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Racial Discrimination in Employment: Rights and Remedies

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RACIAL DISCRIMINATION IN EMPLOYMENT: RIGHTS AND REMEDIES

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Professor Beaird believes that the current multiplicity of forums available to an employee who alleges discrimination against him should be merged into one. Ideally he would like to see an administrative agency given primary jurisdiction with authority similar to that possessed by the NLRB. Until an agency is given such power, Professor Beaird suggests that the forums themselves apply collateral estoppel principles to alleviate the inequities inherent in repetitious litigation.

DURING the past thirty years there have been both governmental and private efforts to achieve equal employment opportunity. These efforts, particularly with respect to racial discrimination, have produced a number of remedies enforceable against both unions and employers in a variety of forums. Today a single factual situation may result in a charge of employment discrimination based on race which may be pursued under at least eight possible theories for relief in six different forums.[1] The purpose of this Article is to examine these

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1 *See* Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); *cf.* Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court* 402 U.S. 689 (1971). In *United Papermakers* a charge was first filed with the Equal Employment Opportunity Commission under whose auspices a satisfactory compliance agreement between the union and the employer was negotiated and implemented. Some dissatisfied individuals brought suit in federal district court, and subsequently the Office of Federal Contract Compliance entered the picture and insisted on more far-reaching remedies than those given by the compliance agreement. When the union refused, the Department of Justice filed suit in federal district court and secured relief more extensive than that proposed by the OFCC. *Hearings on H.R. 1746 Before the Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st Sess. 178-79 (1971).

Dewey offers another example in the related area of religious discrimination. In this

theories and forums and to try to ascertain, by a review of recent decisions, the impact that the selection of one remedy may have upon the later use of another.[2]

I. Remedies for Racial Discrimination in Employment

A. *The Executive Orders*

Since 1941 the federal government has dealt with racial discrimination in employment by specifying the terms and conditions under which it is willing to contract with private parties.[3] Currently, under Executive Order No. 11,246,[4] issued on September 24, 1965, government contracts and subcontracts must contain an equal opportunity clause,[5] which, in addition to prohibiting discrimination, requires that the contractor take certain affirmative action to implement a nondiscriminatory hiring policy.[6] The order also gives the Secretary of Labor the authority to adopt such rules and regulations as he deems necessary to administer the order.[7] Pursuant to this authority the Secretary has exempted contracts involving less than $10,000[8] and has created the Office of Federal Contract Compliance (OFCC) to carry out his responsibilities.[9] Moreover, he has established a procedure whereby either an employee of a federal contractor or an applicant for employ-

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case Dewey felt he had been wrongfully discharged by his employer because of his religious beliefs. 429 F.2d at 327. Having unsuccessfully sought redress of his grievances before a collective bargaining agreement arbitrator, the Michigan Civil Rights Commission, and the Office of Federal Contract Compliance, Dewey finally filed charges with the EEOC which authorized the bringing of an action in federal district court. *Id.*

2 For a more detailed description of these remedies, see Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. Rev. 449 (1971); Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 Wash. L. Rev. 455 (1971); Note, *Title VII, the NLRB, and Arbitration: Conflicts in National Labor Policy*, 5 Ga. L. Rev. 313 (1971).

3 *E.g.*, Exec. Order No. 11246, 3 C.F.R. 339 (1965), 42 U.S.C. § 2000e (1970); Exec. Order No. 11114, 3 C.F.R. 774 (1963); Exec. Order No. 10925, 3 C.F.R. 448 (1961); Exec. Order No. 10479, 3 C.F.R. 961 (1953); Exec. Order No. 10308, 3 C.F.R. 837 (1951); Exec. Order No. 9346, 3 C.F.R. 1280 (1943); Exec. Order No. 8802, 3 C.F.R. 957 (1941). *See generally* Herbert & Reischel, *supra* note 2, at 451-55; Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U.L. Rev. 225 (1971); Peck, *supra* note 2, at 489-91.

4 Exec. Order No. 11246, 3 C.F.R. 339 (1965), 42 U.S.C. § 2000e (1970).

5 Exec. Order No. 11246, § 202, 3 C.F.R. 340 (1965), 42 U.S.C. § 2000e (1970).

6 This action includes adhering to any rules promulgated by the Secretary of Labor, *id.* cl. (4); advertising that it pursues a nondiscriminatory employment policy, *id.* cl. (2); and notifying each union with whom the contractor has a collective bargaining agreement of its contractual obligations, *id.* cl. (3).

7 *Id.* § 201.

8 41 C.F.R. § 60-1.5(a)(1) (1972).

9 41 C.F.R. § 60-1.1 to 1.47 (1972).

ment with a federal contractor may file a complaint with the OFCC within 180 days of an alleged discrimination by the contractor.[10] In response to a breach of these regulations, sanctions which may be imposed after a hearing include contract cancellation, exclusion from future contracts, specific performance, and suit for breach of contract.[11]

The Secretary has also given the OFCC the authority to make pre-award compliance reviews to ensure that each bidder will be able to comply with the provisions of the equal opportunity clause.[12] It was pursuant to this authority that the OFCC devised its most controversial pre-award affirmative action requirements in the so-called "Philadelphia Plan".[13] In the Philadelphia area the OFCC had found that the exclusionary practices of certain unions had resulted in the employment of a disproportionately small number of Negroes in six construction trades. In an attempt to halt this discrimination the OFCC required that each bidder set specific goals for minority manpower utilization which would meet the standards set by the Department of Labor's area coordinator.

The Third Circuit recently sustained the "Philadelphia Plan" in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,[14] holding that "as a pre-condition for federal assistance [the Philadelphia Plan] was within the implied authority of the President and his designees" unless prohibited by some other congressional enactment.[15] The court then examined Title VII of the Civil Rights Act of 1964[16] and the National Labor Relations Act[17] and concluded that this executive action was not prohibited by either. The plaintiffs argued that the plan violated sections 703(j)[18] and 703(h)[19] of Title VII of the Civil Rights Act of 1964, by granting preferential treatment to a group because of race and by interfering with bona fide seniority systems. The court, however, dismissed these arguments, holding that these sections were

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10 *Id.* § 60-1.21.

11 Exec. Order No. 11246 § 209(a), 3 C.F.R. 343-44 (1965), 42 U.S.C. § 2000e (1970).

12 41 C.F.R. § 60-1.29 (1972).

13 Department of Labor Order of Sept. 23, 1969, 2 CCH EMPL. PRAC. GUIDE ¶¶ 16,175, 16,176 (1969). *See also* Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 364-73.

14 442 F.2d 159 (3d Cir. 1971).

15 *Id.* at 171.

16 42 U.S.C. §§ 2000e to 2000e-15 (1970) [hereinafter cited as Title VII].

17 29 U.S.C. §§ 151-68 (1970) [hereinafter cited as NLRA].

18 Title VII § 703(j), 42 U.S.C. § 2000e-2(j) (1970).

19 Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1970).

"a limitation only upon Title VII, not upon any other remedies. . . ."[20] The plan was also found not to be a violation of section 703(a) of Title VII[21] which makes it unlawful for an employer to refuse to hire a person because of race. In this regard the plaintiffs had argued that under the "Philadelphia Plan" some tradesmen would not be hired because they were white. After noting that the Department of Labor had found that contractors could commit to the specific employment goals without adverse impact on the existing labor force, the court said:

> To read § 703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Clearly the Philadelphia Plan is color-conscious.[22]

The union *amici* also argued that this plan would prohibit a valid hiring hall agreement. The court held that hiring hall agreements were permitted, but not required, by the NLRA,[23] and the fact that the plan's "contractual provisions may be at variance with other contractual undertakings of the contractor is legally irrelevant."[24]

Thus, the OFCC has broad powers to eliminate discrimination in the employment practices of employers doing business with the federal government. It is estimated that one-third of the nation's work force is affected by this Executive Order.[25]

B. State Fair Employment Practice Laws

Since New York adopted the first state fair employment practice law in 1945,[26] most states and many local governments outside the deep South have enacted similar legislation.[27] Most of these statutes provide for an administrative hearing with judicial enforcement of the administrative agency order.[28] A few statutes make employment discrimina-

20 Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 172 (3d Cir. 1971).

21 Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (1970).

22 Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir. 1971).

23 NLRA § 8(f), 29 U.S.C. § 158(f) (1970).

24 Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 174 (3d Cir. 1971).

25 *See* Herbert & Reischel, *supra* note 2, at 455.

26 *See* N.Y. EXEC. LAW §§ 290-301 (McKinney 1951), *as amended*, (McKinney Supp. 1971).

27 A tabular presentation indicating the significant characteristics of these laws may be found in BNA FAIR EMPLOYMENT PRACTICE MANUAL 451:26-27 (1972).

28 *Id.*

tion on account of race a judicially punishable misdemeanor and provide no administrative machinery,[29] while others simply express a policy of nondiscrimination without enforcement provisions.[30]

The Supreme Court has held that state fair employment practice laws do not place an unconstitutional burden on interstate commerce.[31] Moreover, the state laws do not appear to be preempted by federal labor legislation.[32] Significantly, the continued vitality of these statutes has been expressly preserved by Title VII of the Civil Rights Act of 1964, which requires the EEOC to defer to state fair employment practice agencies in certain circumstances.[33]

C. *The Union's Duty of Fair Representation*

Since national labor legislation clothes union representatives with vast power,[34] it was inevitable that some representatives would abuse this authority by discriminating against racial minorities. To alleviate this discrimination the courts have imposed on unions acting as bargaining representatives under the NLRA[35] and the Railway Labor Act[36] the duty to represent all employees fairly. This doctrine was first enunciated in *Steele v. Louisville & Nashville Railroad Co.*,[37] a case involving an agreement between a representative union and a railroad employer in which seniority rights and promotion opportunities for Negro employees were severely restricted. The court held that the union had "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[38]

Thus, it may be possible to obtain relief from racial discrimination

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29 *Id.*

30 *Id.*; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 5-6 (1968).

31 *See* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714 (1963).

32 *Cf.* Vaca v. Sipes, 386 U.S. 171 (1967).

33 *See, e.g.*, the deferral provisions of 42 U.S.C. §§ 2000e-5(b) & (c) (1970), *as amended*, Pub. L. No. 92-261, § 4(a) (Mar. 24, 1972), which require that the EEOC defer action for 120 days (60 days after Mar. 24, 1973) in cases wherein state or local fair employment practice remedies are available to the complainant.

34 *See, e.g.*, NLRA § 9(a), 29 U.S.C. § 159(a) (1970).

35 *See* Syres v. Oil Workers Local 23, 350 U.S. 892 (1955), *rev'g per curiam* 223 F.2d 739 (5th Cir.); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

36 *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

37 323 U.S. 192 (1944).

38 *Id.* at 203.

in employment through suit against a union for breach of its duty of fair representation.[39] These suits against unions for breach of their duty of fair representation may be brought in either federal or state courts.[40] Since there is no federal statute of limitations specifically applicable to such suits, an appropriate state statute of limitations is to be used.[41]

D. Unfair Representation as an Unfair Labor Practice

Recently the NLRA has been used for the purpose of combating racial discrimination in employment.[42] Although the NLRA is silent on the issue of racial discrimination, the National Labor Relations Board (NLRB) has developed several theories for invalidating racially discriminatory employment practices as constituting unfair labor practices. Two theories used by the Board were set forth in *Miranda Fuel Co.*[43]—a case which did not involve racial discrimination. In *Miranda Fuel,* the Board's majority held that section 7 of the NLRA[44] gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment,"[45] and "that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[46] The Board also held that an employer who "participates" in such arbitrary union conduct violates section 8(a)(1) of the NLRA.[47] In addition it found that the employer and the union may violate sections 8(a)(3)[48] and 8(b)(2)[49] respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause

39 For a more thorough discussion of the union's duty of fair representation, see Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts,* 34 J. AIR L. & COM. 167 (1968); Herbert & Reischel, *supra* note 2, at 456-57; Peck, *supra* note 2, at 480-82; Note, *supra* note 2, at 316-18.

40 Humphrey v. Moore, 375 U.S. 335 (1964).

41 *See, e.g.,* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970); 28 U.S.C. § 1652 (1970); 42 U.S.C. § 1988 (1970).

42 *See* Boyce, *Racial Discrimination and the National Labor Relations Act,* 65 NW. U.L. REV. 232 (1970); Peck, *supra* note 2, at 485.

43 140 N.L.R.B. 181 (1962), *enforcement denied,* 326 F.2d 172 (2d Cir. 1963).

44 29 U.S.C. § 157 (1970).

45 Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962).

46 *Id.*; 29 U.S.C. § 158(b)(1)(A) (1970).

47 29 U.S.C. § 158(a)(1) (1970).

48 29 U.S.C. § 158(a)(3) (1970).

49 29 U.S.C. § 158(b)(2) (1970).

or does cause an employer to derogate the employment status of an employee."[50]

The Board's *Miranda Fuel* decision was denied enforcement by a divided Second Circuit,[51] but in *Local 12, United Rubber Workers v. NLRB*,[52] the Court of Appeals for the Fifth Circuit found the NLRB's argument that refusal to process the grievances of Negro workers constituted a violation of section 8(b)(1)[53] so persuasive that it thought it unnecessary to pass upon the alternative grounds advanced by the NLRB in support of its order.[54] So far only the District of Columbia Circuit has followed the Fifth Circuit in approving the *Miranda Fuel* theory.[55]

There are a number of advantages in utilizing the NLRB in racial discrimination situations. Charges may be filed with the NLRB without cost; the NLRB investigation is also cost free; and if the NLRB decides to litigate it will do so at public expense. Moreover, although the NLRA establishes a six month limitation period on filing unfair labor practice charges,[56] the NLRB has been willing to treat some discriminatory practices as continuing violations making it possible to circumvent the time limit of six months.[57]

In spite of these advantages there has been a dearth of *Miranda Fuel* doctrine cases. It is, of course, possible that the NLRB has decided to limit the theory's application, but it is more likely that today's discrimination, being more subtle and more difficult to prove, has discouraged utilization of the *Miranda Fuel* doctrine.[58]

E. Racial Discrimination by Employers

In *Packinghouse Workers v. NLRB*[59] the Court of Appeals for the District of Columbia adopted a theory that would further expand the

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50 Miranda Fuel Co., 140 N.L.R.B. 181, 186 (1962).

51 *See* NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

52 368 F.2d 12 (5th Cir. 1966), *enforcing* 150 N.L.R.B. 312 (1964), *cert. denied*, 389 U.S. 837 (1967).

53 29 U.S.C. § 158(b)(1) (1970).

54 150 N.L.R.B. 312, 317-19 (1964).

55 *See* Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

56 NLRA § 10, 29 U.S.C. § 160(b) (1970).

57 *See, e.g.*, Houston Maritime Ass'n, Inc., 168 N.L.R.B. 615 (1967), *enforcement denied*, 426 F.2d 584 (5th Cir. 1970).

58 *See* BNA DAILY LABOR REPORT No. 194, at A-23 (Oct. 6, 1971) (Statement of J. Greenberg).

59 416 F.2d 1126 (D.C. Cir.), *enforcing* 169 N.L.R.B. 290 (1968), *cert. denied*, 396 U.S. 903 (1969).

NLRB's role in remedying racial discrimination. Prior to this case the NLRB had consistently proscribed discrimination by unions and employers using such theories[60] as the *Miranda Fuel* doctrine discussed above, but it had never proposed that employer discrimination alone would violate the NLRA.[61] However, in *Packinghouse* the court held that an employer's policy and practice of invidious discrimination against its employees on account of race or national origin violated section 8(a)(1) of the NLRA.[62] The court found that an employer's invidious discrimination restrained employees from asserting themselves against their employer in two ways: "(1) racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination."[63] Thus, the court found "that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1)."[64]

The advantages of seeking relief through the NLRB under this theory are the same as those discussed in section *D* above.[65]

F. The Civil Rights Act of 1866

In *Jones v. Alfred H. Mayer Co.*,[66] the Supreme Court reviewed part of section one of the Civil Rights Act of 1866[67] and held that it prohibits *private* as well as public racial discrimination in the sale of property. This section provides:

> All citizens of the United States shall have the same right . . . as

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60 *See*, Note, *supra* note 2, at 319-25.

61 The Board had, however, collaterally attacked employer discrimination. *See, e.g.*, NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1 (9th Cir. 1965); Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

62 416 F.2d 1126, 1138 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

63 *Id.* at 1135.

64 *Id.* The case was remanded to the NLRB for an appropriate remedy if it found that the employer had a policy of invidious discrimination. *Id.* at 1138. On remand the Board found no invidious discrimination. *See* Farmers' Cooperative Compress, 194 N.L.R.B. No. 8, 78 L.R.R.M. 1465 (1971) (Jenkins, dissenting).

65 *Supra*, p. 474.

66 392 U.S. 409 (1968).

67 42 U.S.C. § 1982 (1970).

> is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.[68]

Another part of section one of the Act of 1866 which is now 42 U.S.C. § 1981 provides: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."[69] By drawing an analogy to *Jones* the Courts of Appeals of the Fifth, Seventh, and Third Circuits have held in *Sanders v. Dobbs Houses, Inc.*,[70] *Waters v. Wisconsin Steel Works of International Harvester Co.*,[71] and *Young v. International Telephone & Telegraph Co.*,[72] that 42 U.S.C. § 1981 prohibits private racial discrimination in employment. Essentially the courts based their holdings upon the contractual nature of the relationship between an employee and a union and the finding that section 1981 is sufficiently analogous to section 1982, upheld in *Jones*, to sustain a complaint based upon *private* discrimination in contracts of employment.

Furthermore, these courts have held that the specific remedies fashioned by Congress in Title VII were not intended to preempt the general remedial language of section 1981. In *Waters* and *Sanders* support for this conclusion was found in the legislative history of Title VII. Both of these courts felt that a legislative intent to preserve previously existing causes of action was demonstrated in the congressional rejection, by more than a two-to-one margin, of an amendment by Senator Tower which would have excluded agencies other than the EEOC from dealing with practices covered by Title VII.[73] The court in *Young* discussed the two categories of repeal by implication set forth in *Posadas v. National City Bank*[74] and found (1) that Title VII was not intended as a substitute for section 1981 and (2) that the two statutes were not

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68 Civil Rights Act of 1866 § 1, 42 U.S.C. § 1982 (1970).

69 Civil Rights Act of 1866 § 1, 42 U.S.C. § 1981 (1970).

70 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

71 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

72 438 F.2d 757 (3d Cir. 1971).

73 *See* 110 CONG. REC. 13650-52 (1964); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 485 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

74 296 U.S. 497, 503 (1936). These two categories are: (1) where provisions in two acts are in irreconcilable conflict, the later act constitutes an implied repeal of the earlier one to the extent of the conflict; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

in irreconcilable conflict.[75] Thus, *Young* also held "that Title VII . . . does not deprive the district courts of jurisdiction over actions brought under § 1981. . . ."[76]

G. *Arbitration Under the Terms of a Collective Bargaining Agreement*

A few employees have found relief from racial discrimination through arbitration procedures under the terms of a collective bargaining agreement.[77] Forty-six percent of all collective bargaining agreements have anti-racial discrimination clauses; this represents a marked increase in the use of such clauses since 1966.[78] However, the increasing use of these clauses could be misleading since it would appear that only a few employees have been successful in obtaining relief from racial discrimination through arbitration.[79]

There appear to be several factors which have contributed to the ineffective use of this remedy. One of the primary factors is the difficulty of proving subtle discrimination. Moreover, since arbitrators are jointly chosen by unions and employers,[80] there may be certain institutional pressures which tend to make the arbitrator somewhat less independent than a judge. Another reason may be that arbitration proceedings may sometimes lack the adverseness necessary to develop the evidence sufficiently for an informed decision by the arbitrator. The effectiveness of the arbitration remedy may also be hampered by the short time periods for filing grievances as provided in the collective bargaining agreement[81] and the fact that arbitrators' awards are not self-enforcing. One plus factor, however, in proceeding by way of arbitration is that the aggrieved employee is not required to incur the expense of a lawyer.

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75 *See* Young v. International Tel. & Tel. Co., 438 F.2d 757, 760-63 (3d Cir. 1971).

76 *Id.* at 761.

77 *See, e.g.*, Allied Thermal Corp., 54 Lab. Arb. 441 (1970); General Foods Corp., 53 Lab. Arb. 291 (1969); Pangborn Corp., 48 Lab. Arb. 629 (1967); Armco Steel Corp., 42 Lab. Arb. 683 (1964); Tri-City Container Corp., 42 Lab. Arb. 1044 (1964); Pittsburg Metallurgical Co., 38 Lab. Arb. 192 (1962); American Sugar Co., 38 Lab. Arb. 132 (1961). For more treatment of this theory, see Peck, *supra* note 2, at 482-85; Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398 (1969); Note, *supra* note 2, at 325-29.

78 BNA, LABOR RELATIONS YEARBOOK—1969, at 34 (1970).

79 *See, e.g.*, cases cited note 77 *supra*.

80 *See* BNA, *supra* note 78, at 39.

81 Time limits of 5 days or less apply in 17 percent of the agreements. BNA, *supra* note 78, at 38.

H. Title VII of the Civil Rights Act of 1964

The most important and comprehensive prohibition enacted against racial discrimination in employment is Title VII of the Civil Rights Act of 1964,[82] which has recently been substantially amended by the Equal Employment Opportunity Act of 1972.[83] The enforcement of the 1964 Act depended primarily on private litigants,[84] although the Attorney General was authorized to bring suit when he had reasonable cause to believe that a pattern or practice of resistance existed.[85] An agency, the Equal Employment Opportunity Commission (EEOC) was created by the 1964 Act, but it was not given any enforcement power. Instead its primary duties were to investigate and to seek compliance with the Act through conciliation and persuasion.[86] The 1972 Act now gives the EEOC a certain amount of enforcement power. It may bring a civil action, except in the case of a governmental agency, if the informal methods of conciliation and persuasion have failed.[87] A governmental agency that refuses the EEOC's conciliation attempts may be sued by the Attorney General.[88] The private right of action is retained,[89] but the primary enforcer now is the EEOC.

The 1964 Act provided elaborate procedures to be followed by a complainant. He was required to file his charge with the EEOC within 90 days of the occurrence of the alleged violation of the Act.[90] However, if he had filed a complaint with a state or local agency empowered to deal with the alleged discrimination, then he had 210 days to file with the EEOC or 30 days from termination of the state action whichever was earlier.[91] The EEOC then had 60 days to conduct its investigation and to attempt to persuade voluntary compliance with the Act if it had found that the charges were indeed legitimate.[92] At the end

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82 42 U.S.C. §§ 2000e to 2000e-15 (1970). For concise discussions of Title VII, see Herbert & Reischel, *supra* note 2, at 458-63; Peck, *supra* note 2, at 457-75.

83 Act of Mar. 24, 1972, Pub. L. No. 92-261, *amending* Title VII §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

84 *See* Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (1970).

85 Title VII § 707(a), 42 U.S.C. § 2000e-6(a) (1970).

86 Title VII § 706(a), 42 U.S.C. § 2000e-5(a) (1970).

87 Pub. L. No. 92-261, § 4(a) (Mar. 24, 1972).

88 *Id.*

89 *Id.*

90 Title VII § 706(d), 42 U.S.C. § 2000e-5(d) (1970), *as amended*, Pub. L. No. 92-261, § 4(a) (Mar. 24, 1972).

91 *Id.*

92 29 C.F.R. § 1601.25(a) (1972).

of this period the EEOC was required to notify the complainant of its findings and of his right to bring suit in a federal court.[93] The complainant then had 30 days to commence an action in court.[94]

Under the 1972 Act the time periods for filing a complaint have been lengthened. The complainant now has 180 days to file after the occurrence of the violation;[95] if however, he has filed with a state agency, he has either 300 days or 30 days from the termination of the state action to file with the EEOC,[96] whichever is earlier. Should the EEOC fail to secure a conciliation within 30 days from the time of filing, it may bring a civil action against the respondent.[97] If the EEOC dismisses the charge or if 180 days have elapsed since the filing of the charge, the EEOC must notify the complainant, who then has 90 days to bring an action in an appropriate district court.[98]

Many attempts have been made to bar actions under Title VII because of alleged procedural defects.[99] But the courts have been very liberal in construing the procedural requirements of Title VII, reasoning that the objective of Title VII is to prevent discrimination in employment and "the procedures of Title VII were [not] intended to serve as a stumbling block to the accomplishment of the statutory objective."[100] Thus, the courts have held: that the complainant may sue even if the EEOC finds no reasonable cause to believe that a violation has occurred;[101] that actual conciliation effort by the EEOC within the 60 day period is not a prerequisite to federal suits;[102] and that the 30 day time limitation for commencement of the court action runs from receipt of notice from the EEOC and not automatically from the end of the EEOC's 60 day conciliation period.[103] In adopting the 1972

93 Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (1970), *as amended*, Pub. L. No. 92-261, § 4(a) (Mar. 24, 1972).

94 *Id.*

95 Pub. L. No. 92-261, § 4(a) (Mar. 24, 1972).

96 *Id.*

97 *Id.*

98 *Id.*

99 *See* Sutter, *Current Procedural and Evidentiary Considerations Under Title VII of the Civil Rights Act of 1964: Ready for the Defense*, 6 GA. L. REV. 505 (1972).

100 Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).

101 *See* Flowers v. Laborers Local 6, 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970).

102 Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Dent v. St. Louis-S.F. Ry., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seabord Air Line R.R., 405 F.2d 645 (4th Cir.), *cert. denied*, 394 U.S. 918 (1968); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).

103 Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Dent v. St. Louis-S.F. Ry., 406 F.2d 399, 403 (5th Cir. 1969).

amendments Congress has charged the courts to continue this liberal construction "so as to give the aggrieved person the maximum benefit of the law."[104] The congressional analysis of these amendments makes clear that there was no intention to circumscribe these court decisions.[105]

II. The Relationship Between Remedies

What is the interrelationship of these remedies? Is each independent of the other? What role, if any, do the doctrines of election of remedies, res judicata, collateral estoppel, all designed to implement the need for repose in litigation, have in this situation? For purposes of analysis emphasis will be placed on Title VII and its relationship to the other remedies discussed.

A. Exhaustion of Administrative Remedies

It is clear that the EEOC need not defer to the NLRB before taking jurisdiction. Neither, however, must the NLRB defer to the EEOC. Both of these forums have been held to have concurrent jurisdiction.[106] Similarly, a contention that contractual and administrative remedies available under the Railway Labor Act[107] must be exhausted before relief can be sought under Title VII has been rejected.[108] However, whether a complainant must first exhaust grievance-arbitration machinery before seeking court relief could turn on how the complaint is framed.[109] If a complainant alleges that racial discrimination is a violation of the collective bargaining agreement then he must contend with the strong federal policy set forth in *Republic Steel Corp. v. Maddox*[110] that contractual remedies must be exhausted before proceeding into court. The complainant may avoid this rule and proceed directly into court only if he shows the futility of proceeding under the contract grievance forum.[111] However, if he alleges that the discrimination

104 Section-by-Section Analysis of H.R. 1746, 118 Cong. Rec. H1862 (daily ed. Mar. 8, 1972).

105 *See id.*

106 *See* Packinghouse Workers v. NLRB, 416 F.2d 1126, 1133 n.11 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

107 45 U.S.C. §§ 151-88 (1970).

108 *See* Bremer v. St. Louis S.W.R.R., 310 F. Supp. 1333, 1337-38 (E.D. Mo. 1969); Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49, 55 (S.D. Ga. 1968).

109 *See* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40 (1969).

110 379 U.S. 650 (1965).

111 *See* Glover v. St. Louis-S.F. Ry., 393 U.S. 324 (1969).

is a violation of Title VII, he does not have to resort to arbitration first;[112] he "need only follow the procedures for relief provided in that statute."[113]

There is some disagreement as to whether EEOC remedies must be exhausted before suing under section 1981. The Seventh Circuit in *Waters* said that "a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for failure to do so."[114] The Court of Appeals for the Third Circuit felt that "such a holding would not be warranted by any language in Title VII"[115] and declined to so hold. Instead, it provided that equitable relief may be fashioned with due regard for the conciliation features of Title VII and also that EEOC procedures may be utilized during the pendency of section 1981 cases.[116] Thus, in this manner the Third Circuit hopes to carry out the policies of both statutes. The Fifth Circuit has agreed with the Third Circuit in *Caldwell v. National Brewing Co.*[117] and recommends to its district courts "the procedures set out in *Young* so as to accord due regard to the conciliatory policy which is at the heart of Title VII while at the same time preserving the full remedy of § 1981."[118]

B. Election of Remedies

The courts have not adopted an election of remedies requirement which forces an employee at the outset to make an irrevocable choice of remedy. It was argued in one of the early cases that an election of remedies should be applied in situations involving both Title VII and a grievance arbitration procedure.[119] In *Bowe v. Colgate-Palmolive Co.*,[120] the district court held that a complainant could not proceed concurrently under a collective bargaining agreement and in the federal district court. In so holding, the court said that it would be inequitable to subject one defendant to two series of extensive litigation.[121] On

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112 *See* King v. Georgia Power Co., 295 F. Supp. 943, 949 (N.D. Ga. 1968); Reese v. Atlantic Steel Co., 282 F. Supp. 905, 906 (N.D. Ga. 1967); Dent v. St. Louis-S.F. Ry., 265 F. Supp. 56, 57-58 (N.D. Ala. 1967), *rev'd on other grounds*, 406 F.2d 399 (5th Cir. 1969).

113 King v. Georgia Power Co., 295 F. Supp. 943, 949 (N.D. Ga. 1968).

114 427 F.2d at 481.

115 Young v. International Tel. & Tel. Co., 438 F.2d 757, 763 (3d Cir. 1971).

116 *Id.* at 764.

117 443 F.2d 1044 (5th Cir. 1971).

118 *Id.* at 1046.

119 Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

120 272 F. Supp. 332 (S.D. Ind. 1967).

121 *Id.* at 367.

appeal the Seventh Circuit reversed the district court and held that the election of remedies doctrine did not apply and that Title VII plaintiffs could proceed both under a collective bargaining agreement and in the courts.[122] The court did limit its decision by holding that a plaintiff would be entitled to only one remedy and thus would be required to elect the remedy desired after adjudication was completed. The court said "it was error not to permit the plaintiffs to utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs."[123] The Third,[124] Sixth,[125] and Fifth[126] Circuits have also refused to apply election of remedies doctrines in Title VII actions.

C. Res Judicata and Collateral Estoppel

A different problem is presented when an employee seeks relief under Title VII after having obtained a judgment in another forum. Here the courts are confronted with the principles of res judicata and collateral estoppel and must weigh these principles against the strong underlying purpose of Title VII, which is to provide victims of employment discrimination access to the federal courts. If an adverse judgment is first obtained under one of the other statutory proceedings such as the NLRA's "duty of fair representation," the courts have allowed the complainant to proceed in a federal court under Title VII.[127] However, if the adverse judgment was in a grievance-arbitration proceeding, the additional federal policy of deference to arbitartion[128]

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122 416 F.2d 711 (7th Cir. 1969).

123 *Id.* at 715.

124 *See* Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970).

125 Cooper v. Philip Morris, Inc., 4 CCH EMPL. PRAC. DEC. ¶ 7888 (6th Cir. 1972); Newman v. Avco Corp., 451 F.2d 743 (6th Cir. 1971).

126 *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).

127 *See* Cooper v. Philip Morris, Inc., 4 CCH EMPL. PRAC. DEC. ¶ 7888 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971); Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970); Norman v. Missouri Pacific R.R., 414 F.2d 73 (8th Cir. 1969). With respect to the application of the doctrines of res judicata and collateral estoppel as bars to a federal court Title VII complaint where there has been prior state agency action, notice must be taken of congressional intent recently expressed in the Equal Employment Opportunity Act of 1972. "In determining whether reasonable cause exists, the Commission shall accord *substantial weight to final findings and orders made by state or local authorities* in proceedings commenced under state or local law pursuant to the [deferral] provisions of subsections (c) and (d) of this section." 42 U.S.C. § 2000e-5(b) (1970), *as amended,* Pub. L. No. 92-261, § 4(a) (Mar. 24, 1972) (emphasis added).

128 United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers

may cause the balance to be struck in favor of res judicata or collateral estoppel.

The courts of appeals for a while appeared to be split on whether a Title VII action should be allowed if a complaint had suffered an adverse determination in the grievance-arbitration process.[129] The Fifth Circuit in *Hutchings v. United States Industries, Inc.*[130] allowed a Title VII action after adverse results in arbitration, arguing that an "arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights."[131] On the other hand, the Sixth Circuit reached an opposite result in *Dewey v. Reynolds Metals Corporation*,[132] a religious discrimination case in which an employee had been denied relief by an arbitrator who had jurisdiction to determine the grievance. The court held that the complainant was thus precluded from bringing an action under Title VII: "[w]here the grievances are based on an alleged civil rights violation, and the parties agree to arbitration by a mutually agreeable arbitrator . . . the arbitrator has a right to *finally* determine them."[133] The court felt that any other construction would mean that the employer but not the employee would be bound—a result that "could sound the death knell to arbitration of labor disputes. . . ."[134] The Sixth Circuit weighed the two opposing policy considerations involved—the NLRA policy of encouraging arbitration and the Title VII policy of providing access to the federal courts—and decided that the NLRA policy was paramount.

However, the broad language used in *Dewey* was considerably restricted in a subsequent racial discrimination case, *Newman v. Avco Corp.*[135] The language of the Dewey court quoted above seemed to suggest that the principles of res judicata would be applied to an arbitrator's decision on a civil rights grievance thereby barring a subsequent suit in federal court under Title VII. However, in *Avco* the Sixth Circuit stated that *Dewey* was based on a doctrine of estoppel; therefore,

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v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

129 *Compare* Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970), *with* Dewey v. Reynolds Metals Corp., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971).

130 428 F.2d 303 (5th Cir. 1970).

131 *Id.* at 313.

132 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971).

133 *Id.* at 332 (emphasis added).

134 *Id.*

135 451 F.2d 743 (6th Cir. 1971).

"where the parties have agreed to resolve their grievances before (1) a fair and impartial tribunal (2) which had *power to decide them*, a District Court should defer to the fact finding thus accomplished."[136] Since the *Dewey* court had held that "questions of law and fact"[137] may be finally resolved by the arbitrator, *Avco* represents a retreat from the principles of res judicata set out in *Dewey*, and now in the Sixth Circuit it appears that a federal court is required to defer only to an arbitrator's findings of fact.

Moreover, under *Avco* a federal court is required to defer to the arbitrator's finding of fact only if the arbitration tribunal was fair and impartial and had the power to resolve the issues controverted. Finding that the complaint in the district court was an attack on the fairness of the arbitration proceeding,[138] and that the labor-management agreement did not prohibit racial discrimination in employment, the court in *Avco* concluded that the arbitrator did not have the power to decide the racial discrimination claims.[139] Consequently, the court held that the doctrine of collateral estoppel was inapplicable and remanded the case to the district court for entry of findings of fact and conclusions of law on the plaintiff's charges.[140]

Title VII proceedings, therefore, appear to be completely independent of the other enumerated proceedings. A Title VII plaintiff does not have to seek relief first in another forum; if he does commence proceedings in another forum, he is not barred from subsequent Title VII relief by the doctrine of election of remedies; and if a judgment is rendered in another forum, he is not barred from subsequent Title VII relief by the bar and merger principles of res judicata. He may, however, be bound by previous fact finding to the extent contemplated by *Avco*. In some instances relief is sought simultaneously from the EEOC and the OFCC. To avoid duplication of effort an attempt is being made by these agencies to coordinate their activities.[141] Moreover, although Title VII expressly directs the EEOC to defer to state proceedings for a period of 60 days, [142] the EEOC and various state agencies

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136 *Id.* at 747.

137 Dewey v. Reynolds Metals Co., 429 F.2d 324, 332 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971).

138 Newman v. Avco Corp., 451 F.2d 743, 747 (6th Cir. 1971).

139 *Id.*

140 *Id.* at 749.

141 *See* Memorandum of Understanding, 35 Fed. Reg. 8461 (1970).

142 Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1970).

have attempted to minimize duplication through a memorandum of understanding.[143]

D. Recent Legislative Proposals

From this discussion it is clear that an employee who alleges racial discrimination against him by his employer may have his claim litigated over and over using each of the many forums and theories available. Recent legislative proposals in Congress would have curtailed in various ways this ability of an employee to relitigate a claimed discrimination. Congressman Hawkins introduced a bill[144] that would have given the EEOC cease and desist power and would have transferred the OFCC from the Labor Department to the EEOC. This bill, although consolidating some governmental remedies, would have had no effect on others, particularly the NLRA, and the private remedies. Congressman Erlenborn introduced a bill[145] which would have permitted the EEOC to bring enforcement actions in federal district courts. His bill further provided that except for deferral to state agencies and to pattern or practice suits by the Attorney General, a charge filed under this bill would be the "exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization."[146] Although the Erlenborn bill was passed by the House,[147] the exclusive remedy provision was rejected by the Senate and the Conference Committee.[148] Accordingly, Title VII as recently amended by the Equal Opportunity Act of 1972[149] does nothing to prevent the relitigation of a discrimination claim in a variety of forums.

III. Conclusion

It is clear we need a vigorous policy to remove all vestiges of racial discrimination in employment from our national scene. Consistently with this goal, however, we can improve upon our present policy of permitting an individual who derives a single injury from a single occurrence to bring as many actions as he can devise legal theories. Al-

143 *See* BNA Fair Employment Practice Manual 431:453 (1972).

144 H.R. 1746, 92d Cong., 1st Sess. (1971).

145 H.R. 6760, 92d Cong., 1st Sess. (1971).

146 *Id.* § 3(b).

147 Act of Mar. 24, 1972, Pub. L. No. 92-261, *amending* Title VII §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

148 *See* S. Rep. No. 681, 92d Cong., 2d Sess. (1972).

149 Act of Mar. 24, 1972, Pub. L. No. 92-261, *amending* Title VII §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

though the unfettered pursuit of substantive justice in racial discrimination situations demands easy access to an appropriate adjudicatory process, the needs of society and the adversaries for repose must also receive consideration in policy development. While our national policy against discrimination on account of race must be strong, it must be recognized that there is a point beyond which there is a diminishing likelihood that successive proceedings will produce affirmative results. The common law recognized the inappropriateness of repetitious litigation and developed the doctrines of res judicata and collateral estoppel. Accordingly, a good deal can be said in this situation for the designation of a primary forum and the establishment of its judgment as the point of diminishing returns in the human, and therefore fallible, pursuit of perfect justice.

The ideal solution would be for Congress to create an administrative agency with primary jurisdiction over the employment discrimination area—an agency with authority similar to that possessed by the NLRB under the NLRA. Of course, the strong demands of federalism and the need to continue the promotion of private determination through collective bargaining would warrant an appropriate deference by this agency to judgments under state fair employment practice laws and grievance arbitration.[150] Such a solution would be advantageous to employees since they could resolve their claims without having to incur substantial legal expenses; employers and unions would benefit since they would have to defend against charges of employment discrimination in only one forum; public policy would benefit since subtle discrimination issues would be more expertly resolved because of the considerable expertise that such an agency would develop in this area. The Hawkins Bill, by giving the EEOC power to issue cease and desist orders, and the Erlenborn Bill, with its exclusive remedy provision, together would have come close to transforming the EEOC into such an agency. But these proposals were defeated, and an employee alleging discrimination still has a smorgasbord of forums and theories to use against his employer or union.

However, even under the present circumstances some of the inequity and expense of repetitious relitigation may be alleviated by the forums themselves applying collateral estoppel principles to the fact findings of other forums if appropriate standards are met. The Sixth Circuit in *Avco* has held that it will defer to an arbitrator's finding of fact if the

150 *See, e.g.*, Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 23, 1971).

arbitration was fair and the arbitrator had the power to decide the issue.[151] The Fifth Circuit in *Hutchings* has said that it may be amenable to adopting in Title VII cases "a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met. . . ."[152] This deferral doctrine should not be limited just to arbitration proceedings but should be applied when the facts have been previously litigated in an adversary proceeding in another forum or in the same forum but under another theory.[153]

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151 Newman v. Avco Corp., 451 F.2d 743, 747 (6th Cir. 1971).

152 Hutchings v. United States Indus., Inc., 428 F.2d 303, 314 n.10 (1970). Two commentators have proposed nine conditions that should be met before the courts in a Title VII suit defer to an arbitrator's award. *See* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 651 (1971).

153 For a discussion of this proposal with respect to the NLRA-LMRDA relationship, see Beaird, *Some Aspects of the LMRDA Reporting Requirements*, 4 GA. L. REV. 696, 707-17 (1970).