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William R. Ming, Jr.

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CRITIQUE ON "THE CONSTITUTION AND JOB DISCRIMINATION"

WILLIAM R. MING, JR.*

The Countryman basic thesis is sound. His analysis of the obligations of the several states is intriguing. But the history and nature of the problem of discrimination against Negroes in employment suggest that more be said of law and legal institutions in this area.

To begin with it should be observed that the developments of the law in this area, as compared with developments in the other major civil rights fields of education, public housing, public accommodation and voting, have been vitally affected by past social and political decisions and events. More than twenty-five years ago under the leadership of Charles H. Houston Esq., of the Washington Bar, first Special Counsel of the NAACP, and former dean of the Law School of Howard University, the National Legal Committee of the NAACP launched a calculated attack on racial discrimination in the United States. The prime targets were racial discrimination in education and the denial to Negroes of the right to vote. The weapons of the attack were constitutional arguments buttressed by such showing of the effects of racial discrimination as was provided by social scientists. The weapons were fired in cases seeking injunctive relief, declaratory judgment or damages, or all three, on behalf of specifically identified Negro plaintiffs and the class of persons they represented. Most of the suits, for obvious reasons, were brought in federal courts. Frequently the procedural devices used required more skillful legal attention than did the substantive problems involved because the Anglo-American legal system had not before been used to redress the wrongs of millions of people any more than international law had been used prior to World War II to punish genocide.

In retrospect it might be argued that the prime target of such a legal program should have been the discrimination against Negroes in employment. Certainly it would have been naive to ignore the social

* Attorney, Chicago, Illinois; partner, McCoy, Ming & Leighton; member, Executive Committee, National Board of Directors, NAACP; member, National Legal Committee, NAACP; Chairman, Advisory Committee, NAACP Legal Redress and Education Fund, Inc.

truism that people who are hungry can hardly be expected to appreciate the values of either education or the franchise. Moreover, the impact of employment discrimination in the '30's was even greater than it is today. But even in retrospect it must be observed that the New Deal offered promises of improvement in economic conditions for all Americans, including Negroes. Similarly, local, state and federal relief programs assured marginal creature comforts even for Negroes. Thus it appeared that if the courts outlawed the use of governmental power to maintain racial discrimination, Negroes, like whites, would benefit from whatever economic gains were achieved in the country as a whole. If the right to vote were secure political action could hold gains won and improved educational opportunities would provide both a means of individual development and acceptance of the ideas of racial equality by the white community.

To some extent these goals have been approached. Both the median and average of income of Negroes has risen since the grim depression days. Proportionately more Negroes are regularly employed today than were so employed in the '30's. More Negroes are employed today in professional technical, skilled and semi-skilled occupations than there were in the '30's. The *Newsweek* poll of whites this past summer reports that currently eighty per cent of whites believe that the law should guarantee Negroes equal rights to whites in job opportunities; ninety-five per cent to equal rights in voting; eighty-five per cent to equal rights in getting good housing (but not in white neighborhoods); ninety-one per cent to equal rights in using buses and trains; seventy-five per cent to equal rights in using restaurants and lunch counters; and seventy-five per cent to equal rights in giving their children integrated schooling.¹

Nevertheless, as Dean Countryman points out, the burden of unemployment in the United States still falls doubly hard on Negroes.

It merits notice in this regard that when slavery was abolished there were four million slaves, all of whom were Negroes. Ironically, the President of the United States reported only the other day that there are now about four million unemployed persons in the United States. Only a third of these are Negroes. But there can be small consolation either to Negroes or whites who are unemployed that the disinherited group of Americans is now bi-racial. Actually, the consideration of national averages tends to be misleading as to the nature

¹ *Newsweek*, October 21, 1963, Vol. LXII, No. 17, 45-57.

of the problem of job discrimination. While it is true that the national non-white unemployment rate is double that of whites this really only means that there are fewer unemployed Negroes proportionately in West Virginia than there are in New York, Illinois or Pennsylvania. Thus in Chicago currently forty-three per cent of the Negro labor force is unemployed. Unemployment among Negro males between twenty-five and forty-five ranges from sixteen to eighteen per cent as compared to two point two per cent for whites in the same age bracket. Whites in Chicago experience only the normal unemployment resulting from short periods of lay-offs and changing of jobs similar to the conditions that existed during World War II, while unemployment among Negroes is at a depression level. The impact of this unemployment is heightened because the median age for Negroes in Chicago is only twenty-five years as compared to thirty-six years for whites. According to the 1960 census there were nearly fifty-five thousand Negro males in Chicago in the under twenty-nine age bracket, and nearly twenty-five thousand additional Negro males have become eighteen and entered the labor force since 1960.² Reports from other northern urban centers convey the same grim picture and more than one-half of the Negroes in the United States live in the North.

Social scientists, politicians and commentators may differ as to the remedy for Negro unemployment. But even the dullest of us must recognize that no matter how manifested, whether in crime, demonstrations, mental breakdowns, or simply despair, this enormous lack of opportunity to earn a living is a socially destructive force from which even racial segregation, residential and otherwise, cannot shield the white community.

In this area contemplation of detailed facts alone is hardly sufficient. Moreover, legal scholars have always been notorious for their preference for the general proposition as a subject for discussion.³ But

² Nicholas, labor economist, Job Development Specialist for the Employment Guidance Department of the Chicago Urban League, *Todd v. Joint Apprenticeship Committee*, (N.D. Ill. October 16, 1963).

³ Holmes-Pollock Letters, Harvard 1941, 13-14, and 17-18. Holmes to Pollock, Washington, May 26, 1919: "Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course, a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them,

the current social and political pressures for solution of civil rights problems must compel serious students of the law and legal institutions to recognize that if the customary processes of resolving controversies do not provide a ready remedy for these major social ills, the alternatives are disorder, violence and the inevitable repressive action by the government which would destroy the basic American concepts of individual liberty and the right to individual development and expression.

Dean Countryman has endeavored to meet this challenge by an imaginative analysis of the concept of "state action" within the meaning of the fourteenth amendment. He would conclude that the failure of a state to provide a remedy for job discrimination against Negroes was itself a denial of the equal protection of the laws required by the fourteenth amendment. In addition, he convincingly articulates the constitutional basis for a federal statute prohibiting racial discrimination in employment.

It is doubtful that any serious legal question can be raised as to the constitutionality of a federal fair employment practice measure. It really seems immaterial whether the federal authority arises from the commerce clause, the thirteenth or fourteenth amendment, the fifth amendment or a combination of these. The Wagner Act, its subsequent amendments, and the judicial decisions in the field of labor relations have made it clear that this is an area of broad, and to some extent, at least, exclusive federal authority.

It is not so easy to support Dean Countryman's thesis as to the obligation of the several states to act to redress job discrimination. The real difficulty arises from the fact that starting in 1873 the Supreme Court of the United States systematically gutted the fourteenth

good also for the performance of my duties, but I shrink from the bore—or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies. I don't remember that I read Michiavelli's PRINCE—and I think of the Day of Judgment. There are a good many worse ignorances than that, that ought to be closed up. I don't know how it will come out." Holmes to Pollock, Beverly Farms, June 27, 1919: "I am glad that you don't treat my proposed excursion into facts as of the essence of salvation. I have sent for books but ten days have gone by without answer. I think of a Catholic lady who on a fast day called for a bass, then terrapin—not forthcoming—and then said, 'Bring me a mutton chop. God knows I have tried for fish.' If I am destined to lapse from facts."²

² It appears from Holmes's Journal that during the summer he read the *Report on the Strike of Textile Workers in Lawrence*, Sen. Dec. 870, 62nd Cong., 2d Sess. (1912) and *Summary of the Report on Condition of Women and Child Wage Earners in the United States*.

NOTE: The editor of the letters reported, page 17, that the Pollock letter referred to in the Holmes letter of June 27 is missing.

amendment.⁴ The Court was aided and abetted in this process by politicians, historians, political scientists, and others, who ignored the facts and distorted the legislative intentions of the framers of the Civil War amendments. The most surprising thing is that the country generally supinely permitted this transformation of a good faith effort to root out slavery and install the freed slaves as the political and social equals of other American citizens into a legal system which affirmed the power of the majority to use the instruments of government to maintain citizenship of two classes, one for whites and the other for Negroes. Beginning with *Shelley v. Kraemer*,⁵ however, the Supreme Court appears to be attempting the long "advance" to 1868. Whether the courts alone can overcome the inevitable inertia of the common law case by case system to say nothing of the efforts of commentators and proponents of the *status quo* to deter the court, remains to be seen. It is ironic, to say the least, however, to find a full century after the Emancipation Proclamation that we are so far from the political and social goals of the 39th Congress. The speed with which it acted to outlaw the "Black Codes" of 1865 suggests that the Countryman thesis would have found a receptive audience there.

Dean Countryman, with admirable candor, has stated some of his biases and assumptions in aid of understanding his thesis. I share those biases. To equal his candor I suppose I must disclose additional biases. First, of course, there is my long, friendly association with, and admiration for, Dean Countryman. Then, entirely obvious, is my personal stake in the subject of these discussions. I trust, however, that neither of these impairs analysis of the problems at hand. More important, I suspect, is my aversion for those who would drown action with words. To paraphrase Sir Winston Churchill, it may be said of civil rights problems that seldom have so many talked so much about the work done by so few. Indeed we have now descended to a second level where scholarship takes the form of talk about the talk.⁶ It is particularly distressing when, under the guise of scholarly discussion of the plain purposes of the Civil War amendments, commentators seek to develop and invoke limitations on judicial power and concepts of "balancing" which, if followed, would inevitably

⁴ For a detailed analysis see II CROSSKEY POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, 1083-1158, 1953

⁵ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁶ See, e.g., Gordon, "Recent Trends in the Study of Minority and Race Relations," *The Annals*, Vol. 350, November 1963; pp. 148-156.

block off the small inroads which have been made on the concept of absolute right of the majority.

This is not to say that there are no areas open for scholarly inquiry into the role of law and the legal institutions in dealing with civil rights problems, particularly in the area of job discrimination. Indeed, intensive study is dictated by the complex of factors involved here, arising from the variations in the aims and goals of sometimes conflicting, sometimes competing, often concurring, forces of unions, employers, government and capital sources in comparison to the simply stated goal of Negroes to secure merit employment.

Actually even this simple statement is complicated by the enormous variation in training and skills currently found among Negroes. Some of this is due to past discrimination in education, training and employment opportunities. But some is due to the inevitable interpersonal differences among Negroes in capacity, goals and desire. These differences, in turn, of course, are grossly affected by racial discrimination.

It is important, perhaps even crucial, to notice that here, unlike the matters of access to the theatre or dining room, or suburban house, or school, or voting booth, color is not the only determinant. It is also important to observe that the problems in this area arise from job discrimination, not total exclusion of Negroes from economic opportunity even though limited. Just as the horror of the *Dred Scott* decision must be viewed in light of the fact that there were already about two hundred fifty thousand Negro free men at the time of the Emancipation Proclamation so too comparative Negro income statistics must be read in 1963 in light of the fact that all Negroes are not unskilled field hands recently displaced from cotton fields by automation.

In any event I would urge that the role of law and legal institutions in the area of job discrimination be considered from several points of view.

To begin with it is perfectly clear that post-depression developments with respect to trade unions have had a marked effect on the problem. Prior to the development of the industrial unions exclusion of Negroes from labor unions was the rule. As a result the Negro work force was readily available for strike-breaking and elements of it were frequently so used. Indeed in some quarters, both Negro and white, the National Urban League still suffers from the charge, merited or not, that one

of its purposes was to facilitate the use of Negroes as strike-breakers. With the formation of the CIO and its organization of workers in industries where there were large numbers of Negroes employed, many observers believed that industrial unions would become a potent force for the elimination of job discrimination against Negroes. The extent of the disillusionment in this regard is epitomized by the bitterness of A. Phillip Randolph, a life long trade unionist, and his organization of the Negro-American Labor Council. Of equal significance in this regard is the increasing NAACP criticism of trade unions. This is particularly illuminating since many of these unions have been among the loudest of the advocates of civil rights, generally, while they simultaneously discriminate against Negro members with a skill matched only by that of southern politicians.⁷ Meanwhile, craft unions which formerly only excluded Negroes from membership, now by dint of combination with state and federal officials prevent Negroes from learning certain trades even in public vocation schools.⁸

This is not to say that unions alone are to blame for job discrimination though some employers so contend. A measure of the attitude of employers can be found in the discriminatory practices in employment in unorganized areas and with respect to nonunion employees.

Dean Countryman has pointed out some legal remedies already provided for job discrimination. These and other factors suggest that analysis of the role of law with respect to job discrimination might profitably proceed by considering separately:

1. Discrimination against Negroes in public employment;
2. Discrimination against Negroes in employment on government contracts; and
3. Discrimination against Negroes in other private employment.

On another plane those topics might again be subdivided as follows:

1. Discrimination in hiring.
2. Discrimination in on-the-job-training and upgrading.
3. Discrimination in tenure.

⁷ See, generally, Marshall, "Ethnic and Economic Minorities: Unions Future or Unrecruitable?", *The Annals*, Vol. 350, November 1963; pp. 63-73.

⁸ See, e.g., *Todd v. Joint Apprenticeship Committee*, *supra* note 2, where preliminary injunction was issued, Oct. 16, 1963, to compel acceptance of Negro applicants as ironworker apprentices where academic instruction is provided in a Chicago public school under a program jointly sponsored by state and federal governments and where the applicants were denied employment by union fiat in construction of a United States courthouse and office building in Chicago.

On still another plane there might be a useful breakdown as between industries, geographic areas, and character of employment as professional, technical, skilled, semi-skilled and unskilled.

The development of the law and the role of legal institutions seems to have varied considerably among these several categories. For example an almost immediate by-product of the legal attack on discrimination in education even prior to World War II was the general recognition by the courts both state and federal, that equal salaries for white and Negro teachers were compelled by constitutional requirements. Indeed, even the expiration of a one year contract before judgment was held not to make moot a suit by a Negro teacher to compel equal salaries.⁹

Underlying these decisions was the obvious proposition that denial to Negroes of equal employment opportunities in public employment violated constitutional limitations. Some states have statutes to this effect.¹⁰ Interestingly, even without lawsuits, many southern communities have conceded this requirement, particularly with respect to Negro police officers. Enforcement of this obvious constitutional requirement of equal job opportunity in public employment state and federal, however is far from uniform.

Discrimination on account of color by trade unions with respect to persons already employed in a unit designated as such for collective bargaining seems also to be prohibited by law. Denial of union membership, however, on account of race or color may still have no authoritative remedy.¹¹

After erection by the National Labor Relations Board of a "facade of lofty sentiments" with a performance record of "distinctly minor achievement, characterized by numerous temporizations with seem-

⁹ *Alston v. Board of Educ. of City of Norfolk*, 112 F.2d 992 (4th Cir. 1940).

¹⁰ See, e.g., ILL. REV. STATS., 1961, ch. 38, § 13-2(c). But see *In re Taylor*, III. FEPC, Charge No. 62-1; 8 RRLR 319 (1962). There a trial examiner concluded the Commission had no jurisdiction over a complaint by a Negro teacher that because of her race she had been denied employment by a Chicago public junior college, because it was a public body, though he also found in her favor on the merits. More than a year after his report the matter remains unresolved by the Commission!

¹¹ See *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944) and *Syves v. Oil Workers*, 350 U.S. 892 (1956) reversing 223 F.2d 739 (5th Cir. 1955). In light of the introductory comment as to Mr. Houston, it should be noted that he was counsel for petitioner in *Steele* as he was also in *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944). See generally, Wellington, *The Constitution, the Labor Union, and Governmental Action*, 70 YALE L. J. 345; *Sovern, The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563; Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21; Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874; Hewitt, *The Right to Membership in a Labor Union*, 99 U. PA. L. REV. 919; Weiss, *Federal Remedies for Racial Discrimination by Labor Unions* 50 GEO. L.J. 457.

ingly basic principles of democracy"¹² the general counsel of the Board has announced a policy of giving "solid support to efforts to provide equal representation where the rights invoked are intended to be protected under industrial relations principles defined in the NLRA."¹³

Dean Countryman has alluded to another area where there has been federal action with respect to job discrimination, namely in the field of government contracts. Even to that limited extent, the rights of individuals to judicial remedy when they are discriminated against is not settled. The major feature of the federal action to date is the non-discrimination clause required in all government contracts. Some states and cities have similar requirements.

The right of individuals discriminated against however, in violation of such contract provisions till now, has been limited to administrative remedy. The refusal of the courts, so far, to apply orthodox notions of the rights of third parties beneficiary to enforce contracts made for their benefit in this situation raises the always perplexing problem of the propriety of using private law concepts to resolve public controversies.¹⁴ It is clear that the contract clauses are wholly for the benefit of the people as to whom discrimination is usually practiced. It is equally clear that the contract clause is an effort by the executive branch of the government to exercise its limited law making function in a situation where the Congress has failed or refused to act. Thus there is room for argument that individuals are limited to the administrative remedies provided by the executive because the doctrine of separation of powers bars creation of a judicial remedy by action of the executive. A recent amendment to the Judiciary Act suggests otherwise but there is as yet, no authoritative resolution of the matter.

Dean Countryman has proposed a remedy for job discrimination in private employment generally. Besides the constitutional issue he raises, some *caveat* seems required as to the efficacy of administrative action in this field, as in others. The conciliation, "social work" technique is of dubious value when dealing with able, crafty, evasive

¹² Aaron and Komoffe, *Statutory Regulation of Individual Internal Union Affairs*, 44 ILL. L. REV. 425,445 (1949).

¹³ Calendar Year Report of the Office of the General Counsel of the National Labor Relations Board, December 31, 1962, 8 RRLR 313, 314. The report cautiously adds: "Where they are not subsumed under the remedial provisions of this statute, of course, our hands will be tied."

¹⁴ See, e.g., *Todd v. Joint Apprenticeship Committee*, *supra* note 2; and *Farmer v. Philadelphia Electric Co.*, 215 F. Supp. 729 (E.D.Pa. 1963).

union and management people. Inestimable delay is characteristic of any administrative system without well-defined procedural and substantive rules. Overall, lack of commitment to resolution of issues for the benefit of individuals bars real remedy for the individual who seeks only a job or up-grading.

In any event, the whole area, constitutional and otherwise, appears to warrant intensive investigation.

It would appear that any discussion of the role of law in connection with job discrimination must consider the totality of the problem of unemployment in the United States. As Walter Lippmann pointed out recently:

The economic grievances of the Negroes cannot be redressed on a racial basis. They are an inseparable part of the national problem of how to stimulate the American economy—how to provide that much higher standard of life which is within the capacity of our technology, our resources, our capital reserves, and our labor force. Here there is no near prospect of a big advance. In the Congress the conservative coalition opposes the measures which in the experience of the more advanced countries of the world are conducive to rapid and sustained economic growth. To this opposing coalition a preponderant mass of the voters are giving at least tacit assent—some because they agree with the conservative coalition and some because they do not understand the alternatives.¹⁵

In July 1963 the Bureau of Labor Statistics reported that there were approximately four million three hundred thousand unemployed persons in the United States. Of this number more than nine hundred thousand had been unemployed for fifteen weeks or longer. Also, of the total more than nine hundred thousand were non-white, mostly Negroes. Of the unemployed non-whites more than thirty-two per cent had been unemployed for more than fifteen weeks.

The President of the United States has proposed immediately only a tax reduction in aid of solution of this problem. Without regard to the merits of this proposal it is obvious that there can be no real solution of the problem of job discrimination by law or otherwise in the absence of an upsurge in the American economy which will increase the demand for labor, both white and black, by some two to three million jobs.

This is probably not the forum for a debate on the respective merits of the views of the "liberal" economists and the "Keynesians," nor would it seem possible here to analyze the relative effects of automa-

¹⁵ Newsweek, September 16, 1963, p. 21.

tion and the proposals for a compulsory shorter work week. The real social fact is that Negroes in the United States both as individuals and en masse, have all the problems that other Americans have. In addition they bear the burdens of the problems arising from racial discrimination. To the extent that these are based on color only, law and legal institutions can and must provide certain and rapid remedies. But overall resolution of the problem of job discrimination on account of race cannot be achieved short of solution of economic problems heretofore regarded as admitting of only limited activity by law and legal institutions.