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WILLIAM B GOULD PAPER

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NON-GOVERNMENTAL REMEDIES FOR EMPLOYMENT DISCRIMINATION

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NON-GOVERNMENTAL REMEDIES FOR EMPLOYMENT DISCRIMINATION+

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For the most part, time-honored custom adapts to change unwillingly. The employer who could deal with an individual without the interference of a labor union possessed of exclusive bargaining authority sometimes found the collective contract a difficult concept to stomach. But Congress, through enactment of the National Labor Relations Act, said that the collective bargaining agreement superseded the individual contract.[1] Today, labor and management have constructed an institution of self-government upon that edifice. But, in my judgment, the structure may be on a collision course with the racial tensions America is experiencing - tensions which have spilled over into the plant community. And it is no secret that when labor and management talk about the irresponsible restiveness of the rank and file worker today, they are often speaking euphemistically of the black worker's alienation[2] from the industrial system and society itself.

+Primarily, the focus of this paper is racial discrimination.

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1. See J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). For examinations of the majority rule principle under the National Labor Relations Act, see Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731 (1950); Gould, The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act, 52 Cornell L. Q. 672 (1967); Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. 556 (1945).

2. This is not to say that the rank and file rebellion is not a problem into itself. It is. See Raskin, Rumbles From the Rank and File, The Reporter, Jan. 28, 1965, at 27. However, the point is that in certain parts of the country this problem has overlapped to a substantial degree, with racial disputes in the plant.

This paper addresses itself to two avenues through which this discord is emerging. The first is labor arbitration - the system of a binding third party interpretation of collective bargaining agreements which has gained a large measure of acceptability in this country during the past twenty-five years.[3] The second is the Supreme Court's decision in Jones v. Mayer where it was held that the Civil Rights Act of 1886 is, in effect, an anti-racial discrimination statute in the field of housing in addition to the Civil Rights Act of 1968. The focus for our discussion is the use of the Jones decision and the 1866 Civil Rights Act to supplement Title VII, the fair employment practices provisions of the Civil Rights Act of 1964.

I

LABOR ARBITRATION AND RACIAL DISCRIMINATION GRIEVANCES

A. Labor Arbitration Law

Ever since the Supreme Court held that collective bargaining agreements are enforceable in federal and state courts under section 301 of the National Labor Relations Act,[4] arbitration has had legal recognition and respectability as a substitute for industrial strife. As the Court has said of section 301: "It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained in that way."[5] And in establishing both the expertise of labor arbitrators and the comprehensive nature of collective bargaining agreements in the Steelworkers trilogy, the Court said: "The mature labor agree-

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3. 36 U.S.L.W. 4661 (U.S. Jan. 17, 1968).

4. Labor-Management Relations Act (Taft-Hartley Act), § 301(a), 29 U.S.C. § 185(a)(1964).

5. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

ment may attempt to regulate all aspects of the complicated relationship from the most crucial to the most minute over an extended period of time."[6] Thus, in the absence of contractual expression of intent to the contrary, every facet of the labor-management relationship appeared to be within the reach of labor arbitrators selected to interpret bilateral contracts negotiated by unions and employers.

The power which the Court was willing to bestow upon unions and the arbitration process became clearer in Republic Steel Corporation v. Maddox[7] and Vaca v. Sipes.[8] In Maddox, the Court articulated the "general rule" that ". . .federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union and the mode of redress. . .unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf."[9] And, in Vaca v. Sipes the Court stated that national labor policy "subordinates the interests of the individual employee to the collective interests of all employees in a bargaining unit. . ."[10] And that the individual has no "absolute" right to

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6. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960). The Steelworkers trilogy is composed of Warrior and United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); cf. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1952).

7. 379 U.S. 650 (1965).

8. 386 U.S. 171 (1967)

9. See note 7 supra at 652-53. NLRB v. Industrial Union of Marine and Shipbuilding, 391 U.S. 418 (1968), opposed Union exhaustion requirements. But there the machinery was purely intra-union and resort was to a specialist administrative agency rather than a court. Moreover, contract interpretation does not appear to have been at issue.

10. See note 8 supra at 182.

have his grievance taken to arbitration. Thus, in the absence of contrary contract language, the individual or group of workers could not generally bypass the grievance procedure and could not exhaust it without the union's permission.

B. The Glover Decision

However, the Court has indicated that there are limits to the Maddox-Vaca rules in the recently decided case of Glover v. St. Louis-San Francisco Railway Co.[11] In Glover 13 workers - 8 Negroes and 5 whites - brought an action against the Union and the Company which alleged that both parties had discriminatorily refused to promote Negro workers to the classification of Carmen. The white workers joined in the suit because their promotional opportunities were impaired by the alleged practices. Subsequent to the defendant's motion to dismiss for failure to exhaust the grievance machinery in the labor contract, in the Union's Constitution and before the National Railroad Adjustment Board, plaintiffs amended their complaint to say that Negro workers had "called upon" the Union to process grievances but that nothing had been done. Moreover, it was alleged that "other representatives" of the Union had told the Negro plaintiffs "(a) that they were kidding themselves if they thought they could ever get white man's jobs; (b) that nothing would ever be done with them; and (c) that to file a formal complaint with the Brotherhood or the Company would be a waste of their time." Responses similar to those noted above were alleged to have been made by both the Union and the Company in the amended complaint.

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11. 37 U.S.L.W. 4084 (U.S. Jan. 14, 1969).

The jurisdiction of federal courts to entertain suits alleging a breach of the duty of fair representation had been established prior to Glover.[12] But here the allegation was that the labor contract itself required a practice contrary to the one followed by the parties in this instance. Said the Court referring to Conley v. Gibson which held for federal court jurisdiction where discrimination was rooted in the negotiation of the contract: "In this situation no meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face."[13]

Rejecting the defendant's exhaustion argument, the Court citing Vaca to the effect that there are situations where union-employer controlled contractual remedies ". . .may well prove unsatisfactory or unworkable for the individual grievant"[14], stated that this was one of the ". . .most obvious exceptions to the exhaustion requirement - the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile."[15] Said the Court:

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12. Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Conley v. Gibson, 355 U.S. 41 (1957); Syres v. Oil Workers, 350 U.S. 892 (1956); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Local 1, Independent Metalworkers, 147 NLRB 1573 (1964); Miranda Fuel Co., 140 NLRB 181 (1962), enforcement denied 326 F.2d 172 (2d Cir. 1963) cf. Aaron, The Duty of Fair Representation Under the National Labor Relations Act and the Railway Labor Act, 34 J. Air L. & Com. 167 (1968).

13. See note 11 supra at 4085.

14. Id. at 4086; see note 8 supra at 185.

15. See note 11 supra at 4086.

> . . .the attempt to exhaust contractual remedies required under Maddox, is easily satisfied by plaintiff's repeated complaints to Company and Union officials, and no time-consuming formality should be demanded of them. The allegations are that the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race. If that is true, insistence that plaintiffs exhaust the remedies administered by the Union and the railroad would only serve to prolong the deprivation of rights to which these plaintiffs according to their allegations are justly and legally entitled.[16]

If Glover is read to say that allegations of union-employer conspiracies concerning racial discrimination remove the exhaustion barriers erected by Maddox, the result is a salutary one. For the parties controlling the grievance procedures cannot be detached and objective in the adjudication of Glover-type controversies. And Mr. Justice Black, the author of the Court's unanimous opinion, has been a severe critic of the exhaustion rule of the past.[17] But the tenor of Glover seems less ambitious. For the amended complaint of the plaintiffs states that Union officials were "called upon" and the Court's opinion notes that the attempt to exhaust required by Maddox is satisfied by plaintiff's "repeated complaints."

But why would a more far-reaching opinion in Glover have been preferable to the Court's implicit decision to adhere to Maddox in racial discrimination cases? I submit that many grievances alleging racial discrimination are, per ce, - to use the language of Maddox - "critically unlike" other grievances that arise in the plant. I have arrived at this conclusion despite the fact that Glover - with or without any attempt to exhaust the grievance machinery - possesses some of the very same ingredients which the Court found so essential to the exhaustion rationale in Maddox. For certainly where Negro workers allege discriminatory seniority and promotion schemes, the remedy will have an ". . .

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16. Id. at 4086; cf. Foy v. Norfolk & Western Rwy., 377 F.2d 243 (4th Cir. 1967), cert. denied, 389 U.S. 848 (1967).

17. See Justice Black's dissenting opinions in note 7 supra at 660 and note 8 supra at 203.

effect on future relations between the employer and employee."[18]

C. The Suitability of Arbitration to Racial Discrimination Grievances

Labor arbitration is an institution with hybrid characteristics. On the one hand, the Supreme Court has placed legal sanctions behind this "private" process through (1) its willingness in section 301 suits to resolve all doubts in favor of ordering the parties to arbitrate contract grievances where a question of arbitrability exists[19]; and (2) a refusal to set aside arbitration awards unless they manifest clear infidelity to the contract. This attitude, along with the National Labor Relations Board's deference to arbitration awards where ". . .the proceedings have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. . .",[20] supports the proposition that arbitration awards ignore public laws like Title VII, for instance, at their peril.[21] But, at the same time, the arbitrator is a creature of the parties and their labor contract. And the Supreme Court, in Enterprise, has informed the arbitrator that while ". . .[h]e may of course look for guidance from many sources,

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18. Republic Steel Corp. v. Maddox, 379 U.S. 656 (1965).

19. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

20. Spielberg Mfg. Co., 112 NLRB 1080, 1082 (1955); see also Cloverleaf Div. of Adams Dairy Co., 147 NLRB 1410 (1964); Raley's Inc., 143 NLRB 256 (1963); International Harvester Co., 138 NLRB 923 (1962) enforced sub nom., Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964). But see A. O. Smith Corp., 174 NLRB No. 41 (1969); Horn & Hardart Co., 173 NLRB No. 164, 69LRRM 1522 (1968); Westinghouse Elec. Corp., 162 NLRB 768; Hotel Employers Assn. of San Francisco, 159 NLRB 143 (1966); Ford Motor Co., 131 NLRB 1462 (1961); cf. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. C. & C. Plywood Corp., 385 U.S. 421 (1967); NLRB v. Strong Roofing & Insulating Co., 37 U.S.L.W. 4087 (Jan. 15, 1969); see Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. Law Rev. 529 (1963).

21. Contra B. Meltzer, Rumination About Ideology, Law and Arbitration, National Academy of Arbitrators Proceedings of the 20th Annual Meeting (BNA, Inc. 1967). However, as this paper indicates, I cannot subscribe to the opposing view taken in R. Howlett, The Arbitrator, The NLRB and The Courts, National Academy of Arbitrators Proceedings of the 20th Annual Meeting (BNA, Inc. 1967).

yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[22]

Thus, the mandate of Enterprise raises one of the basic problems involved in adapting arbitration to racial discrimination grievances. For while plaintiffs in Glover maintained that discriminatory practices violated the contract - at least as reflected by custom and past practice - in many instances discriminatory practices are supported by the agreement between union and employer. A reported decision involving the application of separate seniority districts which deny the black worker seniority credits accumulated in a segregated job or department when he attempts to transfer to formerly all-white jobs is one of the best examples of this problem.[23] Clearly the grievance involves future relations amongst both the employees and between the employees and employer, i.e., competition for promotions and protection against the layoffs and bump-backs to another job or department. But, despite the agreement's potential conflict with Title VII, the arbitrator cannot reform the contract in the name of public law or policy. To do so would countermand the requirements of Enterprise.

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22. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) at 597; cf. Honold Mfg. Co. v. Fletcher, 70 LRRM 2368 (3d Cir. 1969).

23. Goodyear Tire & Rubber Co., 45 Lab. Arb. 240 (1965). For discussions of this subject, see Gould, Seniority and the Black Worker: Reflections on Quarles and its Implications, 47 Texas L. Rev. (1969); Gould, Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 How. L. J. 1 (1967); Note, Title VII, Seniority Discrimination and the Incumbant Negro, 80 Harv. L. Rev. 1260 (1967). United States v. Local 189, United Papermakers, 282 F. Supp. 39 (E.D.La. 1968); cf. Quarles v. Phillip Morris, Inc., 271 F. Supp. 842 (E.D.Va. 1967); United States v. H. K. Porter Co., 70 LRRM 2131 (N.D.Ala. 1968); United States v. Hayes International Corporation, 70 LRRM 2926 (N.D.Ala. 1968).

(This pattern of conflict between law and contract makes incomprehensible the National Labor Relations Board's holding in Rubber Workers[24] to the effect that the Union must carry protests against an allegedly discriminatory seniority system to arbitration. The remedy purports to effectuate the duty of fair representation owed employees by the Union. But, not only would this appear to be a function of the judiciary operating under section 301,[25] but, more important, the Board through its arbitration remedy delivers Negro workers up to the contract which they have complained against. One must hope for the speedy burial of this unfortunate ruling. Its primary vice is not its ineffectiveness but rather the contradiction of a right which the Board has purportedly established for black workers.)

But it is not just the agreement which the arbitrator is bound to interpret in accordance with the parties' intent that causes difficulties in these cases. By tradition, collective bargaining involves two parties - and thus the arbitration clause along with the selection of the arbitrator are in the hands of labor and management. The discriminatee group does not generally participate in this process. There may be an inclination for the arbitrator to respond to the desires of the parties who have picked him rather than to those who challenge the same unions and employers. I do not think that many arbitrators are venal or dishonest in their handling of any type of plant grievances. But it seems to me that one ignores the institutional

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24. Local 12, United Rubber Workers, 150 NLRB 312 (1964), enforcement granted, 368 F.2d 12 (5th Cir. 1956), cert. denied, 389 U.S. 837 (1967). Cf. Gould, The Negro Revolution and the Law of Collective Bargaining, 34 Fordham L. Rev. 207, 226-30 (1965).

25. Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a)(1964). See NLRB v. American Nat'l. Ins. Co., 343 U.S. 395 (1952). But see Mr. Justice Fortas' comment in Vaca v. Sipes, 386 U.S. at 201 (1967): "The Court agrees that 'one of the available remedies [obtainable, the Court says, by court action] when a breach of the union's duty is proved' is 'an order compelling arbitration.' This is precisely and uniquely the kind of order which is within the province of the board." (emphasis supplied). This concurring opinion of Mr. Justice Fortas is joined in by Chief Justice Warren and Mr. Justice Harlan.

pressures at the jeopardy of minority group workers' rights. And, although I have no probative evidence of a statistical nature to support him, I would suppose that one need not subscribe to every charge that Judge Hays has made against the arbitral process[26] to accept the notion that a substantial number of arbitration awards are tailored to create future business for the award's author and thus achieve acceptability with the parties to discrimination. The parties to the agreement are in a better position to supply that business than are black workers who claim to be the victims of wrongdoing.[27]

Moreover, we have it from the Supreme Court in Vaca that the grievance-arbitration machinery enhances the union's prestige: ". . .the settlement process furthers the interest of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of that agreement."[28] In my view, the furthering of this union interest is a legitimate and extremely desirable objective in most situations. But I can see no substantial reason for such enhancement in cases like Glover where it is said that the coauthors engaged in discrimination. It seems to me that the result which the Court arrived at in Glover is a proper one even in the absence of both the attempt to exhaust the agreement's machinery and the racist remarks which are alleged to have been made in that case.

At the same time, I disclaim any absolutist approach against the suitability of arbitration to racial discrimination grievances. There are a number of considerations arguing for a carefully balanced approach to this issue. But it must be understood that these considerations involve the adoption of revisions of the grievance-arbitration system as we know it today. For while

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26. See P. Hays, Labor Arbitration: A Dissenting View (1966).

27. Note, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale L.J. 1215, 1244 (1964).

28. 386 U.S. at 191 (1967).

collective bargaining, of which arbitration is an integral part,[29] has been fairly successful in establishing industrial peace during the term of a contract, it has not vouchsafed sufficiently the principle of justice for the Negro worker. This is made clear not only by the prohibition against discrimination imposed on unions and employers by Congress in 1964[30] - but also through unauthorized walkouts by black workers protesting discrimination and the new found interest in "black unions."[31]

To some extent the arbitration process can be updated so as to disenthrall itself of the characteristics which limit its usefulness. After all, the expertise that arbitrators have on matters like seniority and discharge - both in and out of the racial context - can be of value to all three parties - union, employer and black worker. I believe that there are inherent risks in turning over such issues to less knowledgeable judges and governmental officials exclusively. As the Court said in its Warrior decision: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a [grievance as an arbitrator], because he cannot be similarly informed."[32] If it is at all possible, the skills of arbitration acquired through experience with contract grievance ought to be tapped for the fight against racial discrimination in employment.

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29. ". . .arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

30. Civil Rights Act, § 703(a)(1), 42 U.S.C. § 2000(e)(1964).

31. See N.Y. Times, July 4, 1968, at 8, col. 2; N.Y. Times, July 13, 1968, at 28, col. 2; Owens, Black Unionists Posing Chrysler Wildcat Threat, Detroit Free Press, Aug. 19, 1968, at 3, col. 6; N.Y. Times, Aug. 26, 1968, at 25, col. 6; cf. Sligo, Inc., 50 Lab. Arb. 1203 (1968).

32. 363 U.S. at 582.

Secondly, while the arbitrator's award must draw its "essence" from the contract, the arbitrator may "look for guidance from many sources." In many cases there will be room for accomodation between the two sources of law and contract. For instance, where a black worker has been discharged because of racial considerations, public policy and Title VII both make possible, if not mandatory, an arbitral remedy of the discharge under a standard "just cause" provision.[33] Where it can be said that the parties negotiated a no-discrimination clause in their contract so as to make their practices comport with Title VII obligations, the arbitrator should rely upon both law and contract. In such a case the arbitrator can properly rely upon both in rooting out discriminatory practices. Even in the seniority and promotion cases there may be situations where the contract - which does not as a rule formally embody racial discriminatory provisions - can be read by a sympathetic arbitrator to countermand custom and practice. Where a no-discrimination clause is in the contract, it may be possible for arbitrators, as well as courts, to invalidate a discriminatory clause on the theory that the parties cannot be assumed to have intended to act illegally. But insofar as arbitrators are concerned, the violation should be clearly unlawful and the remedy uncomplicated. If these ingredients are not present, the arbitrator - whom most parties do not commission to be a roving EEOC - will be too far in front of the contract expectations of both labor and management. (Separability clauses - which do not evidence a specific concern with discrimination - seem to me to be an inadequate basis for reaching the

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33. Cf. Armco Steel Corp., 42 Lab. Arb. 683 (1964); Tri-City Container Corp., 42 Lab. Arb. 1044 (1964). Among the sex discrimination cases which present the problem are: Owens-Illinois, Inc., 50 Lab. Arb. 871 (1968); Weirton Steel Co., 50 Lab. Arb. 795 (1968); Capital Mfg. Co., 50 Lab. Arb. 669 (1968); Great Atlantic & Pacific Tea Co., 49 Lab. Arb. 1186 (1967); Pitman-Moore Div., 49 Lab. Arb. 709 (1967); Creative Industries, Inc., 49 Lab. Arb. 140 (1967); Ingraham Co., 48 Lab. Arb. 884 (1966); General Fireproofing Co., 48 Lab. Arb. 819 (1967); Eaton Mfg. Co., 47 Lab. Arb. 1045 (1966); International Paper Co., 47 Lab. Arb. 896 (1966); Northwest Airlines, Inc., 46 Lab. Arb. Container Corp., 42 Lab. Arb. 1044 (1964).

same result.)

I find another argument for arbitral involvement in my own discussions with some arbitrators which lead me to the conclusion that there are numerous people of good will in the profession who would welcome the opportunity to reconcile law and contract in support of the Negro worker's struggle for equality. And even if I am in error on this matter, the efforts of institutions like the American Arbitration Association which has established a Center for Dispute Settlement may create a new group of third party "impartials" who have both the expertise in industrial relations and a commitment against racial injustice.

However, even genuine arbitral efforts are limited by two factors of great consequence. The first is the situation which I have outlined above - the outright conflict between contract and law. And, secondly, while Warrior may properly assess arbitral expertise concerning contract grievances, arbitrators - especially those not trained in the law - may blunder in their intervention through a failure to appreciate the complexities of fast-changing civil rights law.

Insofar as the conflict between law and contract is concerned, it seems to me that in most cases the arbitrator has one of two choices. He may render an award which realizes the parties' discriminatory intent and, in so doing, specifically direct the parties' attention to the substantial possibility that the award may be illegal.[34] But when one looks to what was said about the arbitral and settlement process and the enhancement gained through it for its coauthors in Vaca and couples this with the thrust of Glover, this hardly seems to be a satisfactory approach. Too many minority group workers have already lost faith in orderly procedures. Whatever validity this proposal

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34. This is the approach taken in B. Meltzer, Ruminations About Ideology, Law and Arbitration, at note 21 supra.

has in nonracial cases of illegal awards - and I believe that it may be questionable there also - the parties' use of arbitrators to rubber-stamp discrimination is inflammatory and irresponsible.

The alternative is for the arbitrator to stay his hand and refuse assistance to the parties. But, in light of the disagreement among the courts themselves on many issues of racial discrimination, how can the arbitrator be expected to make such an assured and informed determination? Furthermore, since the parties have called upon him for his services, a decision to issue, in effect, no award, may be inconsistent with the submission agreement itself, through which the arbitrator impliedly agrees to interpret the contract while the parties agree to be bound by the interpretation.

D. The Pitfalls of Hotel Employers Association

To a significant degree, the arbitrator's award in Hotel Employers Association of San Francisco[35] raises all of the problems under discussion. In that case the arbitrator construed the validity of an agreement between a civil rights organization and an employer's association to be unlawful and in violation of the labor contract. The fact that the civil rights group was not a party to the proceedings did not deter the arbitrator from rendering an award which combines the worst of two worlds. For, on the one hand, the arbitrator held that the hiring hall, seniority and recognition provisions voided the agreement without the participation of the civil rights organization in the arbitration proceedings. Also, it seems clear that the opinion was predicated upon two rather shaky legal propositions: (1) a statistical analysis of minority groups by job classification is "immaterial" unless used

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35. 47 Lab. Arb. 873 (1966).

to establish an unlawful preference for minority group workers; (2) the employers' association could not deal with the civil rights organization about minority group hiring and promotions without violating the National Labor Relations Act, since the civil rights organization was, in the arbitrator's view and opinion, a "labor organization" within the meaning of the Act.

This is not the place for a detailed evaluation of all the legal issues touched upon by the arbitration award in Hotel Employers Association.[36] But the opinion exhibits a lack of sophistication about the need for racial statistics in effectuating minority group hiring and promotion policies and thus in eliminating discrimination. The Equal Employment Opportunity Commission relies upon and requires the submission of statistics dealing with minority group participation in the work force under a statute which prohibits preferential treatment.[37] Race conscious remedies are necessary to combat racial discrimination in all spheres of American life.[38] Thus, the award in this case demonstrates some of the dangers involved in handing over legal interpretations to arbitrators who lack legal expertise in the civil rights arena.

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36. They are dealt with in more detail in my forthcoming article, Black Power in the Unions: The Impact Upon Collective Bargaining Relationships.

37. See 1967 U.S. Employment Opportunity Comm'n. 2d Ann. Rep. at 21-35.

38. See Monroe v. Board of Commissioners, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Green v. Country School Bd., 391 U.S. 430 (1968); Louisiana v. United States, 380 U.S. 145, 154 (1965); Cassell v. Texas, 339 U.S. 282 (1950); Norris v. Alabama, 294 U.S. 587 (1935); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); U.S. v. Jefferson County Bd. of Ed., 372 F.2d 836 (5th Cir. 1966), aff'd with modifications on Rehearing, en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967). In the labor field, see Local 53, International Ass'n. of Heat & Frost Insulators v. Vogler, 70 LRRM 2257 (5th Cir. 1969).

Moreover, despite the exclusive bargaining representative concept under the National Labor Relations Act, it is possible and, in my judgment, necessary for those civil rights groups - in which racial minority group workers demonstrate some interest - to play some role with labor and management in resolving race problems in the plant. Hotel Employers Association seems unable to brook any accomodation with that principle. The effect is to engender distrust on the part of the Negro community for trade unions and arbitration.

Rehabilitation of arbitration can be assisted by arbitrators, the Court and Congress. The Court can re-evaluate the Steelworkers trilogy in dealing with arbitration and the unique public law and other considerations presented in the racial cases. In Dewey v. Reynolds Metals Co.,[39] a case involving allegations of religious discrimination, a district court has said that the plaintiff should not be "penalized" for exhausting the contractual machinery and that an arbitration award based upon the labor agreement is not the "final one." In dicta the Dewey opinion indicates that the results would be the same if the arbitrator purported to resolve statutory and constitutional issues raised. And, in U.S. v. H. K. Porter[40] another court has said:

> ... As a general proposition, the court doubts that the courts should defer in their consideration of Title VII cases to arbitration awards.[54] At the same time, however, the Court cannot agree that an arbitration award must be dismissed out of hand as irrelevant and believes that it may properly be considered as an item of evidence..." [41]

Curiously, the court states that it leaves open the issue of whether a standard

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39. 69 LRRM 2601 (W.D.D.C. Mich. 1968). Compare Washington v. Aerojet-General Corp., 282 F. Supp. 332 (S.D. Ind. 1967); Cf. Local 985, UAW v. W.M. Chase Co., 262 F. Supp. 114 (E.D. Mich. 1966).

40. 70 LRRM 2131 (N.D. Ala. 1968).

41. Id. at 2183.

similar to that utilized by the Board in deferring to arbitration awards is applicable in Title VII cases. The best rule would be one containing a de novo review of all Title VII issues by the court.

A lesson of cases like Hotel Employers Association is that arbitration must be sensitive to due process issues such as third party representation (i.e., civil rights organizations) so that the arbitrator will have the benefit of all testimony and argument.[42] I am not suggesting that strangers to the employment relationship be included through the arbitrator's procedural rules---but rather organizations, representatives and/or counsel in whom the minority group has demonstrated an interest. The inclusion of a third party is not at odds with the exclusive representative principle. For, subject to duty of fair representation considerations, the forum for grievances should remain in the union---negotiated machinery and the union decides what issues go to arbitration.[43] If unions do an effective job on racial discrimination cases and thus squelch the "black union" trend, the involvement of the discriminatee as an entity should prove less disruptive than a similar role for the minority union.[44]

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42. For an excellent treatment of this issue see Wirtz, Due Process of Arbitration in the Arbitrator and the Parties, Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators (BNA, Inc. No. 11, 1958). See especially Humphrey v. Moore, 375 U.S. 335, 350-351 (1964).

43. Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, n. 7 (1965); Black-Clawson Co. v. Lodge 355, IAM, 313 F. 2d 179 (2nd Cir. 1962). For a discussion of the individual's rights in the grievance-arbitration machinery in connection with both sections 9(a) and 301 of the National Labor Relations Act, see Cox, Rights Under a Labor Agreement, 69 Harvard Law Review 601 (1956); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U. Law Review 362 (1962).

44. See Douds v. Local 1250, Retail Wholesale Dept. Store Union, 173 F. 2d 764 (2nd Cir. 1949). Contra, Federal Telephone & Radio Co. 107 NLRB 649 (1954). For a critical treatment of this Douds decision see Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Columbia Law Review 731, 751-760 (1950).

Further, the Court ought not to compel arbitration under Section 301 where the proceeding would exclude a civil rights group or individual discriminatees who have an interest in the issues to be adjudicated. To some extent, this argument was rejected in the jurisdictional dispute context in Carey v. Westinghouse.[45] In Carey arbitration was directed pursuant to a bilateral agreement dispite the absence of one union. While Mr. Justice Douglas, speaking for the Court, noted the possibility that "...arbitration as a practical matter might end the controversy or put into movement forces that will resolve it,"[46] one cannot make the same assumptions in the racial area. Trilateral arbitration, a procedure advocated by Professor Jones for jurisdictional disputes between two unions[47] might be relied upon---especially when the civil rights organization has a contract with the employer dealing with discrimination problems. However, the absence of a civil rights contract or an organized group ought not to preclude the courts from ordering some kind of intervention for third party discriminatees or, at a minimum refusing to order arbitration unless the parties guarantee the inclusion of the group representing Negro workers. Where exclusion is practiced, the courts should vacate the arbitration award. As the Court has said of the judicial role in making Section 301 substantive law in Lincoln Mills:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems

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45. 375 U.S. 261 (1964).

46. Id. at 265.

47. Jones, Autobiography of a Decision: The Function of Innovation in Labor Arbitration, and the National Steel Orders of Joinder and Interpleader, 10 UCLA Law Review 987 (1963); Jones, An Arbitral Answer to a Judicial Dilemma: The Cary Decision and Trilateral Arbitration of Jurisdictional Disputes, 11 UCLA Law Review 327 (1964); Jones, A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Labor Disputes---The Supreme Court's Gift to Embattled Employers, 15 UCLA La Review 877 (1968).

> will lie in the penumbra of expressed statutory mandate. Some will lack expressed statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." [48]

In enacting Title VII, Congress recognized the fact that black workers had been dealt with unfairly at the bargaining table by both unions and employers and that legislation was necessary to deal with the unique problems of racial minority groups. Since the policy of Congress was to remedy that situation and thus do what the majority representatives in many organized plants had left undone, Lincoln Mills would seem to provide the Court with the opportunity to order a form of trilateral arbitration or third party intervention where appropriate.[49] If the argument is made that the entry of a third party would unduly disturb the objective of uniformity in administering plant grievances---the principle which is emphasized in both Maddox and Vaca, part of the answer must be that "...the rationality of the exhaustion doctrine is dependent upon the fairness of the process to which the individual is remanded."[50] Moreover, Glover has already carved out an exception, which

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48. Textile Workers Union v. Lincoln Mills 353 U.S. 448, 457, (1957). (emphasis supplied).

49. Compare Acuff v. United Papermakers 69 LRRM 2828 (5th Cir. 1968) with Clark v. Hein-Werner Corp. 8 Wis. 2d 264, 99 N.W. 2d 132 (1960). Cf Soto v. Lanschaft Optical Corp., 7 App. Div. 2d 1, 180 N.Y.S. 2d 388 (1958); Matter of Soto, 7 N.Y.S. 2d 397, 165 N. 2d 855 (1960); In re Iroquois Beverage Corp. 159 N.Y.S. 2d 256 (1955); Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S. 2d 709, 714, aff'd men., 306 N.Y. 966, 120 N.E. 2d 227 (1954). It is possible that arbitration involving civil rights organizations will touch upon subject matter with which the union has not concerned itself. For instance, traditionally, industrial unions have not negotiated hiring matters. Cf. NLRB v. Tanner Motor Livery Ltd., 349 F. 2d 1 (9th Cir. 1965), on remand, Tanner Motor Livery Ltd., 166 NLRB No. 35 (1967); Norfolk Conveyor 159 NLRB 464, 468-9 (1966). On the comprehensiveness of labor agreements see Cox, Rights Under a Labor Agreement, 69 Harvard Law Review 601 (1956).

50. Note, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale Law Journal 1215, 1228 (1964).

is in some respects more radical than that proposed here. For Glover permits the plaintiff to bypass the grievance procedure entirely in some circumstances. What is advocated here is the incorporation of the potentially dissident and aggrieved group in an exclusive process. This hardly seems to be at odds with the goal of uniformity. And in Hotel Employers Associations it might have effectuated a more laudable result, let alone the selection of a different arbitrator.

But the above-noted lack of arbitral expertise concerning statutory problems is not remedied by such a court order. Perhaps Congress could enact a statute which would, on the motion of any of the three parties or the arbitrator, require the Equal Employment Opportunity Commission to render an advisory opinion on such complex matters as, for instance, seniority disputes emanating from segregated job patterns.[51] In this way, the energies of respective specialists---in both the statutory and contract area---would be coordinated to remedy racial discrimination more equitably and sensibly.[52]

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The Supreme Court's decision of last June in Jones v Mayer[53] may well have substantial import in the area of employment. As noted above, that case held that the Civil Rights Act of 1866 prohibits racial discrimination

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51. Supra note 3.

52. I am indebted to Mark L. Kahn, Professor of Economics, Wayne State University, for his idea on the subject. Professor Kahn advocates the enactment of a statute which would obligate the arbitrator to obtain an advisory opinion where, in his judgment, statutory questions raised would necessitate such an opinion.

53. 392 U.S. 409 (1968).

in housing. Said the Court: "We hold that §1982 bars all racial discrimination, private as well as public, in the sale of rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment 5."[54] The Civil Rights Act of 1866 also provides that "all persons" have "the same right...to make and enforce contracts"[55] "in terms," said the Court in Jones, "that closely parallel those of §1982 [the housing provision]."[56]

In Hodges v. United States,[57] Negro workers had been terrorized by whites who were subsequently convicted of conspiracy to prevent the former from exercising their right to contract for employment---a right derived from §1981, the provision which "closely parallels" §1982. As the Jones majority opinion says of the facts in Hodges, "...there was no doubt that the defendants had deprived their Negro victims on racial grounds, of the opportunity to dispose of their labor by contract."[58] The Court in Hodges, set aside the convictions on the ground that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery" and that only conduct which actually "enslaves" someone is within the scope of the Thirteenth Amendment. The death knell for this approach was proclaimed in Jones which said: "The conclusion of the majority in Hodges rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as Hodges is inconsistent with our holding today, it is hereby

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54. Id. at 413.

55. Civil Rights Act of 1964, 42 U.S.C. §1981.

56. Jones v. Mayer, 392 U.S. at 442, n. 78.

57. 203 U.S. 1 (1906).

58. Jones v. Mayer, 392 U.S. at 442, n. 78.

overruled."[59]

Interference with the black worker's right to make and enforce a labor contract by unions, employers and individuals would then appear to be unlawful under the Civil Rights Act of 1866. Even the dissenting opinion of Mr. Justice Harlan is not in conflict with this conclusion. For, according to Justice Harlan, only "community sanctioned" customs or local practices "...which in the recent time of slavery probably were embodied in laws or regulations"[60] could be equated with that "state action" which Justice Harlan regarded as a necessary prerequisite to the exercise of rights under the Act---and, as his opinion itself demonstrates, the white employer's custom of interfering with the employment contract rights of Negro workers was a well-established one at the time of the Act's passage.[61] Indeed, racial discrimination in employment was an essential motivation for the enactment of the Civil Rights Act of 1866.[62]

As of this writing, one court, in Dobbins v. Local 212, IBEW,[63] has held that Jones establishes a right of protection against racial discrimination in employment. In that case, an individual plaintiff's action alleging discrimination in a union referral system was held to be "appropriately filed" under

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59. Id. at 442-443, n. 78.

60. Id. at 475.

61. Id. at 462: "The Court's mention, ante, at 427, of a reference in the Senate debates to 'white employers who refused to pay their Negro workers' surely does not militate against a 'state action' construction, since 'state action' would include conduct pursuant to 'custom,' and there was a very strong 'custom' of refusing to pay slaves for work done." See also Justice Harlan's dissenting opinion at 470, 471, 475 and 476.

62. See tenBroek, Equal Under Law, 124, 125, 178-179, 181 (1965); Stampp, The Era of Reconstruction, 131, 134-136 (1965); Cf. Kimmerling, Memorandum on Jones v. Mayer (on file at Columbia Law School Library).

63. 69 LRRM 2313 (S.D. Ohio 1968).

the Civil Rights Act of 1866 and Jones was cited to support the proposition. Said the Court: "Membership in and/or a referral status in a union is a contractual relationship and/or a link in the chain of making a contract. The subject matter is, therefore, within 42 U.S.C. 1981. At least, since Jones v. Mayer, a [sic] strictly private right be it in the property field as such or the contract field as such, is within the protection of the Civil Rights Act 1866 against interference by a private citizen or a group of citizens. Governmental sanction is no longer a necessary factor in the assertion of §1981 action."[64]

According to Dobbins, the "most adaptable State statute of limitations"[65] is to govern Jones actions---and they are generally longer than those provided in either the Civil Rights Act of 1964 or the National Labor Relations Act.[66] Moreover, complicated state-federal machinery and jurisdictional restrictions built into Title VII[67] as well as whatever limitations may have been imposed upon duty of fair representation suits by the rather restrictive language contained in Vaca, can be avoided by proceeding under the Civil Rights Act of 1966. And since the Court said that both Section 1982 and the Civil Rights Act of 1968 stand "independently" of one another in the housing field, one must assume that, by the same token, substantive as well as procedural limitations contained in Title VII do not in any way alter the scope of Section 1981.[68] Perhaps equally important is the fact that Jones can be

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64. Id. at 2334-2335.

65. Id. at 2336.

66. Civil Rights Act of 1964, U.S.C. Sec. 2000c-5(d); National Labor Relations Act, 29 U.S.C. Sec. 160(b).

67. Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5(b) which provides for filing complaint with state agency before Equal Employment Opportunity Commission.

68. However, Jones should be read together with Title VII so as to avoid any inference that the Civil Rights Act of 1866 preempts the field and ousts the states from exercising jurisdiction. See Hunter v. Erickson, U.S.L.W. 4091, 4092 (1969). Cf. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714 (1963).

relied upon in cases involving, for instance, seniority practices which embody within them the effects of past discrimination, to establish the proposition that race discrimination in employment was in fact unlawful prior to the effective date of the Civil Rights Act of 1964.

In Jones the Court said that "...The fact that 42 U.S.C. §1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy."[69] In this connection, it is important to understand that the intent of the Thirteenth Amendment and its framers was to "affirmatively" achieve equality for the freedman.[70] Whatever remedies are appropriate to the achievement to that goal are proper ones.

In Dobbins the court stated that it had the power to eliminate a union referral system in certain circumstances and to establish a new one in its place. Two courts have recently moved in the direction of providing remedies which are aimed to assure Negroes access to the trade.[71]

If the courts can devise remedies which are, in effect, governmentally established referral systems, one wonders whether the courts may devise remedies which take apprenticeships and the recruitment for such programs out of the hands of the private parties involved where discrimination has been evidenced in referral and where, for instance, unions and contractors say that they cannot find a substantial number of Negro plumbers and electricians. The fact that Jones cites Griffin v. School Board,[72] in its discussion

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69. Jones v. Mayer, 392 U.S. at 414 n. 13. The Court left open the question of whether there was an "implied right" to compensatory damages and said that "on the facts alleged in the present complaint" the petitioners could not obtain punitive damages.

70. See tenBroek, Equal under Law, 195 (1965).

71. Local 53, International Association of Heat and Frost Insulators v. Vogler, 70 LRRM 2257 (5th Cir. 1969); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

72. 377 U.S. 218 (1964).

of remedies may be particularly instructive. For in Griffin, it is to be recalled, the Court ordered public officials to lay taxes and raise revenues to provide public education where a county had attempted to evade its integration mandate through shutting down its school system.

Perhaps, at least where the state has become involved in the training of skilled workers,[73] public officials can be ordered to exercise more detailed supervisory responsibilities for devising programs which step up the flow of minority group workers into the trade. If larger numbers of apprentices or other revisions of arbitrary standards such as age limitations, or the length of apprenticeship programs, are the only means to effectuate this goal, a court should not be deterred by the argument that this is interference with free collective bargaining.[74] For collective bargaining must be interfered with today if we are to redeem the promise made by America more than one hundred years ago. Jones v. Mayer suits and the revision of the arbitration process are two significant forums for this struggle.

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73. Cf. Todd v. Joint Apprenticeship Comm. of Steelworkers, 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot 332 F. Id. 243 (7th Cir. 1964), cert. denied 380 U.S. 914 (1965).

74. Cf. Gould, The Negro Revolution and Trade Unionism, Speech for Tri-County Long Island Labor-Management Institute, June 23, 1968, reprinted in 114 Congressional Record, No. 136, E 7726-8 (August 1, 1968).