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Comment

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DEAN HYMAN, friends: It is a great privilege to participate in a conference honoring Judge Halpern. And it is of course deeply fitting both that we honor him by meeting to discuss problems of civil rights—problems which so deeply engaged the Judge's mind and heart—and that this conference is held under the auspices of the Law School with which the Judge was so closely identified. As this conference bears witness, Buffalo Law School is one of those centrally dedicated to fostering those uses of law which can help to realize our democratic commitments. The character of this School is one of the lasting memorials to Judge Halpern. But it also testifies to the distinguished leadership of Dean Hyman. As the Dean nears the end of his decanal term, I am happy to have this opportunity to salute him.

Dean Hyman has indicated, in his very generous introduction, that my role as commentator on this evening's papers—however that role may have been originally conceived—has been skewed a little. Let me explain why: Up until yesterday morning I was quite hopeful that, as commentator—whatever that may be—I would be permitted an advance view of the papers I was to commentate (if you will excuse the expression) upon. To be sure, none of the papers was in hand. But at least I had a phone call yesterday morning from Dean Ferguson's secretary promising me that a massive tome was on its way to New Haven. Yet when I stopped at my office this morning, en route to the airport—no tome.

Well, how would you feel? I felt discriminated against. But, remembering that the law proceeds only upon due inquiry, I sent out my field examiners to the New Haven Post Office to track down the Ferguson manuscript. A few minutes later they were back with a reply from the Postmaster: "If Dean Ferguson sent Pollak a paper through the mail, we'll produce it or write one ourselves." And, sure enough, five minutes later one of those red-white-and-blue mail wagons trundled up to the Yale Law School door and delivered what was alleged to be the Ferguson opus. I grabbed it, drove to the airport, and settled down to read Dean Ferguson's text on the flight to Buffalo. And a splendid text I found it to be, all garnished with fifty-eight numbers designating footnotes. But there were no footnotes. So, once again, I felt discriminated against. After all, I'd received only one of the three papers, and only the text of that. But then, still in mid-flight, I reasoned it out to myself that I'd misunderstood the dimensions of the role Dean Hyman and Professor Schwartz had contemplated for me. It was sheer megalomania that had led me to suppose I was to commentate upon the Ferguson *and* Feild *and* Hill papers. My assignment was the Ferguson paper, and only the text of that; and another heavy-domed scholar was to commentate upon the footnotes.

But when I arrived at this dinner I discovered I was in error. Dean Hyman

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indicated that he expected me to deal with all three papers—and he made it fairly clear that he didn't think my contribution would be any the less meritorious for not having seen two of the papers. I was trying to decide whether the Dean's observation was just routine courtesy (and if so, to whom) when John Feild came over to greet me—a document in one hand and a bourbon in the other. I'm afraid I mixed them. What I'm trying to say is that, though I absorbed a good deal of the Feild paper, I'm not sure that the absorption process was wholly useful.

At that point Professor Schwartz came in bearing on his back what turned out to be the collected works of Herbert Hill. I sampled pages; then chapters; and then, in my desperation, whole volumes. And, as I was trying to think of how to locate and climb the central summit of the Hill, I was reminded of an experience which befell my colleague, Boris Bittker, some nine thousand years ago when he was law clerk to Jerome Frank. One Friday afternoon Judge Frank handed Boris a draft opinion which he proposed to hand down the following Monday. Boris said, with law clerkly diffidence, "Judge, this is a pretty substantial opinion—sixty-eight pages long. I wonder whether you would be willing to let me take it home over the weekend and see if I could whittle it down a little bit." Judge Frank said, "Of course, Boris, if you want to spend your weekend that way." Boris did and came in proudly on Monday morning with a seventeen-page restatement compressing the Judge's opinion. He handed it to the Judge and the Judge said, "Give me a little while to look at it, won't you?" He retired to his chambers and emerged ten minutes later: "Boris, what you've done is first-rate. We'll add it on at the end of the opinion."

And now that you know the legislative history of my appearance here this evening, I shall proceed to commentate. First, I'd like to address myself to Dean Ferguson's paper:

Dean Ferguson has strongly emphasized the paramountcy of federal interest in the whole question of racial discrimination in employment. He's exactly right, of course. We start with the integrated nature of our economy—if not of our employment picture. We are compelled—if we really mean to deal with these problems seriously and with substantial effect—to rely heavily on the national power in all of the aspects which Dean Ferguson so clearly articulated; so I'm not disagreeing with anything I understood him to say.

My qualifications are only with respect to what he did not say—at least what I did not hear him say. Actually, I doubt that he will disagree with what I will add by way of addendum—and it may sound like a small thing, but it seems to me a reservation of considerable consequence. In stressing the importance of federal regulation, whether through the President's executive power unaided by legislation or through the whole elaborate programmatic regulation that a federal fair employment practices law would give us, I would urge that we not forget, or sort of discard as not worth bothering about, the segments of the employment picture which are beyond federal control. I mean "beyond" in two senses:

First, I suppose there is an area that's constitutionally beyond federal control. If we think hard enough—or if we get our students in Constitutional Law I to think hard enough—it is possible to isolate certain kinds of businesses that probably don't have any impact on interstate commerce at all. There are ice-cream parlors that are not on interstate highways. There are barbershops that have three chairs which do not cater to people moving back and forth across state lines. And I think it worth being concerned about barbershops. (Tonight I'm not talking about whom the barbershop caters to. We all remember hearing *ad nauseam* how difficult it is for a white barber to learn to cut Negro hair. But I can't believe we whites are wholly incapable of learning this skill. This seems to me a technological problem that we ought to be able to lick in time. Tonight, however, I'm more concerned about the converse of the problem.) In most cities, barbers' scissors do not seem to be handled by people who are not white. And the barbershop is only one of many very small businesses throughout the country which, collectively, employ hundreds and hundreds of thousands of people—far too few of whom are Negroes.

Moreover, even within the range of what the federal government constitutionally can reach, the most vigorous programs conceivable—programs designed by Clyde Ferguson and John Feild and administered by Herbert Hill—are not going to cover anything like the full sweep of possible federal fields of control. That, after all, is why the National Labor Relations Board set up jurisdictional limits.

My point is that "the limits of effective legal action" may be far broader when policed at the state level and yet again at the municipal level.

Now Mr. Hill has very challengingly asserted the ineffectiveness of local regulation—at least the ineffectiveness of state regulation. He hasn't really addressed himself to—although I'm sure it's included in his general indictment —the possibilities of municipal regulatory action. I respond immediately to this. I live in a city which is at this moment considering the establishment of a municipal commission which, among other things, would administer—within the city limits of New Haven—the state of Connecticut's fair employment, public accommodations, and fair housing laws. And the chief reason why it should be possible to persuade the New Haven Board of Aldermen to do this is because the Connecticut Commission on Civil Rights has not been able to do the statewide job that we would want it to do.

Why? Perhaps for many of these reasons adduced by Mr. Hill. But assuredly for the reason that nobody can police Connecticut on a biennial budget of $190,000.00 with a staff of four field investigators. Now those figures, I thought, were fairly pathetic, but they certainly don't look so bad when measured against the figures compiled by Messrs. Feild and Hill as to states which claim to be even larger than Connecticut. California, for instance.

Now are these meager budgets the fault of the California Commission or of the Connecticut Commission? Of course not. These budgets are, instead, an apt

measurement of our inability, as political communities, to elect legislators who will commit a meaningful quantity of tax dollars to support regulatory programs of this sort.

In short, if California has a staff of only 35 to 50 or whatever to administer its state antidiscrimination laws, that's because, collectively speaking, California doesn't really care very much about this kind of a program. Now there may be added problems—there may be internal problems of administration such as those Herbert Hill and John Feild have discussed, and my guess would be that much of this criticism is justified. For example, everything that John Feild said about how he would want to structure a state commission or a national commission seems to me entirely right. On the other hand—and here I am particularly concerned with the Hill paper—I want to file one important caveat.

Mr. Hill finds it significant that Pennsylvania and New York are—and are increasingly—centers of mass Negro underemployment and unemployment. The significance which Mr. Hill sees is that these are states which have been purporting to enforce their fair employment practice laws. The apparent "ergo" is that such laws are useless, or perhaps even counter-productive. But surely that is not the actual lesson to be drawn. Surely the existence of these agencies derives from the lack of employment opportunities—not vice-versa. And surely the lesson to be drawn is that the kind of regulatory apparatus we now have, structured in the fashion we're presently accustomed to, may be able to cope with certain symptoms, but not with deep-seated disequalibria in the labor market. Actually, I doubt that Mr. Hill seriously contends that his data support a graver indictment—*i.e.*, that the law is generically incapable of developing institutions adapted to meeting these exigent moral and economic issues. Indeed, the *Sheet Metal Workers* case,[1] to which Mr. Hill devotes considerable attention, is itself a demonstration that, properly activated, the existing New York Commission can act with significant impact at least at the level of symptomology.

Now, having said that, there is, of course the very real possibility that Herbert Hill is right in the larger sense, namely, that we are talking about a range of problems that are only partially, and haphazardly, within the effective limits of the law at whatever level we are applying the law—federal, state, municipal, or what have you.

And I suspect that this is true. I suspect that we are talking about problems which, since most of us gathered here are lawyers, we would like to analyze and criticize in terms of how can we sharpen up administration, how can we get more administrators—more mine inspectors as John Feild put it so well—and get the job done better. But surely, when we are talking about a major reorientation of our economy, we are really talking about problems that go beyond the scope of regulatory law as conventionally conceived.

We are looking, in short, for new kinds of initiative, not to supplant but to supplement our ordinary regulatory institutions. Now, to give one closest to

1. Lefkowitz v. Farrell, C-9287-63 (N.Y. State Comm'n for Human Rights, 1964).

the governmental standard, I refer you just by chance to the fact that Yale University, under its new President, Kingman Brewster, has established its own private equal opportunity panel. This panel—which is, I may add, still awaiting the filing of its first complaint—is charged with the duty of adjudicating complaints about discrimination in the employment practices of the University, and also in the employment practices of contractors working on substantial Yale building programs. In short, we have a fair-sized corporation engaged in policing its own employment practices and those of enterprises over which it has significant economic leverage. And this private apparatus supplements the existing governmental machinery operative in Connecticut.

But all this, you may properly say, is just another form of governmental mechanism—differing from standard models only in the sense that it happens to be run by a nominally private entrepreneur.

So, you may argue, it is not enough to lengthen our stride a few inches; what we must do is to walk in different paths up steeper mountains. And in a very real sense this is incontrovertible: Today we have to devise new techniques of teaching scores of new skills and disciplines—and we must radically improve existing techniques of teaching the established ingredients of a good education. We have to accelerate the pace of our thinking about the impact of automation on those already in the labor market. And—hopefully—we have to plan the phased readjustment of a defense-oriented economy to one which is at once more variegated and more generally productive. All these, surely, are economic adaptations which are far beyond the scope of anything that the New York State Commission or the Connecticut Commission can decree or that the President of Yale or the President of the United States can by executive order ordain and establish.

In short, we're looking for imaginative, creative action—public and private —which requires legislation or money (and probably both) and which has as a chief objective fitting people to the useful and rewarding jobs likely to exist one and two decades hence. To revert to a single mundane example on the local level I happen to be familiar with, New Haven now has in being a real retraining program producing the kind of technicians John Feild mentioned the growing need for. Under this program men and women, both white and black, who now have neither skills nor jobs, are acquiring both in a matter of months. Today this is a pilot program administered by Community Progress Inc. and financed by the Ford Foundation. But if it proves itself—and there is good reason to believe it will—I have little doubt that New Haven and hundreds of comparable communities will, with federal support, undertake programs of this kind as long-term municipal endeavors. (Please understand that my frequent references to New Haven are not solely the product of a parochial pride fertilized by wider ignorance. My real point is that programs manageable by one medium-sized city are duplicable by hundreds of others).

What conclusions do we come to, then, as to the effective limits of the law

in dealing with the problems of racial discrimination in employment? We know, from what Messrs. Hill and Feild have taught us, something of what needs to be done to improve the fair employment practice commissions which are already in being. The fact that improvements—very likely radical improvements—are in order should not surprise us: after all, in terms of our political-historical perspective, these two-decade old regulatory mechanisms are still very new. But what of the apparent fact that all the innovations we can think of will not enable these commissions to make serious inroads on the dearth of good jobs which confronts millions of Negroes now in and shortly to enter the labor market? When we reach the conclusion that we must, simultaneously, pursue far bolder and far more comprehensive programs, are we saying that the law as we have conventionally understood it is ineffective? Not at all.

I think the more accurate assessment is this. The process we are witnessing —and participating in—is the extension and ramification of law. Thus, I think we can agree that chief among the antecedent causes of this conference is the fact that ten years ago the Supreme Court decided the *Segregation Cases*. To be sure, that was, strictly considered, law of a very different order from the detailed and systematic regulatory legislation which is the focus of our present agenda. That was law speaking in the simple, non-meticulous idiom of the Constitution—law saying to government, "You can't treat people this way any longer." But it was law which has implications far beyond that negative command. That negative command has forced back on all of us collective political responsibility to go out and do affirmative things to right the ills of our democracy. That's why, at the national level, there have been two Civil Rights Acts—in 1957 and 1960;—and why this summer we will get a far more comprehensive Civil Rights Act; and why, in turn, the Civil Rights Act of 1964 will in three or four years time seem ripe for amendment.

Paralleling this positive regulatory legislation there must and will be a wide range of supplementary efforts, both public and private: poverty programs in Harlem and Appalachia; Ford grants to community colleges in Yakima, Sheboygan and Raleigh; self-starting neighborhood groups in Buffalo, Washington and Chicago's South Side.

It's very easy for us, as lawyers, to sit and devise better ways of structuring existing political institutions such as the state antidiscrimination commissions. I hope we do it. I hope we can follow this up by persuading legislators to bet some tax money on it. I hope we can get some better legislators and some reapportioned legislators. (In fact, while we're talking about discrimination in employment, perhaps state legislatures would be a good place to start widening Negro job opportunities.) Better and more responsive legislatures can be expected to provide not half or three-quarters of a million dollars but five or ten million to back up the efforts of a state commission policing a medium-sized state.

It may prove far harder to move our political communities in the ways

they must be moved to invest hundreds of millions of dollars in education and retraining programs and the whole gamut of other necessary ameliorative programs. These, it seems to me, are the things we have to do in addition to the things we are talking about tonight. I have no recipe. In closing I suggest only that there is a paramount fact we cannot escape: as we enter the second century of the Negro's emancipation the most important problem he confronts is how to get back in the labor market.