unions to accept substantial quotas of Negroes—trained or untrained—into the working force and training programs as a necessary step to preserve the national welfare . . . or, certainly more acceptable, the government can attempt to convince industry and the unions that it is absolutely necessary for them to assume the employment training responsibility of the Negro. . . . Without immediate consideration of such alternatives there is little reason to be optimistic, for I am convinced that Title VII in no substantial way alters our present "collision course" with social disaster.[12]

In closing I would like to say, some of the provisions of Title VII have been given meaning in the courts, but I have mostly chosen to deal with the deficiencies in the Act as written in 1964. I leave it to the future to determine whether the courts can give enough meaning to this Act to begin to bring us together.

Justices of the Peace: Judges for Hire

Introduction

The critics of the justice of the peace system have not hesitated to say that the letters "JP" stand for "justice for the plaintiff" rather than "justice of the peace." This criticism stems from the fact that many justices are compensated from fees collected from these plaintiffs who hire them, so to speak.

Historically, the justice of the peace system was called into existence by King Edward III in the early part of the fourteenth century. His majesty would have thought twice before creating such a system had he perceived the graft and confusion later produced by his judiciary creation. The British colonists introduced the institution to America. The system is known to have been in existence in North Carolina prior to the adop-

[12] Schmidt, 7 BOSTON COLLEGE INDUSTRIAL AND COMMERICIAL LAW REVIEW 471 (Spring 1966).