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1969

**Recent Decisions: Labor Relations--Union Racial Discrimination  
Applicability of Title VII, 1964 Civil Rights Act [*Vollmer v. Szabo*,  
17 Ohio Misc. 143 (N.D. Ohio 1969)]**

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**Recommended Citation**

Thomas B. Ackland, *Recent Decisions: Labor Relations--Union Racial Discrimination Applicability of Title VII, 1964 Civil Rights Act [*Vollmer v. Szabo*, 17 Ohio Misc. 143 (N.D. Ohio 1969)]*, 20 Case W. Rsrv. L. Rev. 658 (1969)

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ceptualism, these cases were unable to conclude that the subject matter of litigation could encompass more than the issues to be litigated at trial. The better view, represented by *Vollmer v. Szabo*, is to permit discovery, thereby introducing the insurance fund at the settlement stage.

E. JOEL WESP

**LABOR RELATIONS — UNION RACIAL DISCRIMINATION  
APPLICABILITY OF TITLE VII, 1964 CIVIL RIGHTS ACT**

*Dobbins v. Local 212, IBEW*, 292 F. Supp. 413  
(S.D. Ohio 1968).

Today the national spirit lies splintered, the victim of a vicious racial whiplash generated by the unrequited desire of generations of Negroes and other minority groups for equality of treatment. Time has run out; national survival depends upon our ability to make equality a reality today, not tomorrow. Without unobstructed access to jobs, the "unequal" citizen can make little headway toward becoming securely enmeshed in the fabric of our materialistic society. The Supreme Court sought to provide the requisite job access 25 years ago when it held, in *Steele v. Louisville & Nashville Railroad*,<sup>1</sup> that a labor union clothed with great power by the Railway Labor Act<sup>2</sup> was bound by that Act's provisions and the Constitution's equal protection clause to represent all workers regardless of race or creed. Based upon that decision and its progeny, the federal and state courts have been *capable* of combating discrimination, and yet because of public indifference, union power and recalcitrance, the high cost of judicial relief, and the lack of sophistication of many discrimination victims, the case law had contributed little to the improvement of the Negroes' position at the time Congress enacted the 1964 Civil Rights Act.<sup>3</sup>

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<sup>1</sup> 323 U.S. 192 (1944).

<sup>2</sup> 45 U.S.C. § 151 (1964).

<sup>3</sup> *Id.* §§ 2000a to h-6 (1964). This note is exclusively concerned with Title VII of that Act, *id.* §§ 2000e to e-15 (1964) [hereinafter cited as the 1964 Act]. It is important to note that this title is not the sole piece of federal legislation under which federal agencies can fight employment discrimination. An excellent critical comparison of the relief obtainable under the commission established under Title VII, the Equal Employment Opportunity Commission (EEOC), and the remaining agencies, the National Labor Relations Board and the Office of Federal Contract Compliance

Civil rights groups hailed the 1964 Act as the long-awaited vehicle by which the common man, now backed by that mentor of mentors, the Federal Government, could force the economic levianth, organized labor, to abandon its discriminatory ways. In the permissive judicial atmosphere provided by the Warren Court,<sup>4</sup> much case law has been generated under both the 1964 Act and the long-dormant Reconstruction Legislation.<sup>5</sup> The recent case of *Dobbins v. Local 212, IBEW*,<sup>6</sup> presents an occasion to pause and evaluate the effectiveness of the aforementioned legislation amid the confines of a most hostile environment, the building trades, wherein discrimination (in the more general sense of a *total* limitation of employment opportunity) has become, in the union view, the *sine qua non* of membership economic survival.<sup>7</sup>

Anderson L. Dobbins was a black independent electrical contractor and experienced nonunion journeyman electrician. After the failure of his several attempts to secure employment with a union contractor through the exclusive channel thereto,<sup>8</sup> the referral system of Local 212 (a job allocation mechanism explained at length below), Dobbins brought a class action<sup>9</sup> against the local<sup>10</sup>

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can be found in Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis*, 14 HOW. L.J. 259 (1968).

<sup>4</sup> See Cox, *The Supreme Court 1965 Term, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

<sup>5</sup> Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1964) [hereinafter cited as the 1866 Act].

<sup>6</sup> 292 F. Supp. 413 (S.D. Ohio 1968). The defendant union is Local 212 of the International Brotherhood of Electrical Workers AFL-CIO of Cincinnati, Ohio [hereinafter referred to as the local].

<sup>7</sup> See FORTUNE, Dec. 1968, at 102.

<sup>8</sup> Dobbins had applied for union membership at various times prior to the effective compliance date of the 1964 Act, July 2, 1965. Although he had made one attempt since that time, his NAACP counsel decided not to rest the entire case upon this single occurrence. The decision to broaden the factual base of Dobbins' case and the desire of counsel to invoke a constitutional condemnation of the local's conduct necessitated the inclusion of a claim under the 1866 Act. See Trial Memorandum of Plaintiff at 35, *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968). The court, however, based its entire decision upon Title VII after noting that the 1866 Act *could* serve as grounds for relief. 292 F. Supp. at 442. The minor role of the 1866 Act resulted from the court's holding first that Dobbins' relief could be granted under Title VII because of the single act of discrimination alleged to have taken place after July 2, 1965, and secondly, that to prove the *intent* to discriminate required by 42 U.S.C. § 2000e-5(g) (1964), evidence of pre-Act events was admissible. 292 F. Supp. at 443. For further discussion of the latter point, see text accompanying note 24 *infra*.

<sup>9</sup> In disallowing the class action, the court noted that Dobbins had not established that there was more than one person in the class and therefore he had failed to meet the requirements of rule 23(a)(1) of the *Federal Rules of Civil Procedure*.

<sup>10</sup> There were two defendants in the case, the local and the Joint Apprentice Training Council (JATC). The JATC is a voluntary unincorporated association composed of six members — three from the union and three from the National Electric Con-

in which he alleged discrimination in violation of both the 1964 Act<sup>11</sup> and the 1866 Act. About 1 month later the United States filed an action<sup>12</sup> against the local in which discrimination against 12 other Negroes was alleged.<sup>13</sup> The actions were consolidated and advanced on the docket in accordance with the terms of the 1964 Act.<sup>14</sup>

The main thrust of the complaint was that the local, possessed of nearly absolute power to control employment opportunity, had used that power to eliminate Negro employment opportunity in violation of both the 1964 and 1866 Acts.<sup>15</sup> The evolution of dis-

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tractors Association. It conducted a 4-year program composed of biweekly evening classroom work and fifty 40-hour work weeks with apprentices being paid various percentages of the union minimum wage. In 1963, the JATC, in anticipation of Department of Labor action under 29 U.S.C. § 50 (1964), adopted formal standards for apprentice training which met with the approval of the Labor Department's Bureau of Apprenticeship Training (and this court). The court found that although the JATC had engaged in various acts of discrimination prior to 1968, in that year it had embarked upon an affirmative action program (*see* note 39 *infra* & accompanying text) designed to eradicate the gap between the employability of under privileged Negro children and that of white youths. The sole remaining discriminatory practice was that the JATC continued to alter — in a manner favoring whites — the ratings that its expert evaluators assigned to applicants. Because of the relatively insignificant discriminatory role played by the JATC at the time the *Dobbins* case was initiated, it will not be dealt with further in this article.

<sup>11</sup> It is important to note that an individual must exhaust the Title VII administrative procedures prior to seeking relief in the federal courts. *See* 42 U.S.C. § 2000e-5 (1964). Title VII established the EEOC to "police" cases arising under the Act. *Id.* § 2000e-4. The original conception was to create a commission patterned after the NLRB, empowered to issue cease and desist decrees which would be conclusive as to findings of fact upon judicial review. However, political necessity dictated that certain changes be made; those changes (known as the Mansfield-Dirksen amendments) significantly reduced the Commission's effectiveness. For present purposes, it is sufficient to note that the Commission's role is solely that of a conciliator divested of *any power* to enforce its compliance notices. For a comprehensive discussion of the Commission, *see* M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 61-102 (1966).

<sup>12</sup> 42 U.S.C. § 2000e-6(a) (1964) empowers the Attorney General of the United States to bring an action whenever he "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 subchapter."

<sup>13</sup> The alleged acts of discrimination are discussed in the text accompanying notes 18-23 *infra*.

<sup>14</sup> 42 U.S.C. § 2000e-6(b) (1964). For the purpose of this discussion, the action will be treated as if there were but one plaintiff and one defendant: Important ramifications of the more complex realities of party alignment will be dealt with as clarity requires.

<sup>15</sup> Without comment, the court assumed that Congress, by the 1964 Act, intended and was constitutionally able to reach ostensibly private (union) acts of discrimination. This passive judicial reaction to the rather lengthy arguments on the point by the federal attorneys reflects the fact that because of the availability of both the commerce power rationale which supported earlier cases under Title II of the 1964 Act (*see* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964)) and the Supreme Court's recent expansive reading of

crimutory practices which the allegations brought to light presents a classic model of effective (union) "one-up-manship." In 1963, a new Federal Building was under construction in Cincinnati. Civil rights groups, in an effort to increase Negro craft union membership, chose this occasion to focus their attention upon the membership admission procedures of the various craft locals (which were predominantly or all white) engaged in that project. In that initial campaign and in the years that followed, the union parried each hostile thrust by effecting a devious response composed of well publicized cooperative (but meaningless) action which was counterbalanced by covert changes to its *unwritten* procedures.<sup>16</sup> So successful was the union's strategy, based upon the subtle use of sham action and discretionary power, that it took 5 years and government intervention to bring the entire picture into focus.

The collective bargaining agreement (CBA) which had evolved from the aforementioned confrontation allowed the union to operate an *exclusive* hiring hall to supply workers to area contractors. The only exceptions to this exclusivity were "48-hour men." When the union could not refer a man within 48 hours, the contractor — with *local approval* — was permitted to hire *any* available worker until referral became possible. No referred worker could be "bumped" off the job by a worker with a higher priority. The re-

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congressional power to proscribe acts beyond the literal language of the 14th amendment in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), a serious challenge to the constitutionality of Title VII is not likely.

The court did find it necessary to justify the use of the 1866 Act to proscribe private acts of discrimination, and did so by citing the recent case of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), wherein the Supreme Court used the 1866 Act to sanction a private party's refusal to convey property. The analogy was well taken because the portion of the 1866 Act affecting the right to contract for employment (herein at issue) was contained within the same section 1 of the Act as the provisions relied upon in the *Jones* case. Section 1 of the Act provides in part: "[A]ll persons born in the United States . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . purchase, lease, sell, hold, and convey real and personal property . . ." 42 U.S.C. §§ 1981-82 (1964); *see* Recent Decision, 20 CASE W. RES. L. REV. 448 (1968). The aforementioned language is applicable to the contractual relationship of union membership and referral status. *Cf. Machinists v. Gonzales*, 356 U.S. 617 (1958). In view of the above, it can be safely assumed that future plaintiffs can, without lengthy justification, rely upon the protection of both the 1964 and 1866 Acts.

<sup>16</sup> The intricacy of these maneuvers can best be demonstrated by example. A competency examination, which the local advertised as a membership examination, was given in 1966. It was, in fact, an examination to determine whether a person was qualified to participate in the referral system. Forty-two of the 55 men who took the examination were veterans of the referral system: Only one of these 55 men was black. All men failed the test yet the veterans continued to be referred. The entire procedure was a sham to quiet the demands of civil rights groups for a membership exam. Participation in this meaningless exercise was made a prerequisite for taking the 1967 membership examination.

ferral procedures contained no formal standards for evaluating whether a worker was a qualified electrician; rather, the union business agent used his discretion in making this threshold determination. The procedures encompassed four formal priority groups with classification accomplished according to the following criteria: Group 1 — 4 years' trade experience, area resident, passed journeyman exam, employed under CBA during 1 of the last 4 years (no Negro had ever been referred from this category); Group 2 — 4 years' trade experience and passed journeyman examination (one Negro was referred from this category in 1968); Group 3 — 2 years' trade experience, area resident, 6 months' experience under CBA (this was the largest referral group and no Negro had ever been referred therefrom); Group 4 — 1 year's trade experience (no Negro had ever been referred from this group). The local had never had a Negro member and, at a representative date in 1967, only two out of 600 nonmember employees of area union contractors were Negroes. After the 1967 CBA negotiations, only indentured apprentices — anyone learning the trade who was participating in the Joint Apprenticeship Training Council (JATC) program<sup>17</sup> — were employable by union contractors. Subsequently there have been only two routes leading to union membership: (1) work 4 years for a nonunion contractor, and (2) join the JATC program. However, because the union had an unwritten rule that membership applications would not be accepted from electricians working for nonunion contractors, JATC involvement became, in reality, the sole route to union membership. Because of its discriminatory procedures in processing applicants (prior to 1968), the JATC effectively slammed the door in the Negro's face on the threshold of his search for employment. The stricture was complete; the local had prevailed in the struggle that started in 1963.

Based upon its inspection of the application of the above procedures to individual worker-union interaction, the court concluded that of the 27 Negroes who had contacted the local subsequent to the effective date of Title VII, July 2, 1965, 13 (including Dobbins) had been discriminated against by one or more of the following local practices:<sup>18</sup> (1) failure to inform Negro applicants of

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<sup>17</sup> See note 10 *supra*.

<sup>18</sup> The court based its conclusions upon 42 U.S.C. § 2000e-2 (1964), rather than upon EEOC rulings or other case law. It is interesting to note the dearth of court citation to EEOC rulings. This situation seems to be the logical result of the damaging blow to the EEOC's potency dealt by the Mansfield-Dirksen amendments alluded to in note 12 *supra*. For relevant subsections of 42 U.S.C. § 2000e-2 (1964), see note 24 *infra*.

the existence of the referral system (prior to August 1967); (2) incomplete disclosure of application procedures<sup>19</sup> and examination prerequisites;<sup>20</sup> (3) failure to group and refer qualified men; (4) failure to administer a membership examination from 1965 to 1967;<sup>21</sup> (5) the chilling<sup>22</sup> and arbitrary nature of the prerequisites<sup>23</sup> established for the 1967 membership examination.

In formulating the above findings, the court was careful to delineate the chronological limitations which the invoked legislation placed upon the admissibility of discriminatory evidence in each case. The determination as to whether a particular worker-plaintiff qualified for equitable relief and whether the referral system constituted a discriminatory procedure was governed by this consideration. Taking the government case first, it was noted earlier that the 1964 Act upon which that action was based had an effective date of July 2, 1965. Any action taken (or procedure continued) on or after that date, the intent of which was to discriminate within the meaning of Title VII,<sup>24</sup> creates a cause of action under the Act.

<sup>19</sup> The union had an unwritten rule that no application for membership would be accepted from a worker not *then* employed under the local's collective bargaining agreement. However, applications made by Negroes were readily accepted without comment. 292 F. Supp. at 423.

<sup>20</sup> One interesting facet of the local's examination procedure was that one examination, which was held exclusively for Negro applicants in mid-1963, was scheduled for a *nonexistent day*, Monday, July 9, 1963; Monday fell on July 8, 1963. *Id.* at 425.

<sup>21</sup> Local membership policy is governed by the International's Constitution, local by-laws, and the negotiated collective bargaining agreements. The most demanding of these documents requires that the local membership board meet monthly to examine applicants. *Id.* at 419.

<sup>22</sup> The court analogized to *Dombroski v. Pfister*, 380 U.S. 479 (1965), wherein the Supreme Court held the Louisiana Subversive Activities and Communist Control Act to be unconstitutional because of its vagueness. The "chilling effect" upon the first amendment's freedom of expression guarantee, which can result from a state's criminal prosecution, was held to justify plaintiff's refusal to exhaust his state court remedies. The *Dobbins* court has pulled the word "chilling" out of the aforementioned dual context — first amendment and exhaustion — and in so doing has entered uncharted waters. *Dobbins* alone invoked the Constitution in his trial presentation. See Trial Memorandum for Plaintiff, *supra* note 8, at 35. He alleged fifth amendment violations which were not concerned with exhaustion of remedies. The attempt to extend *Dombroski* beyond the specially treated first amendment area is interesting but not convincing, considering the Supreme Court's favored treatment of that amendment. See *Cameron v. Johnson*, 390 U.S. 611, 618-19 (1968). See also Recent Decision, 19 CASE W. RES. L. REV. 1089 (1968).

<sup>23</sup> See note 16 *supra*.

<sup>24</sup> 42 U.S.C. § 2000e-2(c) to (d) (1964) makes it an unlawful employment practice:

[(c)] (1) to exclude . . . from . . . membership, or otherwise to discriminate against, any individual because of his race, color . . . [or] (2) to limit . . . its membership, or to classify or fail or refuse to refer for employment any individual because of such individual's race, color . . . [or] (d) it shall be an unlawful employment practice for any . . . labor organization, or joint labor-management committee controlling apprenticeship or other training . . . to

While certain actions by their very nature expose their perpetrators' intent, others are ostensibly neutral. To pierce the latter category's shell of neutrality, the court felt it necessary to consider pre-Act events which were indicative of the purpose of a particular procedure. Thus, in addition to direct discriminatory acts perpetrated since July 2, 1965, discriminatory treatment resulting from contact with procedures continued after that date (such as the referral system) which, while ostensibly neutral, perpetuated the anti-Negro intent of an earlier period, constituted a basis for redress under Title VII.

The same pre/post Act distinction was not applicable in the *Dobbins* case because the 1866 Act does not make *intent* to discriminate an element in the act of discrimination.<sup>25</sup> However, the evidence in that action (insofar as it rested upon the 1866 Act) was governed by the applicable state statute of limitations and the court held that September 1963 represented the chronological line of demarcation.<sup>26</sup> Mr. Dobbins' case was thus stronger than that of the government, both because earlier *direct* acts could be adduced and because *no intent* to discriminate needed to be demonstrated.<sup>27</sup> The above accounts for Dobbins' counsel's inclusion of allegations under both the 1964 Act and 1866 Act.

In addition to the chronological limitations noted above, the court found it necessary to delineate certain acts which were not within the purview of the term discriminatory. Specifically, it refused to accept three of the government's allegations of discrimination: First, it rejected the contention that a prima facie case of discrimination is established when it is proved that a local or its apprenticeship program is predominantly or all white. The craft nature of the local dictated the court's position that, absent a showing that a significant number of Negroes possessed the requisite skills or qualifications for a craft, the racial balance within a group is not probative.<sup>28</sup> In *Dobbins*, the evidence demonstrated that, in fact,

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discriminate against any individual because of his race, [or] color . . . in any program established to provide apprenticeship or other training.

<sup>25</sup> See note 15 *supra*.

<sup>26</sup> The court chose the forum state's *tort* statute of limitations, 4 years, because no federal law spoke to the issue. OHIO REV. CODE § 2305.09 (Page Supp. 1968). This seems inconsistent with the court's opinion that the entire *Dobbins* case was contractual in nature. 292 F. Supp. at 442. The Ohio contract statute of limitations is 6 years on an oral contract (the case here). OHIO REV. CODE § 2305.07 (Page Supp. 1968).

<sup>27</sup> See comments on the effects of the Mansfield-Dirksen amendments to Title VII, note 11 *supra*.

<sup>28</sup> The court used a negative inference from the holding of the Supreme Court in



very few qualified Negroes existed in the Cincinnati area. Secondly, the fact that only contractors who employed white electricians exclusively were subjected to local organizing efforts was held not to create a *prima facie* case of discrimination.<sup>29</sup> The court felt that because only one nonunion contractor had been approached by the local since the effective date of the Act, that isolated incident did not establish a pattern of discrimination. The legislative history of Title VII supports the court's holding.<sup>30</sup> Thirdly, because intent to discriminate must be demonstrated,<sup>31</sup> absolute limitations as to membership in either a union or its apprenticeship program<sup>32</sup> are not violative of Title VII.<sup>33</sup> That title is concerned only with the *manner* in which the aggregate of membership is determined, not the aggregate itself.

The most serious problem in the implementation of civil rights legislation has always been — and still is — the formulation of an effective decree within the parameters of the particular statutes involved.<sup>34</sup> The judicial challenge is that of creating controls whereby the recalcitrant can be forced to abide by both the letter and spirit of the law. As the Cincinnati experience demonstrates, because discrimination is best accomplished through the use of flexible, unwritten policy to guide *discretionary* decisions, the decree, a mere proclamation frozen in time, represents an inept shepherd.

The *Dobbins* court approached the problem by considering the nature and amount of corrective action which ought to be required of the local, the proper relief for the individual worker-plaintiffs, and the fate of the referral system. The court held that direct remedial action could and would be required of the local to correct the results of discrimination. The government had prayed that af-

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Norris v. Alabama, 294 U.S. 587 (1935), in which the Court based its ruling that Negroes were improperly excluded from jury service upon the fact that, while qualified Negro candidates were available in large numbers, no Negro had ever served upon a jury. 292 F. Supp. at 446.

<sup>29</sup> *Id.* at 445.

<sup>30</sup> *Id.* at 444.

<sup>31</sup> 42 U.S.C. § 2000e-5(g) (1964). This was one of the facets of the Mansfield-Dirksen amendments mentioned in note 11 *supra*.

<sup>32</sup> These limitations serve the craft unions in the same manner as seniority serves the factory oriented unions; they protect against layoffs. For an excellent and concise treatment of discrimination and seniority, see Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

<sup>33</sup> NLRB v. Shipbuilding Workers, 391 U.S. 418 (1968).

<sup>34</sup> See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954).

firmative action in the broad sense<sup>35</sup> of requiring the local to assist, through special remedial training programs, those Negroes who had been denied apprenticeship training and referral in the post-1964 Act period. The court would not accept the government's expansive interpretation of its remedial authority<sup>36</sup> and instead decreed that qualified workers who had been the victims of post-Act discrimination were to be grouped and referred immediately with credit for work under a collective bargaining agreement *from the date of the discriminatory act* after the Act's effective date.<sup>37</sup> This formulation has been the historical limit<sup>38</sup> to relief from discrimination, and the *Dobbins* court suggests it is the limit under Title VII.<sup>39</sup>

The referral system presented the most complex aspect of the decree. As noted earlier, the evidence clearly demonstrated that

<sup>35</sup> See Black, *The Supreme Court 1966 Term, Foreward: "State Action", Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Cox, *supra* note 4, at 93.

<sup>36</sup> 292 F. Supp. at 445.

<sup>37</sup> *Id.* at 450.

<sup>38</sup> It should be noted that the Supreme Court's recent decisions may represent the ground work upon which state and federal legislative power can be utilized to force the private sector to carry its part of the total affirmative burden in the struggle to equalize opportunity. See Cox, *supra* note 4, at 114-20.

<sup>39</sup> The court interpreted Title VII's position as to the meaning of "affirmative" action. 42 U.S.C. § 2000e-5(g) (1964), states in part: "If the court finds that the respondent has intentionally engaged . . . in an unlawful employment practice . . . [it] may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . ." The enumerated remedies which follow in subsection (g) are two: reinstatement and award of interim earnings. This limitation of "affirmative" action is complemented by *id.* § 2000e-2(j) (1964) (emphasis added), which states in part: "Nothing contained in this subchapter shall be interpreted to require any . . . labor organization . . . to grant *preferential* treatment to any individual or group because of race, color. . . ." This narrow interpretation of affirmative contained in the statutory language finds support in the 1964 Act's legislative history. 292 F. Supp. 413, 444 (1968).

The court, however, departed from the aforementioned finality of Title VII and sailed into uncharted waters when, in dicta, it later distinguished between the *limits* of relief from continuing pre-Act patterns as opposed to post-Act discriminatory actions. In the latter situations the court seemed to be shaping the standard of required action with the broad stroke of Professor Black when it stated:

Relief requiring affirmative remedial action in order to correct the effects of a post-Act pattern and practice is necessary and proper. Where a labor union has engaged in a pattern or practice, the form and substance of the relief must be designed to effectuate the declared Congressional policy of open employment opportunities. . . . *Id.* at 447.

Was the court discarding its earlier position that broadly affirmative acts — such as classes to qualify the underprivileged for apprenticeship training — were forbidden by Title VII? The more limited requirements of the decree answer in the negative, yet confusion and distortion can result when courts speak broadly of "affirmative" action. For another interpretation of the broad type of affirmative relief that may be granted, see *Asbestos Workers v. Vogler*, 37 U.S.L.W. 2447 (5th Cir. Jan. 15, 1969), wherein the court affirmed a preliminary injunction ordering that one out of every two union job referrals be given to a Negro.

the referral system, as currently structured, was intended to deny employment to Negroes and, in fact, did so operate. It was not per se discriminatory, but the evidence revealed that it was discriminatory in fact. The court noted that Title VII empowered it to completely eradicate the referral system. Although both Title VII and the National Labor Relations Act<sup>40</sup> recognized the validity of seniority provisions and the latter legislation sanctions exclusive hiring halls in the building trades,<sup>41</sup> neither Act ought to be permitted to shelter a procedure which perpetuates past discriminatory policy.<sup>42</sup> This was the holding of the district court in the recent case of *Quarles v. Philip Morris*,<sup>43</sup> and the *Dobbins* court, while accepting the logic of that decision, held that where no large group of competent Negroes (beyond the 27 who were the subject of the *Dobbins* case) was competing in the relevant labor market, the drastic step of eradicating the entire referral system need not be taken. The court seemed to reflect both that traditional judicial hesitancy which militates against taking a "giant step" in developing areas of the law and to feel that the time-tested referral procedure had inherent merit worth preserving. However, the better view seems to be that similar referral procedures, which now exist throughout the building trades unions, represent a generally restrictive device whose purpose is to keep the supply of journeymen low and wages high in the face of an unprecedented present and projected demand for new structures of all types.<sup>44</sup> While it is clear that the shaping of judicial relief in racial discrimination cases brought under either Title VII or the 1866 Act cannot eliminate the economic illogic which the referral-hiring hall system represents, certainly these decrees ought not to preserve such systems in the name of efficiency.

Economic considerations aside, it was clear that some locally administered plan was required to prevent chaos from characterizing

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<sup>40</sup> 42 U.S.C. § 2000e-2(h) (1964), and 29 U.S.C. § 158(f)(4) (1964).

<sup>41</sup> 29 U.S.C. § 158(f)(3) (1964).

<sup>42</sup> It should be noted that seniority fulfills a different function for a craft union than that which it fulfills in industrial unions. In the latter area, seniority prevents unemployment by setting up "bump-back" or last-in-first-out procedures to insure that workers with longevity will face minimal unemployment. In craft unions seniority gives one a better chance to regain employment by entitling the senior men to superior group classification and the resultant speedier referral. Thus, in a craft union, seniority may be viewed as less of a vested right than in the factory union; the "prevention" function, however, is accomplished through the hiring hall referral system's general restrictions of entry opportunity alluded to in the text accompanying note 29 *supra*.

<sup>43</sup> 279 F. Supp. 505 (E.D. Va. 1968).

<sup>44</sup> See FORTUNE, Dec. 1968, at 102.

the craft union hiring process. The challenge was to prevent that plan from incorporating the discrimination of the past during the transitional period. The *Dobbins* court held that a temporary referral system was to be created which did not involve grouping based upon union membership, prior passing of union examinations, or period of employment by a union contractor. (Presumably the existing system — less the directly discriminatory procedures noted above — may be reestablished after time has removed its discriminatory taint.)

While the retention of the present hiring hall referral form is, in this writer's view, a less than ideal economic solution to the Cincinnati type situation, the simple restructuring of grouping criteria to match the form of the decree will not suffice to accomplish even the more limited purpose of preventing future *racial* discrimination.<sup>45</sup> Reliability insurance in the form of lengthy retention of jurisdiction over the parties is of critical importance because the ease of devising new grouping criteria is paralleled by the facility with which those new criteria may be perverted. The time frame forces the court to assume the posture of a supervisory administrative body rather than the traditional stance of an arbiter of disputes.

The courts can and will do their part, as in *Dobbins*, by forcing initial compliance and retaining jurisdiction over the defendants to insure that the initial corrective action is taken. But this appears to be the limit of their reach. Each local is the master of its own vessel and the fleet numbers in the thousands. It would be sheer folly to presume that we may expect *substantially* greater mileage than that extracted from the *Steele* case<sup>46</sup> from *Dobbins*, or any other similar action. They are restricted to their facts by the traditional recalcitrance and discriminatory practices of building trade unions.<sup>47</sup> Indigents and the United States Attorney General cannot force the multitude of locals into line by court action alone. But this is not to say that the Title VII cases are without significance.

*Steele* stood alone in a hostile atmosphere of discrimination. As

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<sup>45</sup> This writer suggests that a most workable referral procedure would be one structured along present lines but endowed with a set of group classification criteria which comport with the *intent* and form of the decree. Those group criteria might include work experience in the trade without regard to past union affiliation, the demonstration of various levels of competence to the JATC, *not* the union, and area residency.

<sup>46</sup> See text accompanying note 7 *supra*.

<sup>47</sup> See M. SOVERN, *supra* note 11, at 200.