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# THE CROSSROADS FOR EQUAL EMPLOYMENT OPPORTUNITY: INCISIVE ADMINISTRATION OR INDECISIVE BUREAUCRACY?\*

*Alfred W. Blumrosen\*\**

## I. Introduction

In the sixties minorities and women were accorded rights to enhanced opportunity in many arenas of life. Then, the painful and difficult process of implementing these rights began. The primary question for the seventies is whether those rights will be translated into socioeconomic reality. The issue raised goes to the genuineness of the law. Are these laws hypocritical—the velvet glove over the fist of powerful interests—or will they in fact enhance the position of the weak against the already strong?

If we fail to make these promises of equal opportunity meaningful, some will conclude that our intention all along was to satisfy aspirations for human dignity and opportunity with words on the statute books, rather than by opening up the fabric of life for those long suppressed by history, economics or culture. If large numbers and classes reach this conclusion and are reinforced in it, we face harsh and difficult times beset with the twin risks of private violence and government repression. Thus, the prompt demonstration of the reality of the promises of the sixties concerning opportunity may be central to the process of humanizing the direction of social and economic change which has been the legacy of the past half century. The centerpiece of this demonstration may well be the expansion of minority and female employment opportunity.

The law of equal employment opportunity has received a full, clear, and positive exposition since the passage of the Civil Rights Act of 1964. Growth in employment opportunities can in part build on the improvements in minority educational opportunities instituted in the sixties thus making substantial improvement in the relative position of minorities and women possible and practical. Finally, the social consequences of expanding employment and income have broad and prompt radiations. Enhanced income and dignity have a multiplier effect for the beneficiaries and their families.

This is the context in which we will examine the question of the implementation of the promise of equal employment opportunity expressed in Title VII of the Civil Rights Act of 1964.<sup>1</sup> The question is, Why is it taking this nation so long to translate the policy of equal employment opportunity into industrial relations reality? This is a question of serious concern, because while there have

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1 Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, and became effective a year later. See 42 U.S.C. § 2000e *et seq.*

been some constructive changes, the basic contours of the employment discrimination problem have not changed. The issue tests our ability to enact effective legal standards. It has nothing to do with partisan politics or the venality or incompetence of any political party, administrative agency, or governmental official.

After a decade in this field as an administrator, lawyer, law professor and consultant, my primary conclusion is this: The major stumbling block to equal employment opportunity during the coming decade will probably be those federal and state agencies which are charged with implementing laws and executive orders on the subject.

To explain this proposition, I will first sketch a model of a practical and effective legal regulation of industrial relations with respect to equal employment opportunity. My model involves both the "law making" and the "law transmission" systems which taken together could produce implementation of policy of equal employment opportunity.<sup>2</sup> The model has four stages.

## II. A Model for Administrative Implementation

In the first stage the policymakers speak. The Executive, the legislature, and the courts develop and articulate a general social policy. This stage was concluded in our field with the adoption of the Civil Rights Act of 1964, when Congress joined with earlier statements by the courts and Executive, to make unanimous the governmental policy against employment discrimination.<sup>3</sup>

In the second stage the administrative agencies and the courts "flesh out" the general sentiment embodied in the policy statements by a variety of official acts applying that policy. The Equal Employment Opportunity Commission (EEOC) did this both in reasonable cause decisions and publication of guidelines. The district courts and the courts of appeal have joined in this process.

In the third stage the Supreme Court puts the imprimatur of law on the product of this administrative and judicial process. In our traditions, all of the administrative and lower court actions are tentative until the Supreme Court has spoken on the direction of legal development. This stage was accomplished by 1971 with the decisions in *Griggs v. Duke Power Co.*,<sup>4</sup> *Phillips v. Martin Marietta*,<sup>5</sup> and *Love v. Pullman*.<sup>6</sup>

The fourth stage is the one we are now entering. This is the fork in the road with respect to implementation of equal opportunity laws. There are two alternative routes. One will facilitate prompt implementation of equal opportunity laws, while the other will perpetuate and bureaucratize the problem so that it will be with us, largely unsolved, a decade from now. In the optimum fourth stage the agencies will take the rules of law which have been defined and declared legally sound, and implement them promptly across the broad spectrum of persons subject to regulation. A massive program of nationwide

<sup>2</sup> See A. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW*, Ch. 1 (1971).

<sup>3</sup> U.S. CIVIL RIGHTS COMM., *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT*, at 1-4 (1971).

<sup>4</sup> 401 U.S. 424 (1971).

<sup>5</sup> 400 U.S. 542 (1971).

<sup>6</sup> 404 U.S. 522 (1972).

enforcement of existing legal standards against large employers whose practices set area-wide employment patterns will be undertaken. Agency decisions will carry weight because of the existing court decisions. The agencies will resort to courts largely to (a) deal with the occasional recalcitrant, (b) clarify those interstitial matters still not resolved by the courts, and (c) to demonstrate "muscle" when that is tactically necessary. The volume of litigation would not increase markedly because settlements within the existing legal framework would become common. Negotiation will become again the primary mode of enforcement, but the terms negotiated will be those already worked out in court decisions. This fourth stage will require adoption of agency policies to insist that the key employers and unions throughout the country forthwith comply with existing legal standards *without extensive litigation with each company*.

### III. Litigation or Negotiation

The alternative model for the fourth stage is the litigation approach. It is a stage of intense bureaucratization. This approach is gaining momentum within the EEOC. The agency is "tooling up" for this approach, hiring hundreds of lawyers, but filing only fifteen lawsuits in the first year under the amendments which gave it the right to sue.

The staffs of the agencies will expand. Each subunit within the agency will jockey for a bigger piece of the action; individuals will seek to better their own positions. There will either be the continuous comings and goings among high officials which has been characteristic of the EEOC or there will be a stabilization of personnel which will thwart the ambitious and able within the agency. Either situation provides justification for inaction by units and persons within the agency. Either no clear answers from the top will be available because of a rapid turnover of leadership and thus no one will know what he is doing, or, the same nonresponsive answers will be given by the deadwood in the agency which will have entrenched itself so that we have to wait for death or retirement to make progress. The resulting tendency of agency personnel to look inward to their personal situation and attach undue significance to their small group is almost certain. Each unit will look after itself, avoiding new responsibilities and passing the buck. Intense attention will be paid to being successful, which means being cautious and not taking risks. The best way to do that is to follow the existing patterns and paths, even though they have been well trodden, rather than embark on new fields with their attendant risks.<sup>7</sup>

Furthermore, there is now a field of technical competence and specialization. There is nine years' worth of commission and court law and lore. The professional tendency of lawyers to embellish this body of law by tiny increments in the common law tradition is strong. A lifetime can now be spent mastering Title VII law and being concerned with its interstitial growth. This professionalism of the legal expert may come to dominate the growth and activity of the agency. It becomes particularly acute as there comes to be more to lose. The more successful the agency and the courts are in developing the expanded law

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<sup>7</sup> See DIMOCK, *ADMINISTRATIVE VITALITY*, Ch. 8 (1959).

necessary to grapple with the really tough problems of discrimination,<sup>8</sup> the more cautious the lawyers for the Government are likely to become. Government lawyers, even more than private counsel, want to win what they know they can rather than seek what they should.

All of these reasons make it more than likely that creeping bureaucratization will induce paralysis of the EEOC. (The existence of the Office of Federal Contract Compliance (OFCC) as a viable governmental unit has always been marginal, depending on the personality of the Secretary of Labor, the Assistant Secretary, or the Director.) The result will be emphasis on technically exact and largely insignificant activity. Bureaucracy will prevail in the narrowest sense of the word. If this happens, my projected fourth stage will never take place. There will *never* be maximum leverage on the problem of discrimination under now-developed law. The problems of discrimination will be perpetuated, classified, pigeonholed, and made permanent, because of the bureaucracy. All of the terrible things which conservatives say about the creeping paralysis of bureaucracy may then come true. At this risk, one can only shrug. We must tackle the problems of discrimination, and if this is the best we can do, we must do it. But it is hard to have much enthusiasm for this prospect.

This result will serve no major interest. Employers and unions will be saddled with the costs and tensions of drawn-out litigation and ultimately to high damage awards, along with the need to continually restructure their operations and the constant human turmoil which accompanies this activity. Minorities and women will wait years, perhaps decades, for relief which for them will be too little and too late. Nor will the public interest be served. To litigate discrimination cases against all major employers in the nation on all issues would produce such a volume of litigation that the courts will undertake a defensive reaction to protect themselves.<sup>9</sup> This defensive reaction will be intended to reduce the work of the courts. It may involve restriction of the concept of discrimination, which in turn will reduce the overall effectiveness of the law, or it may involve development of rigid rules which could deprive employers and unions of certain important defenses. Ultimately, a deluge of litigation may force the Congress to allow the EEOC the hearing and cease-and-desist authority which was rejected (and in my view properly so) in 1972. The centralization of authority in the agency will itself dilute the application of the law because agencies which have such powers have generally failed to function effectively.

#### IV. Challenging Bureaucratization

The question is whether our institutions have the capacity to avoid this dreary and unrewarding prospect. This is not a partisan question. It is a technical question. My fourth-stage model of massive application of existing law

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<sup>8</sup> See, e.g., *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Local 189 Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969); *Vogler v. Asbestos Workers*, 407 F.2d 1047 (5th Cir. 1969).

<sup>9</sup> See *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972).

may simply be too difficult. It will require not only the highest level policy decision to move in the directions sketched here, but also the capability of seeing these decisions implemented and the technical ability to achieve them.

It would involve agency heads fighting bureaucracy with "ad-hocracy."<sup>10</sup> The *AT&T* case was run within the EEOC out of the Chairman's hip pocket. A separate unit which does not fit on the EEOC organizational chart was created to handle the case. The conditions for growth and development were created for the purpose of permitting a small team to get something done. Chairman Brown went around his bureaucracy. His bureaucracy obviously will not like that, and in coming years will probably be seen chuckling over the failure of the *AT&T* agreement which they predicted because they were not involved. There is a tendency for professionals to downgrade the results of work which is identified with individuals rather than institutions, and I fear Mr. Copus, who ran the AT&T task force, may suffer a decline in internal agency reputation.

Yet, this is a risk which should be run so long as the element of truth in the professional bureaucrats' view is recognized. That truth is that the accumulated wisdom and lore of these professionals simply cannot be ignored with impunity. They do know much about their segment of the world. The question is how to benefit from that knowledge and skill and understanding, without bowing to the bureaucratic trappings in which those human skills and abilities have become encased. The answer to this depends partly on the human relations skills with which the "ad-hocracy" is created within the EEOC. The task force concept should be molded to overwhelm internal organization lines and mobilize the manpower of the agency for the achievement of the fourth stage in a forthright way. There must be direction and persons in charge who have a clearly defined mission and the authority to circumvent the increasing red tape and internal bureaucracy of the Commission.

Separate task forces should be established to deal with each large nationwide employer. These task forces should include many people now engaged in routine assignments with the agency. They would be released temporarily from these assignments to spend the intermittent and unpredictable amount of time necessary to work on their "big case." This may restore the sense of mission and participation now lacking among agency personnel and allow for the growth and development of talents and abilities stifled in the bureaucratic setting.

Careful long-range planning, which has been going on within the Commission staff, will never come to fruition without an act of internal force from the highest authority. The ad-hocracy should be made personally advantageous to as many people in the agency as possible. Its existence should not provide an excuse for failure to do the routine work while the glamorous activities take place elsewhere, but there appears to be sufficient glamour in agency operations which could be shared much more than it is now. In going after the nation's large employers and unions there is enough glamour for every staff member to have his or her share.

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10 A. TOFFLER, *FUTURE SHOCK*, Ch. 7 (1970).

## V. Protecting Individual Rights

The primary objection to this proposed program of massive implementation is that it may be incomplete and provide inadequate recognition of rights to equal opportunity. It is difficult to deal with all aspects of employment discrimination in a large, single facility, much less in a multiplant enterprise, in a single proceeding. In such a massive undertaking, there is a serious risk that the Government will undershoot the mark, and leave minorities and women with inadequate protection for their rights. Considerable evidence along these lines developed during the sixties. The prime example of such a failure was the organization of large employers in the 1960's known as "Plans for Progress." The theory of PFP was that the nation's large and influential employers would "voluntarily" undertake massive improvements in minority employment opportunity in lieu of intensive enforcement of the antidiscrimination clause in government contracts. By 1968 the EEOC had documented the dismal failure of this undertaking, and PFP was quietly interred.<sup>11</sup> In addition to this generalized failure of the massive national "voluntary program," there are several illustrations of incomplete administration of law enforcement programs: (1) the incomplete remedying of discriminatory seniority systems countenanced by the Chairman of the EEOC and then by the OFCC which were ignored by the Court in *Local 189 Papermakers v. U.S.*;<sup>12</sup> (2) the failure of the Labor Department to eliminate seniority discrimination in the *Bethlehem Steel* (Sparrows Point) case for nearly two years after the law had been made clear in *U.S. v. Bethlehem Steel Co.*;<sup>13</sup> (3) and the fact that in the *Newport News* case, major issues remained unresolved.<sup>14</sup> The new AT&T agreement has already received the first court hint of its incompleteness.<sup>15</sup> Therefore, civil rights proponents may fear that a massive enforcement program may turn into a massive sellout of complainants, a reversion to the failures of the Plans for Progress era and the loss of the rights of thousands of individuals.<sup>16</sup>

This is a serious contention which deserves a satisfactory response, but, thanks to the court decisions set out below, there is today an answer. In a series of unrelated decisions which suggest a store of wisdom in the reservoir of the law, the courts have provided a structural basis which will facilitate a massive implementation program, without exposing minorities and women to deprivation of their rights.

The courts have said that the EEOC may change its guidelines as it changes its policy, and that individual rights will be measured by the most recent guidelines — not by those made earlier in the evolution of EEOC policy.<sup>17</sup> The EEOC may continue to clarify and refine the legal standards

11 A. BLUMROSEN, *supra* note 2, at 225, 293-96.

12 416 F.2d 980 (5th Cir. 1969).

13 446 F.2d 652 (2d Cir. 1971).

14 A. BLUMROSEN, *supra* note 2, at 364.

15 *Leisner v. N.Y. Telephone Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973).

16 A. BLUMROSEN, *supra* note 2, at 43, 293-96.

17 *Rosenfeld v. So. Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *cf. Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (1969). *But see Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (1970), *aff'd by an equally divided court*, 402 U.S. 689 (1972).

under Title VII using the technique of guidelines which give clear advice as to the requirements of the law in various commonly recurring industrial relations situations. Nevertheless, an employer who complied with a guideline which was later changed will not have to respond in damages for the period in which his activity complied with then-existing guidelines.<sup>18</sup> This approach will assure that general guidelines do not destroy individual rights so long as civil rights advocates pay attention to the guideline-issuing process.

But what about the Government's handling of a particular case? Could not that process involve a "soft" settlement or sellout of individual rights? In a fascinating case illustrating the flexibility of basic legal doctrines, the Court of Appeals for the Second Circuit has dealt with this question. In the *Bethlehem Steel* case the Justice Department secured the reformation of a seniority system that did not provide for back pay or for changes in the recall from lay-off rules.<sup>19</sup> Individual employees sued for such relief, and Bethlehem argued that the decision in the suit by the Government was final and binding. In *Williamson v. Bethlehem Steel Corp.* the Second Circuit rejected the argument and permitted the individual suit with respect to these matters.<sup>20</sup> Thus, the individual suit can provide back-up assurance that a massive enforcement program will not become a massive sellout of the rights to equal opportunity. This decision implements the approach of Congress in the 1972 amendments to Title VII. In those amendments, Congress preserved the individual right to sue while expanding the Government's power to litigate. By a close vote Congress evidenced its unwillingness to permit de facto government control of Title VII litigation which would have resulted if the EEOC had been given administrative hearing and "cease-and-desist" order-issuing power.<sup>21</sup>

But what of the other side of this coin? If going along with a government program will not settle matters, then why should employers or unions agree? Why not await litigation for final settlement and force all parties into the litigation? First, legal liability for continued discrimination already exists. The question for business and labor is how can it be minimized, not whether there will be liability. Going along with the government program will cure most matters for the future, thus limiting money claims. If further reform is necessary as a result of later individual suits, the employer or union will have a sympathetic audience for their argument that they should not be liable in damages for actions carried out under a governmental program found subsequently to be less than complete.

The result of these decisions is that Government may do its best to remedy patterns of discrimination. If its best is not good enough, the remainder of specific relief may be obtained by suits by aggrieved individuals, although there may be some restriction on their right to obtain damages. I consider this a sound method of permitting governmental initiative, which may of necessity be incomplete, without depriving individuals of their full rights with respect to the opening up of future opportunities. A limitation on damages during

18 *Manning v. International Union*, 466 F.2d 812 (6th Cir. 1972).

19 *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

20 *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972).

21 A. BLUMROSEN, *supra* note 2, at Ch. 1.



the period when there was apparent compliance with the unfolding law is an appropriate way of protecting respondents from having to respond in damages for conduct lawful at the time of its commission.

This result is a careful judicial meshing of governmental initiative with the individual right to sue which was the hard-fought outcome of the 1972 amendments to the Civil Rights Act of 1964. Given this judicial response, there is now no excuse for the Government to restrict its activities because it may not do perfect justice. Individuals aggrieved by the imperfections in governmental action may pick up the pieces through private litigation, but the governmental programs aimed at massive assaults on discriminatory institutions can proceed.

We are now at a crossroads in the fourth stage in the evolving implementation of the equal employment opportunity principle. The agencies are drifting in the wrong direction; *i.e.*, toward intense bureaucratization and away from massive prompt implementation of the law. Whether or not we are captives of this type of agency discretion or whether we have enough imagination and resilience to prevent this development from immersing us for our lifetime in problems which should be disposed of within a decade is not yet apparent. The executive energy for a decision to follow my fourth stage rather than drift into bureaucratization can come from the White House, the Coordinating Council under the 1972 laws, the EEOC itself, legislative oversight, or possibly from the courts, although the problem of compelling effective administrative action is enormous.<sup>22</sup>

The law has been vigorously clarified during the past nine years, but administrative practice has not changed in harmony with all legal developments. The result is that the agencies are applying administrative concepts which do not make maximum effective use of the newly developed legal standards.

## VI. Nine Years of Legal Development

Under Title VII, the courts have risen to the task of interpretation in the finest and most sensitive judicial tradition. They have evolved, with the help of administrative agencies and academics, a new and broader concept of discrimination, which was enunciated by the Supreme Court of the United States in *Griggs v. Duke Power Co.*<sup>23</sup> This new concept enables the legal system to deal with the aspects of employment discrimination which are rooted in the subordinate position of minorities and women in society.

The concept of "discrimination" historically was that of conduct animated by an "evil motive" of distaste for the group to which the individual victim of the discrimination belonged. This search for "evil motive" was difficult, and in the period 1945-1965 meant that there was little law enforcement activity by the state civil rights agencies. The second test which evolved during this time was the "equal treatment" test for discrimination. It was sufficient to find that minority persons were not treated the same way as similarly sit-

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<sup>22</sup> Hadnott v. Laird, 463 F.2d 304 (D.C. Cir. 1972).

<sup>23</sup> 401 U.S. 424 (1971).

uated whites to find discrimination. This was an improvement in that it permitted some objective evidence, but it left employers and others free to apply qualifications and conditions "equally" to both blacks and whites where the application would have a different *effect*. A high school diploma requirement or a "no arrest" record requirement will exclude a higher proportion of minorities than of whites, even when applied equally, because of the inferior position of minorities in education and their greater arrest rate. The "equal treatment" test allowed employers to utilize the inferior position of minorities in society to bar them from employment opportunity. Stated otherwise, it permitted inferior education, poor police practices, credit problems, residence segregation, and the like to be translated into a denial of employment opportunities. The third concept of discrimination was to be measured by the adverse effect of an employment practice on the minority group. As Chief Justice Burger said in *Griggs*:

[P]ractices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

. . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in head winds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds of the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.<sup>24</sup>

This third concept of discrimination permits an attack on patterns of discrimination and exclusion based on statistical evidence. The *Griggs* concept puts the burden of proof on the employer: ". . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."<sup>25</sup> In 1973, the Supreme Court, in *McDonnell Douglas Corp. v. Green*,<sup>26</sup> made clear that the *Griggs* concept of identification of discrimination by the effect of employment practices on minorities was applicable to suits by individuals concerning their particular situations, as well as to suits directed at general employer practices. The Court held that "statistics as to petitioner's [employer's] employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks."<sup>27</sup> Statistical evidence which demonstrated the adverse effect of employment practices may be held sufficient to justify a conclusion that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices."<sup>28</sup> This conclusion provides the background

<sup>24</sup> *Id.* at 430, 432.

<sup>25</sup> *Id.* at 432.

<sup>26</sup> 93 S. Ct. 1817 (1973).

<sup>27</sup> *Id.* at 1825.

<sup>28</sup> *Id.* at 1826, n.19.

setting within which the Court, in any individual employment discrimination case, may view the particular facts before it. *Green* provides the formal legal nexus between the general concept of discrimination expressed in *Griggs* and the particular facts in an individual employment discrimination case. *Green* assures that the *Griggs* concept will not become a sterile abstraction, but will have meaningful impact in individual cases.

Conceptually, the "adverse effect" definition of discrimination resolves many difficult problems plaguing the administration of the law. The courts and agencies have applied this, and other concepts of discrimination, clearly and definitively so that many problems which were troublesome and in doubt back in 1965 are now clearly decided. For example: Does Title VII require fair recruitment methods, or does it benefit only those who apply for employment or are employees?<sup>29</sup> If it applies to recruiting activities, may the government insist on numerical standards for recruiting and hiring where discrimination is found?<sup>30</sup> With respect to hiring activities, is it sufficient if employers use standards, neutral on their face, which have a differential impact?<sup>31</sup> With respect to promotions and transfers where minorities and women have been confined to certain jobs or departments, is it sufficient to permit them to start at the bottom of the white male line, or must they be given greater rights?<sup>32</sup> If the latter, what is the extent of those rights?<sup>33</sup> With respect to promotions, can discrimination be established by statistics; if so, may the employer pick the "best qualified" by subjective standards, or must he use objective standards?<sup>34</sup> Can the employer defend practices on the ground of business convenience? Or of business necessity? If the latter, how do you prove it?<sup>35</sup> May the Labor Department impose area-wide plans to increase minority employment in construction industry? If so, what are the prerequisites for such plans?<sup>36</sup> All these questions and many more have been answered by the courts. The law, which was vague in 1965, is now clear.

A second difference since 1965 is in the legal status of federal agencies. In 1965 the EEOC was viewed as a "poor, enfeebled thing."<sup>37</sup> By 1971 the Supreme Court had given it lawmaking power in the form of deference to its guidelines. The Supreme Court, the lower federal courts, and legal analysts were citing its reasonable-cause findings as persuasive precedent. Its opinions, developed in an administrative nonadversary proceeding, were cited with the same apparent weight as those of an administrative agency with adversary

29 *United States v. Georgia Power Co.*, 474 F.2d 906; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

30 *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972); *Local 53 Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

31 *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

32 *Taylor v. Armco Steel Co.*, 429 F.2d 498 (5th Cir. 1970).

33 *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Local 189 Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969).

34 *Rowe v. General Motors Co.*, 457 F.2d 348 (5th Cir. 1972); *United States v. Jacksonville Terminal*, 451 F.2d 481 (5th Cir. 1971).

35 *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

36 *Contractors Assn. v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971).

37 M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT*, at 205 (1966); R. NATHAN, *JOBS AND CIVIL RIGHTS*, at 14 (1969).

hearing powers. EEOC decisions carried influence with the district courts and the courts of appeal. In 1972 Congress enhanced the EEOC by giving it the power to sue in federal court.<sup>38</sup>

During the late 1960's and early 1970's, the OFCC was judicially recognized as an important law-implementing body. The earlier judicial view of the OFCC as a conciliatory body<sup>39</sup> was replaced by a view of an agency with important powers. This occurred in the *Philadelphia Plan* case<sup>40</sup> with respect to imposed area-wide plans in the construction industry and in *Hadnot v. Laird*<sup>41</sup> with respect to its primary jurisdiction to see that the fifth amendment strictures on expenditure of federal funds were honored. The budgets and staffs of both agencies increased commensurately.

A third difference is that the first two differences have had opportunities to sink into the respondent community; it is now fully knowledgeable of the above developments. The question today in industrial relations circles is not whether changes need be made but rather the extent of back-pay liability if certain changes are not made.<sup>42</sup>

The fourth difference is simply the fact of the massive volume of complaints to EEOC and litigation. The risks of litigation are not speculative now as they were in the earlier days.

The fifth difference is that the legal pattern outlined above has basically been confirmed by Congress in the passage of the Equal Employment Opportunity Act of 1972.<sup>43</sup>

Thus we can conclude that the third stage of our four-stage model has substantially been achieved and we are now prepared to go into the implementation stage, stage four.

## VII. Old Procedures Still in Use

In the fourth stage, the role of the agencies should change. The creative and innovative period of the EEOC, in helping to shape the new concept of discrimination and in developing benchmark examples of what could be done<sup>44</sup> (as in the *Newport News* and *AT&T* cases), should be replaced by a massive program of clarification and implementation aimed at key employers and unions<sup>45</sup> utilizing the temporary injunction and temporary interruption of

38 86 Stat. 103, *et seq.* amending 78 Stat. 253, 42 U.S.C. § 2000e, *et seq.*

39 *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967).

40 *Contractors Assn. v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971).

41 463 F.2d 304 (D.C. Cir. 1972).

42 *See*, A. BLUMROSEN, *supra* note 2, at 188.

43 *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

44 My view of the first year of the EEOC was, "I felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." A. BLUMROSEN, *supra* note 2, at 59. This is substantially what has happened. *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and Its Concept of Employment Discrimination*, 71 MICH. L. REV. at 94-100, 73 n.57, 110 (1972).

45 My view of this phase was first articulated in 1969:

This chapter has been in one sense a study in nondecisionmaking. Administrative abdication and narrow arbitration interpretation seem the order of the day. At the root of this phenomenon lies the fact that there is only one institution in our society

government contracts. The testing period for the OFCC concluded with the success of the *Philadelphia Plan* court test. It should now move toward a nationwide solution to construction industry problems based on the legal powers sustained in that case. Procedures of both agencies should reflect the first nine years of post-Title VII experience. This has not happened. Rather, the agencies are still proceeding along the lines laid down in earlier periods.

EEOC is essentially utilizing its old procedures of investigation, cause finding, and conciliation followed by a referral to general counsel (or the regional equivalent) for determination of suitability for litigation. Little action has been taken by the EEOC in the use of temporary injunctions based on reasonable cause findings. Reasonable cause findings have not been transmitted into statements of intention to seek temporary restraining orders if conciliation fails.<sup>46</sup>

OFCC compliance review procedures are still organized around the ancient principle of nibbling at the employer year by year, rather than the concept of securing a prompt remedy for illegal discrimination after which the Government should get out of the picture. The older notion, with its trappings of annual compliance reviews, employer surveys, interminable letter writing, and the like may have been indispensable before the current era of legal clarity; but it is an anachronism now. In addition, one of the most awkward notions in the entire field, that of a free-floating affirmative action obligation under the executive order may now be interred. It too may have been necessary before *Griggs*. Now it is not.<sup>47</sup> OFCC should insist that government contractors end discrimination; and having done that, should get out of their hair, rather than hanging around to remedy "deficiencies" under some vague affirmative action plan.

The Justice Department is party to one of the strangest of all mysteries. By suing an employer under Title VII, the Department gives that employer an immunity from risks with respect to his government contracts. Once Justice has sued, OFCC will leave the matter to the courts thus leaving the employer with his government contracts intact during the course of litigation, which may last for years. It would be hard to explain to the average citizen how it is that if the Attorney General of the United States sues a company for discriminating,

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capable of the difficult tasks of articulating the meaning of modern antidiscriminatory statutes in the complex setting of labor relations. The courts must speak before the less formal processes can operate effectively. Once the courts speak forcefully and clearly on the substantive law, then the administrators and the arbitrators will have guidance, private counsel will be able to measure the results he seeks against what is possible, and the industrial relations community can work out detailed changes which the law requires. At that point, the administrative and arbitral processes will gain in importance, as part of the "law transmission system" which takes the basic ideas of the courts and Congress and converts them into social and economic reality. The techniques of negotiation, settlement, and informal decision will then be more valuable and effective than they have been in the past.

A. BLUMROSEN, *supra* note 2, at Ch. 4.

In late 1973, the EEOC instituted nationwide proceedings against several large employers and unions. *See*, N.Y. Times, Sept. 18, 1973, at 1.

<sup>46</sup> A clear judicial invitation to use of the temporary injunction was extended in *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969). *See* *Williamson v. Bethlehem Steel Co.*, 468 F.2d 1201 (2d Cir. 1972).

<sup>47</sup> Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 *RUTGERS L. REV.* 383, 401 (1971).

that company is assured of continuation of its government contracts for the long period of time it requires to get a final judgment.

The EEOC, endowed in 1971 by the Supreme Court with major law-making responsibility, has failed to exercise that responsibility in connection with its new jurisdiction over state and local governments; and has not refined guidelines in connection with areas of discrimination now clarified by the Court. It is as if the power to sue has knocked the ideas of lawmaking by guidelines out of the frontal part of the EEOC's collective mind.

EEOC, OFCC, and Justice have not joined their powers and placed total pressure on key employers to secure compliance with the law, except in two major cases over the nine years (*Newport News* and the *AT&T* cases). Plans for coordination have fallen through. The memorial to my eight months in 1969-70 as Chairman of the Inter Agency Coordinating Committee is a worn trail across the lawn behind the White House between Labor and EEOC and a document in the federal register providing for coordination, which was never implemented.<sup>48</sup>

A realistic role for state civil rights agencies has not evolved. The concept implicit in the statute that the state should get first crack at "all cases" is unrealistic.

Finally, much attention is now lavished on the question of the relation between Title VII and arbitration under labor agreements without recognizing one of the fundamental differences in function between the EEOC and the NLRB. The difference, in brief, is that the underlying statute administered by the NLRB *encourages* collective bargaining agreements and arbitration as a method of administering them, while the underlying statute administered by the EEOC *discourages* certain kinds of activities in the collective bargaining arena and declares the product of collective bargaining in some situations illegal.<sup>49</sup> At the same time, not enough attention has been paid to the possibility of individual arbitration between complainants and employers as an alternative to Title VII litigation.

All of these considerations are enmeshed in the context of a case backlog whose dimensions are not known by the EEOC. The backlog may reach 100,000 cases, and it may take up to five years to process a complaint filed with it today. When I left the Commission in 1967, the backlog was a major headache. It became a dragon which was not slain by the most imaginative of the McNamara whiz kids, and now devours all bureaucrats who seek to stem its growth.

### VIII. The How of Implementation

The moment of opportunity for administrative implementation of the well-developed law of equal employment opportunity is slipping through our fingers. Bureaucratic inertia and a propensity to burden the courts to an unconscionable degree are operating today. The post of Chief of the EEOC Office of Concilia-

<sup>48</sup> U.S. CIVIL RIGHTS COMM., *supra* note 3, at 130-32.

<sup>49</sup> See Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971).

tion, which in 1969 was called "the most important headquarters operation" in the Commission,<sup>50</sup> has been vacant for months while the able people on the Commission staff move into the newly established litigation arena.

All this gives encouragement to those in labor and management who have reasons, rooted in history, for still hoping that the problem will go away, or at least, the individual plaintiffs will die if they wait long enough. This of course is no longer so, because neither the complainants nor the courts will go away, and the risk of back-pay liability is now so severe that major corporate treasurers might want to set up contingency funding programs. If the bureaucracy undertook a systematic implementation approach to apply existing law in clear fact situations with influential companies throughout the country, then both labor and management might say, "Okay, let's get it over with; we will make the changes which must be made," and then hope the agencies will themselves "cease and desist."

Wage control gives another reason for movement now. Since payments to correct discrimination will not count in the wage-ceiling computations,<sup>51</sup> unions can encourage settlements knowing that they will not be precipitating a fight between the majority and the minority workers. Employers getting the advantage of wage control with respect to the majority may have resources to pay the minority discrimination claims.

Of course there is still the problem of perpetuation of the bureaucracy; the elimination of discrimination might mean the end of some jobs and positions. But I do not think this should be considered a real deterrent by the administrators. There is enough to do to last a lifetime even with rapid handling of the major parts of the problem. The agency may lapse into the middle age of the NLRB or the old age of the Interstate Commerce Commission or might conceivably be given a new useful mission in another decade if it does a good job on discrimination. Similarly, the question of what will happen if we are successful in terminating discrimination must occur to those in symbiotic relation with the agencies; *i.e.*, the persons in labor and management who deal with the government agencies, and whose status is enhanced because they are working on the problem. What will they do if it is solved? And one might even ask that of itinerant consultants and, perish the thought, law professors whose reputations have been enhanced by dealing with the problem. Are we more interested in perpetuating it or in ending it?

I think we must face the question for we are all in the establishment which deals with the problem. We all have our personal and institutional concerns as well as our share of responsibility for the larger dimensions of the social problem. I think that success will bring further rewards to each of us, and that our personal interest in ending discrimination is the same as the society's interest in that result. None of us need war with the objective of providing upward mobility into the employee society for those kept in its lower reaches.

Here then are some simple suggestions as to the how of implementation. None of them are remarkable or new; most of them have occurred to the

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50 R. NATHAN, *supra* note 37, at 34.

51 EEOC News Release (Jan. 9, 1973).

competent administrators and planners at the EEOC and OFCC.

1. Major matters involving key companies, in the industrial relations sense, in all areas and in all important industries should be the immediate object of total governmental effort to enforce the clearly established legal principles. This approach may involve the Justice Department, the Labor Department, and the EEOC.<sup>52</sup> If settlements along lines required by the cases are not forthcoming promptly, then EEOC should institute suit seeking temporary restraining orders against continuations of clearly discriminatory practices. If such orders are issued, the OFCC should forthwith suspend further government contracting with the *entire* company. This will produce a prompt and fair settlement of those issues which were clear enough to warrant a temporary restraining order. The terms of settlement may be measured by relief given by the courts with further elements of relief determined in later litigation on the merits.<sup>53</sup>

2. OFCC compliance procedures should be changed to produce proof of discrimination and then require specific remedies; the bland and indefinite nibbling of the nebulous concept of "affirmative action to remedy deficiencies" should be forgotten.

3. The states should be given primary administrative responsibility over one-on-one cases involving discharge and refusal to hire (which between them amount to between 40 and 50 percent of all cases). This responsibility should be exercised through the use of recently developed and tested procedures which are producing good results in this area. The EEOC role should be limited to financing the agencies and conducting paper review of their decisions before issuing notices of right to sue. The standard form interrogatory now in use in several states in discharge cases, and about to be introduced in New Jersey in hiring, should be made known to employers so that they can understand the information which will be demanded of them and be prepared accordingly.

The one complexity here is the use of pattern evidence to help establish a *prima facie* case of discrimination in individual cases. This use has been approved by the Supreme Court and the employer will therefore need to have such evidence available.<sup>54</sup> Under this program a copy of the charge of discrimination and the interrogatory are mailed to the respondent the day the complainant comes to the agency. I believe that prompt service will produce substantial adjustments of matters which time alone would turn into contested cases.

The states should continue their efforts to deal with systemic discrimination in a manner which takes realistic account of their resources and independence.

4. Manpower training programs should be dovetailed into remedies for discrimination, as Nathan suggested four years ago.<sup>55</sup> This was achieved in a conciliation agreement this author negotiated in Birmingham in 1966. This has not

<sup>52</sup> The experience in the *Newport News* case gives point to this suggestion. See A. BLUMROSEN, *supra* note 2, at 365-66.

<sup>53</sup> *United States v. Hayes International*, 415 F.2d 1038 (5th Cir. 1969). See *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). A proposal along these lines was developed in 1970, but never implemented. See U.S. CIVIL RIGHTS COMM., *supra* note 3, at 131 n.953.

<sup>54</sup> *Parham v. Southwestern Bell Telephone Co.*, note 29 *supra*; *Spurlock v. United Airlines*, 330 F. Supp. 228 (10th Cir. 1972); *Mabim v. Lear Siger*, 457 F.2d 806 (6th Cir. 1972), *aff'g*, 4 F.E.P. 679 (W.D. Mich. 1971).

<sup>55</sup> NATHAN, *JOBS AND CIVIL RIGHTS*, at 234 (1969).



been done on a national level and represents an unacceptable instance of bureaucracy. It is apparent that training programs conducted in an atmosphere of discrimination will not be meaningful to minorities. Discriminatory systems of industrial relations cannot be reformed without a training program component; the two are natural adjuncts. Yet, although the Assistant Secretary of Labor for Employment Standards has the office next to the Assistant Secretary of Labor for Manpower, there is no effective interrelationship at the remedial level.<sup>56</sup> Where the duty of fair recruitment has been violated, or where upgrading training has been discriminatorily denied, the interrelationship should be made specific.

5. This approach will also reduce largely uninformed discussion of "goals and quotas" to the manageable proportions which our courts have already quietly done. The free-floating bureaucratically imposed duty of "affirmative action" with its indefinite goals will be replaced with the duty to end discrimination in recruitment and hiring by promptly bringing into the work force substantial numbers of the excluded group on a reasonable numerical basis. Once this has been accomplished, the obligation to utilize numerical standards will cease because the companies employment practices will no longer constitute "built-in head winds" against minority advance, and the reason for continued massive government involvement will be gone. At that point, the administrators should go on about other business and allow the economic system to function in a freer and fairer way.

6. With respect to arbitration as an alternative to litigation, I would distinguish two kinds of cases. In those cases where the basic collective bargaining agreement is itself in violation of Title VII, as in the use of departmental instead of plant seniority, I doubt that arbitrators operating under the present contractual language can do much about the matter. If the parties wish to allow the arbitrator to reform the contract to bring it into compliance with Title VII, they should amend the arbitration clause of the contract to make that point specifically.<sup>57</sup> But with respect to those individual situations involving promotions, transfers, and discharges where the systems are fair, arbitrators may be able to do as well as anyone, provided that the individual's interest is represented, evidence is fairly presented, the issue is faced squarely and the legal standards fairly applied. The courts have already indicated an interest in sustaining such activity.<sup>58</sup> I believe the civil rights interest is parallel to that of management and labor here. In dealing with an individual allegation of injustice in the workplace, where the worker may have a practical choice between arbitration or the cumbersome uncertainties of the administrative agencies plus the delay of the courts, opting for arbitration and limited judicial review may be the most preferable choice. We

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<sup>56</sup> Such a connection was recently upheld in *United States v. I.B.E.W. Local 212*, 5 F.E.P. 478 (5th Cir. 1973).

Another internal discontinuity in the Labor Department involved the OFGC and the U.S. Employment Service. Until 1972, government contractors were not required to list their job vacancies with the state employment service, even though the employment services were the major method of job search of minorities. This was corrected by Executive Order suggested by former Assistant Secretary Arthur Fletcher, but the President acted under a program of aid to returning veterans, rather than under his equal employment opportunity powers. See 1972 *Manpower Report of the President*, at 63.

<sup>57</sup> 28 ARB. J. 145 (1973).

<sup>58</sup> *Id.* See *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972).

should not forget that one of the primary functions of collective bargaining and grievance arbitration is to assure individual dignity and justice at the workplace, and in many Title VII cases, this same issue is involved.

7. To deal with the masses, individual hiring, promotion, and discharge claims which make up a substantial part of the huge volume of Title VII work, the concept of individual voluntary arbitration should be promoted by the EEOC. The development of a cadre of arbitrators acceptable to employers and the civil rights interests would be the first step. For many employers, as well as for many complainants, the submission of these individual claims to arbitration under the standards announced in *McDonnell Douglas v. Green*<sup>59</sup> would be preferable to either lengthy state administrative proceedings or federal court proceedings under Title VII. Now that the rules of law applicable to such situations have been worked out with reasonable clarity, arbitration on an individual basis, should be brought to bear on the mass of cases.

### IX. Conclusion

The fundamental issue is whether it is possible to focus governmental programs toward the maximum, prompt, effective attack on employment discrimination, or whether the drifts and tendencies of government bureaucracy will produce continued ineffectual assaults on the problem. Our social and economic problems are tragic enough as legacies from the past. We should not compound them further by bureaucratic processes which perpetuate the difficulties rather than eliminate them. The unresolved question for our time is whether we are able to direct governmental activity, or whether it will, from forces which we imperfectly understand, drift in such a way as to magnify our social tragedy. This, indeed, would be the second American Dilemma: that once we expressed the will to end discrimination, we lacked the capability to do it.

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59 *Supra*, note 26.