Carton 11:33 THE BROTHERHOOD of SLEEPING CAR PORTERS "The California FEPC: Stepchild of the State Agencies" 1965

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NOTES

The California FEPC: Stepchild of the State Agencies

The 1959 California Fair Employment Practice Act[1] declares that it is "the public policy of this State . . . to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, or ancestry."[2] To effectuate that policy, a Division of Fair Employment Practices (FEPC)[3] was created within the Department of Industrial Relations[4] and empowered to prevent unlawful employment practices.[5] This Note examines the effectiveness of the FEPC in carrying out California's fair employment policy.[6] A description of the organization and functioning of the Agency is followed by an analysis of the need for increased resources and changes in Agency policy and the law. The Note concludes that the FEPC cannot fully implement fair employment without increased resources and broader powers.[7]

I. Personnel and Functions of the FEPC[8]

A. *Commissioners and Staff*

The FEPC is headed by seven part-time commissioners who are appointed by

1. Cal. Labor Code §§ 1410–32.
2. Cal. Labor Code § 1411.
3. "FEPC" is used to refer to the Agency as a whole, including both commissioners and staff.
4. Cal. Labor Code §§ 50, 56.
5. Cal. Labor Code § 1421.
6. No attempt is made to evaluate the FEPC's role in the enforcement of antidiscrimination policy in the field of housing, a function also vested in the Agency. Cal. Labor Code § 1419.5. While technically still a responsibility of the FEPC, this function has been dramatically reduced by the passage of the Proposition 14 initiative in November 1964, which amended the California constitution to give owners of private housing absolute discretion as to whom they choose to rent or sell.
7. This study was made possible by a grant from the Justin Miller Endowment Fund. The primary source material is a series of thirty-nine interviews conducted from December 1964 through March 1965 with FEPC commissioners and staff, businessmen, management representatives, labor leaders, employment agency personnel, leaders of civil rights and minority groups, attorneys, legislators, and others familiar with the problems of fair employment. The writer gratefully acknowledges the time and assistance rendered by those interviewed. The sources of some interviews have been kept confidential at the request of interviewees. In other instances the writer has exercised discretion in keeping in confidence the sources of certain facts, statements, or opinions that might prove embarrassing to interviewees.
8. For an excellent description of the functioning of state FEPC's in general see Note, 74 Harv. L. Rev. 526 (1961). Other less comprehensive descriptions are found in 2 Emerson & Haber, Political and Civil Rights in the United States 1451–83 (2d ed. 1958); Norgren & Hill, Toward Fair Employment 93–113 (1964); Staff of Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 82d Cong., 2d Sess., State and Municipal Fair Employment Legislation (Comm. Print 1952); Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 Cornell L.Q. 747 (1950); Kovarsky, *A Review of State FEPC Laws*, 9 Lab. L.J. 478 (1958); Rosen, *The Law and Racial Discrimination in Employment*, 53

the Governor[9] and are responsible for all major policy decisions of the Agency as well as for the disposition of individual cases.[10] Individual commissioners conduct the necessary conciliation conferences in assigned cases, but final decisions are approved by the Commission as a whole. Commissioners devote seven to ten days a month to FEPC activity, about 60 per cent of which is devoted to handling individual complaint cases.[11]

The present commissioners represent a fair cross section of the interested public. Three commissioners are from Northern California and four are from Southern California. The only Negro commissioner is also an official of the NAACP and of the Brotherhood of Sleeping Car Porters; a Spanish surname[12] commissioner is an attorney and an official of the Mexican-American Political Association; another commissioner is an official of the Urban League and vice-president of a major aircraft corporation. Other commissioners include a real estate executive, a small-businessman, a former county supervisor, and a woman who has been active in social work.

The fifty-member professional staff of the Agency is divided about evenly between the main office in San Francisco and the southern area office in Los Angeles, although additional one-man offices have been maintained in Fresno and San Diego since 1963. The staff is headed by three administrators appointed by the Governor—the Chief, Assistant Chief, and Special Representative. The remaining forty-seven staff positions are civil service jobs[13] and include a two-man legal staff, five persons in educational work, a northern and a southern area supervisor, about twenty consultants who do the investigating and field work, and clerical employes.[14]

CALIF. L. REV. 729, 775–81 (1965); Tobriner, *California FEPC*, 16 HASTINGS L.J. 333 (1965); 68 HARV. L. REV. 685 (1955); 36 NOTRE DAME LAW. 189 (1961); 5 RACE REL. L. REP. 569, 582–92 (1960).

9. CAL. LABOR CODE § 1414. Commissioners are paid on a per diem basis, CAL. LABOR CODE § 1416, and meet at least once a month, CALIFORNIA FEPC, MANUAL OF POLICY § 600.1 (1964) [hereinafter cited as MANUAL].

10. CAL. LABOR CODE §§ 1418–19, 1421–26.

11. *Hearings Before California Senate Fact Finding Subcommittee on Race Relations and Urban Problems*, Jan. 20, 1965, at 12 (testimony of Clive Graham, Chairman, FEPC) [hereinafter cited as *Graham Testimony*].

12. Spanish surname is used to designate all white persons with Spanish surnames, as defined by the United States Bureau of the Census. White persons comprise 97.5% of all persons with Spanish surnames in California. CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME 53 (1964).

13. When the FEPC was first created, staff positions were filled on a temporary appointment basis. The result was a series of political appointments of staff members who offended respondents by their overzealous approach. Interviews With Commissioners and Staff, FEPC, Dec. 1964 to March 1965. All hiring is now done through normal civil service channels; the present field staff has learned that it makes more progress without militance. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

14. About 40% of the staff are minority group members. This has led critics of the FEPC to charge that its hiring policies discriminate against nonminorities, Interview With Hon. Jack Schrade, State Senator, in Sacramento, Feb. 3, 1965, a charge also made by some civil rights leaders who see the practice as a coverup for the lack of minorities in other state agencies, Interview With Harry Bremond, Vice-President, South San Mateo NAACP, in Palo Alto, Feb. 5, 1965. However, although the FEPC does exercise greater control over its personnel selection than other state agencies, it is more likely that the high percentage of minority staff is attributable to other circumstances: minority persons are typically well qualified for FEPC work because they are sensitive to discrimination that would escape other investigators; they are by and large exceptionally qualified to deal personally with minority complainants, showing understanding and instilling confidence; furthermore, such persons are attracted by the very nature of the Agency's work. In addition, 9.1% of California's population is of Spanish surname

B. *Agency Functions*

FEPC activities can be broadly categorized as educational activities and compliance activities. The former are designed to inform persons of the law and their rights and obligations under it. The latter are used to induce or, where necessary, compel compliance with the law.

1. *Educational activities.*

In a sense, every activity the FEPC undertakes is educational. For example, even when the Agency is negotiating with respondents in compliance procedures, it is attempting to educate them and influence others. However, the Agency also carries out a special program of dissemination of information about fair employment and the law. The 10 per cent of the present budget allocated for this educational program must pay the salaries of the five persons working on the program, as well as printing, postal, and other incidental expenses.[15] Educational efforts are devoted mainly to producing pamphlets, folders, posters, and newsletters, many of which are designed to serve the FEPC's special publics. One publication, for example, explains the law to management, while another is aimed at motivating young minority persons to strive for higher attainment. At least one publication is printed in Spanish, *Usted tiene el derecho* ("You have the right").[16] Another notable pamphlet is *Promoting Equal Job Opportunities*, which offers detailed suggestions to employers for making equal opportunity a reality in their work force. This pamphlet lists minority radio and television stations and newspapers, and encourages employers to take such affirmative steps as advertising in these media and making their job needs known to minority organizations, such as the NAACP, the Jewish Vocational Service, or the Council of Mexican-American Affairs. Publications are distributed to a comprehensive management mailing list obtained from the FEPC's parent Department of Industrial Relations.[17]

The FEPC also distributes filmstrips, exhibits, and special reports, and maintains a speaker service. Many staff members take a personal interest in this aspect of their work and go far beyond their job requirements in carrying the message of fair employment to the community. This is particularly true of the Spanish surname consultants, who carry an integrated caseload[18] and often take on a heavy educational burden in the Spanish surname community as well.[19]

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descent and 4–5% of the FEPC's individual complaints originate in the Spanish surname group. CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME 5 (1964); Vega, FEPC and the Mexican-American Community, Nov. 12–15, 1964, at 1, on file with *Stanford Law Review*.

15. Interview With Mrs. Betty Miller, FEPC Staff, in San Francisco, Feb. 2, 1965.

16. More publications in Spanish are needed—in the idiom rather than simply translations of materials in English. See Vega, *op. cit. supra* note 14, at 6.

17. Interview With Lloyd Zimpel, Assistant Education Officer, FEPC, in San Francisco, Jan. 22, 1965.

18. An integrated caseload is one in which the consultant handles both Spanish language and non-Spanish language cases.

19. The effectiveness of the dedication of these Spanish surname consultants may be measured by the fact that the Spanish surname caseload, after remaining relatively constant for several years, nearly doubled (from 31 to 57) in 1963 after Consultant Vega had been added to the Los Angeles staff. Interview With Thomas Talavera, Deputy Labor Commissioner, California Department of Industrial Relations, in Los Angeles, March 18, 1965.

2. *Compliance procedures.*

The California FEPC follows compliance procedures closely analogous to those used by its counterparts in other states.[20] There are three types of compliance procedures—individual complaints, section 1421 investigations, and affirmative actions. The individual complaint is the usual compliance procedure. It is typically begun by an individual worker, although complaints may also be initiated by the Attorney General or an employer. The 1421 procedure is used in the absence of an individual complaint when the Agency makes an investigation prompted by a belief that discrimination exists. The affirmative action procedure may begin at the initiative of the Agency or of an employer, labor union, or employment agency. It differs from the 1421 investigation in that it does not presuppose the existence of discrimination and is used only with the consent and cooperation of the party to the action.

Individual complaints. Individual complaints account for approximately 90 per cent of the consultants' time and 60 per cent of the commissioners' time.[21] About seventy-four complaints a month were received in 1963–1964.[22] Complaints may be filed by any person claiming to be aggrieved, by the Attorney General, or by an employer whose employes refuse or threaten to refuse to abide by the law.[23] The power of the Attorney General to file a complaint has been used only twice.[24] This power enables the FEPC to acquire enforceable jurisdiction in the absence of an individual complaint; it may be used when the Attorney General or the FEPC believes discrimination exists but the respondent refuses to cooperate in a 1421 investigation or an affirmative action. The procedure puts the Attorney General in the position of a complainant rather than that of prosecutor, and the FEPC handles the case as if it were an individual complaint. There is no evidence in available FEPC statistics that an employer has ever filed a complaint.[25]

When an individual files a complaint, he is interviewed by an FEPC consultant. The consultant's first job is to eliminate obviously ill-founded charges, and he is expected at this stage "to exercise reasonable discretion in determining whether or not a complaint should be accepted."[26] The facts are obtained and set down in writing—often the consultant has to articulate the problem for complainants with poor powers of expression. The complaint is then submitted to the

20. Twenty-two states, beginning with New York in 1945, have passed fair employment legislation having enforceable sanctions. The California law is patterned after the New York law, as are the laws of most of the twenty-two states. See NORGREN & HILL, *op. cit. supra* note 8, at 93–94; 36 NOTRE DAME LAW. 189, 193 (1961).

21. *Graham Testimony* 12.

22. *Id.* at 8.

23. CAL. LABOR CODE § 1422.

24. On one occasion this was at the initiative of the Attorney General's Los Angeles office against a municipality (case closed for insufficient evidence of discrimination), and on a second occasion at the request of the FEPC against a large San Francisco retail store (case pending). Letter From Charles E. Wilson, Senior Legal Counsel, FEPC, to Robert N. Baker, Deputy Attorney General, March 16, 1965, on file with *Stanford Law Review*.

25. See 1959–1960 CALIFORNIA FEPC REP. 16; 1961–1962 CALIFORNIA FEPC REP. 17; 1963–1964 CALIFORNIA FEPC REP. ——.

26. MANUAL § 100.2. This policy was clarified by a bill passed in 1965 amending CAL. LABOR CODE § 1423 to read that a complaint must allege "facts sufficient to constitute a violation of any of the provisions of Section 1420 . . . ," the section defining unlawful employment practices. Cal. Stat. 1965, ch. 1462, § 1.

complainant for his signature. It must be served upon the respondent at the time of initial contact or within forty-five days, whichever occurs first.[27]

At this point, complaints are handled according to a set of priorities[28] made necessary because each consultant presently has an average pending caseload of almost thirty-six cases.[29] These priorities can be set out as follows: (1) Fresh cases are preferred because they are generally more successful than cases of discrimination that occur weeks or months before a complaint is filed. (2) Cases that promise to open up greater numbers of job opportunities tend to get assigned a higher priority. (3) Various other factors, such as an impending discharge of a complainant, may demand priority.[30]

Each complaint is assigned to a commissioner and a consultant for investigation into whether there is probable cause to believe that discrimination has occurred.[31] The consultant's function is primarily to gather the facts and present them to the commissioner, who is responsible for the decision on probable cause. The concept of probable cause is difficult to define precisely. One FEPC consultant describes it as "trying to find objective standards to apply to subjective circumstances."[32] The difficulty arises because discrimination occurs in many elusive ways and legal proof of discrimination presents difficult problems, such as determining the weight to be given the fact that an employer, who hires a work force of several hundred out of a community that is 30 per cent Negro, employs only two Negroes.[33] Nevertheless, the vagueness of the probable cause concept makes it a flexible tool in the hands of a commissioner. By loosening the standard he can lower the high percentage of complaints dismissed for insufficient evidence of discrimination.[34] By tightening it he can cut the Agency's caseload, perhaps to allow the Agency to devote its resources to cases that may be expected to produce a higher return in terms of job opportunities, or perhaps only to disguise his own personal timidity. This flexibility is at the base of accusations by some civil rights leaders that commissioners for political reasons stifle staff work by not proceeding with certain cases. The Commission does, as one commissioner acknowledges, "exert a leavening influence" on the staff.[35] But whatever use—conscious or unconscious—a commissioner makes of the flexible probable cause stan-

27. Cal. Stat. 1965, ch. 1461, § 1.

28. Interview With Arthur Padilla, Consultant, FEPC, in San Francisco, Feb. 11, 1965.

29. These break down as follows: 28 individual complaints, 2.6 section 1421 investigations, 2 affirmative actions, and 3.2 housing complaints. *Graham Testimony* 11.

30. Housing cases, when the FEPC had greater responsibilities in that field, see note 6 *supra*, also received priority. Once a house is sold, it is too late for any sanction available to the FEPC to be effective since real estate is unique. An employer, however, is not only likely to have a number of jobs available, none of which have the uniqueness of real property, but he is also likely to have openings occurring frequently.

31. The probable cause concept is embodied in the language of CAL. LABOR CODE § 1421, authorizing the commissioner to proceed with the conciliation conference if "further action is warranted . . ." as a result of the investigation. A 1965 amendment to CAL. LABOR CODE § 1423 clarifies this somewhat by authorizing the investigation "where warranted by the evidence . . . ." Cal Stat. 1965, ch. 1462, § 1.

32. Interview With Arthur Padilla, Consultant, FEPC, in San Francisco, Feb. 11, 1965.

33. See generally Note, 17 U. CHI. L. REV. 107 (1949).

34. Most recent statistics show that 60–70% of individual complaints filed are dismissed for insufficient evidence. See 1963–1964 CALIFORNIA FEPC REP. ——.

35. Interview With Louis Garcia, Commissioner, FEPC, in San Francisco, Jan. 26, 1965.

dard, it undoubtedly varies significantly from case to case and commissioner to commissioner.

In each investigation a pattern check is sought as a matter of policy.[36] A pattern check is a survey of the percentage and distribution of minority employes made either visually or by examining respondents' records. While never conclusive, the pattern check is a highly relevant indicator of the extent of conscious or unconscious discrimination.[37] Investigators may also interview respondents' employes and take all reasonable steps required for proper investigation.[38] Among other things, investigators are directed to ask nongovernmental respondents if they hold contracts with the state or federal government.[39] This procedure partakes of the nature of a sanction. While the Agency disavows using government contracts as a lever to pressure respondents,[40] the reminder of the nondiscrimination clause in such contracts keeps the government contract holder conscious of the threat of losing what may be a major customer.[41]

If upon completion of the investigation the commissioner does not find probable cause, the complaint is dismissed and the complainant may appeal to the full Commission.[42] Notice of dismissal at this or any other point in the proceedings must be communicated to the respondent.[43] In all cases in which probable cause for discrimination is found the Agency proceeds to a conciliation conference with the respondent.[44] This is normally conducted by the assigned commissioner, although he may delegate the authority to certain high-ranking staff members.[45] The object of the conference is to convince the respondent not only to redress the complainant's grievance but also to end any other questionable practices and engage in affirmative cooperation in the future. The approach of each commissioner and the results he obtains vary, but all commissioners aim at inducing a cooperative attitude on the part of the respondent. Since few are willing to admit they discriminate, most respondents are amenable to solutions suggested by the Agency. Thus in more than 99 per cent of cases the conciliation conference succeeds in producing an agreement between the Agency and the respondent.[46] The terms of this agreement are sent to the complainant;[47] if he is dissatisfied with the

36. MANUAL § 112.1.

37. For an excellent analysis of the problems involved in the use of such sociological evidence as legal proof of discrimination see Note, 17 U. CHI. L. REV. 107 (1949).

38. MANUAL § 104.1.

39. MANUAL § 104.5. Investigators also ask to examine pattern check forms used by firms participating in the "Plans for Progress" program with the federal government. MANUAL § 112.2.

40. Interview With Hugh Taylor, Consultant, FEPC, in San Francisco, Feb. 25, 1965.

41. The effectiveness of this sanction, however, may be tempered by the probable nonenforcement of government nondiscrimination clauses. No enforcement cases have come to the writer's attention and it seems unlikely that governments would ever withdraw contracts on grounds of discrimination, especially from such industries as defense and public utilities.

42. 8 CAL. ADMIN. CODE § 19003. Title 8 compiles the rules and regulations issued by the FEPC pursuant to its authority under CAL. LABOR CODE § 1427.

43. Cal. Stat. 1965, ch. 1464, § 1.

44. The commissioner must endeavor "to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion." CAL. LABOR CODE § 1421. In 1965 the legislature added CAL. LABOR CODE § 1421.1, which directs the Agency to inform the respondent whether a particular discussion, or portion thereof, is part of the nondisclosable conciliation conference or of the investigative process. Cal. Stat. 1965, ch. 1463, § 1.

45. MANUAL § 105.1.

46. See *Graham Testimony* 5.

47. 8 CAL. ADMIN. CODE § 19003(d). MANUAL § 105.6 purports to give the commissioner discre-

results of the conciliation conference, he may appeal to the full Commission.[48]

Should the conciliation conference fail to effect compliance by the respondent, the investigating commissioner can have an accusation issued in the name of the FEPC, thus bringing the case to public hearing.[49] Hearings are to be conducted in accordance with the Administrative Procedure Act.[50] The investigating commissioner may not participate in the hearing, except as a witness, or in the deliberations on the case, nor may he give his opinion on the merits of the case.[51] The Commission makes findings of fact and either dismisses the case or issues a cease and desist order which may require the respondent to take various affirmative steps.[52] Dismissals and orders are subject to judicial review,[53] but such review is not limited to whether the Commission's findings were supported by substantial evidence, as in most states. Instead, California allows the reviewing judge to examine the evidence and to determine whether in his opinion the decision accorded with the weight of the evidence.[54]

To date, only three cases have been taken to hearing.[55] The Commission found discrimination in each case, but all three were reversed on appeal to the Superior Court.[56] Obviously the hearing process plays an insignificant part in the work of the Agency and seems useful primarily as a sanction to induce compliance at an earlier stage. This sanction could be made more powerful by limiting judicial review to a consideration of whether the record contained substantial supporting evidence. But even though a respondent under present law might anticipate having an adverse hearing decision reversed on appeal, he would quite likely wish to avoid the expense and publicity of a hearing. This in itself is a powerful incentive to earlier settlement. Moreover, experience in other states where review of FEPC decisions is more limited indicates that the hearing process is used no more than in California.[57]

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tion whether to furnish this information to complainant in writing or not, but the regulations calling for a written statement are apparently followed. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

48. 8 CAL. ADMIN. CODE § 19003(e). As an example of results that might be unsatisfactory to the complainant, the case may be considered adjusted by the Agency when complainant is not hired or upgraded but the respondent makes a significant improvement in his employment pattern or modifications of his application forms. See MANUAL § 110.5. Presumably this sort of adjustment would only be acceptable to the Agency in cases in which there was no provable case of discrimination against the complainant.

49. CAL. LABOR CODE § 1423; 8 CAL. ADMIN. CODE § 19004; MANUAL § 111.1 (issuance at discretion of assigned commissioner after consultation with Legal Counsel and Division Chief). See also 8 CAL. ADMIN. CODE §§ 19006(t) (withdrawal of accusation), 19010 (service of accusation).

50. CAL. LABOR CODE § 1424, as amended, Cal. Stat. 1965, ch. 967, § 1.

51. CAL. LABOR CODE § 1425, as amended, Cal. Stat. 1965, ch. 967, § 2.

52. CAL. LABOR CODE § 1426. Such steps might include hiring, reinstating, or upgrading the employe and making up back pay.

53. CAL. LABOR CODE § 1428.

54. Atchison, T. & S.F. Ry. v. FEPC, 7 RACE REL. L. REP. 164, 167 (Los Angeles Super. Ct. 1962), citing Thomas v. California Employment Stabilization Comm'n, 39 Cal. 2d 501, 247 P.2d 561 (1952), and Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 136 P.2d 304 (1943).

55. Matter of Guy F. Atkinson Co., 7 RACE REL. L. REP. 280 (1962); Matter of T. H. Wilton Co., No. SF-1, FEP 60-A239, July 18, 1961; Matter of Atchinson, T. & S.F. Ry., 6 RACE REL. L. REP. 332 (1961).

56. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965. The opinion of the Los Angeles Superior Court in the Atchison, T. & S.F. Ry. case is reported in 7 RACE REL. L. REP. 164 (Los Angeles Super. Ct. 1962).

57. See 68 HARV. L. REV. 685, 686–87 (1955). The experience of the seven FEPC's on which that study was based indicated that only 8 of over 6,000 complaints filed in the various states had ever come to hearing.

The time required for handling complaints varies immensely from case to case, but presently averages about four months.[58] Complaints are occasionally lodged against employers who are already engaged in an affirmative program of cooperation with the FEPC in promoting equal employment. A phone call is usually enough to solve such problems. Here the company rather than the FEPC staff investigates; typically a misunderstanding on the part of lower line personnel is found, and the company redresses the complainant's grievance within hours. But in cases in which the Agency meets resistance in gathering information or where extensive investigation is needed to clarify other areas of apparent discrimination revealed by the investigation, field work may extend over many months. Frequently the Agency is forced to choose between a speedy settlement of an individual complaint and prolonged efforts to open up an entire firm instead of just a single job. The complaint is the Agency's opportunity to get its foot in the door; when a case is settled, the FEPC no longer has jurisdiction and its opportunity to settle larger problems within the firm is lost. Thus, extended cases may reflect greater long-run employment opportunities than quickly settled cases that leave the broader problem of respondents' overall policies untouched.

The 1421 investigation. The second type of FEPC compliance procedure is named for the section of the act that authorizes it. Section 1421 of the Labor Code empowers the FEPC to prevent unlawful employment practices by investigation and conciliation, even in the absence of a complaint, but provides no enforceable sanctions in such an action. The standard for undertaking such an investigation is variously stated as: "when it shall appear . . . that an unlawful employment practice may have been committed,"[59] upon "presentation of reasonable evidence by a credible source,"[60] or upon a "showing of substantial evidence indicating a probable violation."[61] Similarly, the obligation to undertake the investigation once the applicable standard has been satisfied is not altogether clear. The statute appears to require an investigation, stating that once it appears that an unlawful employment practice may have been committed "the chairman . . . *shall* designate one of the commissioners to make . . . prompt investigation in connection therewith."[62] However, the FEPC policy manual indicates that such an investigation *may* be initiated;[63] and that is apparently the basis upon which the Agency acts. Many 1421 investigations are not undertaken due to lack of manpower. The commissioners believe it is better not to open the investigation at all than to make an ineffective one.[64] While this may be a wise policy, it is questionable whether the law allows such discretion.

The investigation and conciliation procedures in a 1421 case are conducted like the individual complaint. However, 1421 cases are normally concerned with large numbers of jobs and thus take substantially longer to settle than the typical individual complaint case, the average time to date being eleven months.[65] While

58. *Graham Testimony* 11.
59. CAL. LABOR CODE § 1421.
60. MANUAL § 107.2.
61. *Graham Testimony* 6.
62. CAL. LABOR CODE § 1421. (Emphasis added.)
63. MANUAL § 107.2.
64. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.
65. *Graham Testimony* 11.

the FEPC has no enforcement power in a 1421 investigation, few respondents are recalcitrant and it is possible to refer cases to the Attorney General with a request that he file an enforceable complaint.[66] About half of the 103 section 1421 investigations initiated prior to December 1964 were still pending at that date.[67]

Affirmative actions. The term "affirmative actions" can be used to describe all FEPC activities in which the Agency goes beyond the allegations of the particular complaint to encourage respondents to undertake positive programs, such as recruiting employes by advertising in minority news media. In this sense the affirmative action procedure overlaps certain aspects of the education program, as well as the individual complaint and section 1421 compliance procedures. Nonetheless, the term is also descriptive of the third and final type of compliance activity in which the FEPC engages.[68]

Even though classified as a compliance activity, the affirmative action, unlike the other compliance activities, does not presuppose any violation of the law. An affirmative action program may begin on the initiative of an employer, perhaps when he is pressured by civil rights groups[69] or when, for reasons of social conscience or business judgment, he decides to embark on such a program. A program may also be initiated by the FEPC, but only with the employer's consent. Less commonly, affirmative actions involve labor unions or employment agencies, on either their own initiative or the FEPC's. Usually affirmative actions are initiated when some combination of three circumstances is present: (1) an employer controls a large number of jobs; (2) new opportunities for widespread employment arise, as in new plant openings or old plant expansions; and (3) a seriously deficient situation in terms of percentage and distribution of minority employes is discovered. Affirmative actions also encompass setting up local human rights commissions and working with other state agencies to eliminate discrimination.[70]

One consultant in each of the major offices works exclusively in the field of affirmative actions. This type of activity has become a major undertaking only

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66. See CAL. LABOR CODE § 1422; 8 CAL. ADMIN. CODE §§ 19001(c), 19002(a)(2). This procedure has been rarely used, however. See note 24 *supra* and accompanying text.

67. *Graham Testimony* 7.

68. The FEPC considers the authority to engage in affirmative compliance procedures to be implicit in the act. *Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 258 (1963) (testimony of Edward Howden, Chief, California FEPC). Moreover, ample authority seems explicit in the act's mandate to "prevent unlawful employment practices." CAL. LABOR CODE § 1421.

69. The most widely publicized case of this nature occurred when the Bank of America, following criticism by the San Francisco Congress of Racial Equality, offered to turn over employment statistics to the FEPC. The bank and the FEPC worked out a landmark "Memorandum of Understanding" providing for detailed submission of personnel data and implementation of fair employment programs in many areas, including hiring, recruiting, training, and promotion, with a continuing critical review by the Agency. A comprehensive collection of information and documents covering the entire episode is available from the bank. Bank of America, Bank of America and the Congress of Racial Equality (1964). The first report by the FEPC on the bank's progress indicates a 37% increase in Negro personnel in the first three months. 1 CALIFORNIA FEPC, BANK OF AMERICA EMPLOYMENT PRACTICES REP. 5 (1964).

70. Interview With Hugh Taylor, Affirmative Actions Consultant, FEPC, in San Francisco, Feb. 25, 1965. CAL. LABOR CODE § 1419(h) specifically authorizes the FEPC to sponsor local advisory agencies and conciliation councils. To date, only two such bodies have been set up under FEPC auspices, in northern San Mateo County and in Palo Alto, the latter at the request of local citizens. Palo Alto Times, April 6, 1965, p. 1, cols. 5–8. Other such agencies have been established by local authorities independent of the FEPC. Interview With Sidney Worthington, Chairman, Advisory Council, San Francisco Human Rights Commission, in San Francisco, Feb. 19, 1965.

within the past two years[71] and experience indicates that these cases take about as long to complete as section 1421 investigations.[72] Thirty-nine such efforts have been undertaken, most of which were still in progress as of December 1964.[73] The opinion is apparently unanimous within the Agency and nearly so with interested outside observers that this type of activity is by far the most efficient and productive use of FEPC time and resources.

II. Problems and Potential Improvements

Most of the problems and potential improvements of the California FEPC that can be discussed fall into four broad categories: the inadequacy of staff and budget; the need for new legislation; the need for changes in Agency policy; and general political considerations.[74]

A. *The Inadequacy of Staff and Budget*

Starvation of an agency after its creation is an easy way to destroy its potency while appearing to support its goals. Although the 640,000 dollars currently available to the California FEPC compares favorably with allocations in other states,[75] the pressing need for more resources to devote to the antidiscrimination struggle is a subject on which all but the Agency's enemies can reach a rare unanimity. The Agency Chief considers present understaffing the greatest barrier to a more effective FEPC.[76] The commissioners agree.[77] Civil rights leaders' estimates of the FEPC's actual budget needs range from a four-[78] to a twenty-five-fold[79] increase in present resources. Although the Agency's officials and its literature all proclaim the backing of the state government,[80] budgetary requests are regularly

71. Interview With Louis Garcia, Commissioner, FEPC, in San Francisco, Jan. 26, 1965.

72. *Graham Testimony* 11.

73. *Id.* at 7.

74. For other criticisms and suggestions for improving FEPC's see Konvitz & Leskes, A Century of Civil Rights 215–18 (1961); Lucks, FEPC—Role & Philosophy, Nov. 1, 1964, at 5–7, on file with *Stanford Law Review*; Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 Cornell L.Q. 747 (1950); Field, *Hindsight and Foresight About FEPC*, 14 Buffalo L. Rev. 16 (1964); Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 Buffalo L. Rev. 114 (1964); Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 Buffalo L. Rev. 22 (1964); Kovarsky, *A Review of State FEPC Laws*, 9 Lab. L.J. 478 (1958); Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 Buffalo L. Rev. 100 (1964); 68 Harv. L. Rev. 685 (1955); 17 U. Pitt. L. Rev. 438 (1956).

75. Apparently only New York, the original FEP state and the one FEP state of a size comparable to California, has devoted more money to fair employment than California. The New York Commission, however, also has jurisdiction over public accommodations. In 1963 the New York budget was about $2 million, *Hearings, supra* note 68, at 272 (testimony of Henry Spitz, General Counsel, New York State Commission for Human Rights), as compared with about $200,000 in Ohio, 5 Ohio Civil Rights Comm'n Ann. Rep. 34 (1964), $48,000 in Missouri, *Hearings, supra* note 68, at 272 (testimony of Milton Litvak, Acting Chairman, Missouri Commission on Human Rights), and $2,000 in New Mexico, 13 New Mexico FEPC Ann. Rep. 15 (1961).

76. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.

77. *Graham Testimony* 14. Commissioner Brombacher estimates the Agency could use at least double its present staff just in the urban areas where its main offices are located. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965.

78. Interview With Dr. Thomas Burbridge, Former President, San Francisco NAACP, in San Francisco, Feb. 9, 1965.

79. Interview With Michael Myerson, Cochairman, Ad Hoc Committee to End Discrimination, in San Francisco, Feb. 26, 1965.

80. See, *e.g.*, California FEPC, Fair Employment Newsletter, July–Aug. 1960.

trimmed from 25 to 75 per cent, which includes cuts by both the executive and the legislature.[81] In the words of Dean Pollak of the Yale Law School, this is

> an apt measure of our inability, as political communities, to elect legislators who will commit a meaningful amount of tax dollars to regulatory programs of this sort.
>
> In short, if California has a staff of only 35 to 50 to administer its state anti-discrimination laws, that's because, collectively speaking, California doesn't really care very much about this kind of program.[82]

1. *Part-time commissioners and staff responsibility.*

One advantage in having community leaders as part-time commissioners is that they command respect in the community apart from their FEPC work. Such stature is vital to an agency such as the FEPC, which must rely heavily on cooperation. It would seem even more advantageous to have full-time commissioners who could continuously bring their community prestige to bear. This advantage would result, of course, only if a commissioner's community status were such that it would not diminish once he left his non-FEPC position. Carryover of prestige could be enhanced by limiting commissioners to a single four-year term,[83] although some difficulty might arise in finding community leaders willing to give up an established position in a business or profession to accept a full-time, nonrenewable FEPC appointment. A more important problem, however, is the practical reality of the present 640,000-dollar budget. To pay commissioners, for example, a salary of 20,000 dollars to serve full time would increase the Agency budget nearly 17 per cent.[84] A full-time salary at the present rate of fifty dollars per day would still involve an increase of at least 10 per cent. Other more pressing needs therefore rule out full-time commissioners under present budget allocations.

Working under part-time commissioners forces the staff to assume a high degree of responsibility.[85] Consequently the chief administrators attempt to upgrade the quality of the staff, but are limited by a budget that is too small to provide salaries to attract highly qualified people. As a further result of low salaries, the Agency has lost many of its best staff members.[86]

2. *Access and community contact.*

The existence of the FEPC is a response to minority group pressures, although the Agency is intended to serve all the people and has processed some complaints

81. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 15, 1964. Budget cutting occurs in the Budget Bureau of the executive branch and in the Senate Finance Committee and the Assembly Ways and Means Committee.

82. Pollak, *Comment*, 14 BUFFALO L. REV. 70, 72–73 (1964).

83. Four years is the term provided by statute, but commissioners may be reappointed. CAL. LABOR CODE § 1414. Although the FEPC's six-year existence has not provided time for any significant turnover, four of the original five commissioners are still members of the Commission. The size of the Commission was increased from five to seven in 1963, but only one commissioner has left in six years.

84. Commissioners presently work seven to ten days a month, which accounts for a present salary of $4,200 to $6,000. An increase to $20,000 would mean an increase of about $15,000 for each of the seven commissioners, or a total increase of $105,000.

85. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

86. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

by nonminority Caucasians.[87] Nevertheless, the great bulk of complaints does come from minority persons, about 88 per cent of the total being from Negroes.[88] Therefore, some measure of the FEPC's accessibility may be seen by comparing the population distribution of these minority groups with the location of FEPC offices.

In 1960 people of Spanish surname comprised about 10 per cent of the population of California.[89] Fully 35 per cent of these people lived outside any metropolitan area served by an FEPC office. The definitions of "metropolitan area" are such that even those within such an area could easily live thirty miles or more from an FEPC office. The San Francisco–Oakland metropolitan area, for example, includes San Francisco, Alameda, Contra Costa, Marin, San Mateo, and Solano counties. This area has a total nonwhite and Spanish surname population of 523,933, of which only 187,515 live in San Francisco County.

The statistics are not quite so depressing for the Negro, who makes up 5.6 per cent of the state's population.[90] Only about 15 per cent of California's Negroes live outside the metropolitan areas served by the FEPC. These statistics, however, do not tell the whole story. Such population centers as San Bernardino and Santa Clara counties, whose nonwhite and Spanish surname populations are 81,573 and 98,445 respectively, do not have even the one-man office accorded Fresno County, with a comparable population of 88,983—and offices of that size are concededly too small to be very effective.[91] Furthermore, such obscure FEPC offices as the one on the seventh floor of the State Building in San Francisco, even when physically near, are psychologically far removed from uneducated and unsophisticated minority persons who suffer discrimination. Many do not know that the FEPC exists, and others are for various reasons reluctant to take their problems to it.[92]

A large part of the need for FEPC contact with those who have suffered discrimination could be filled by civil rights groups. The Palo Alto NAACP, for example, has referred thirty cases to the FEPC;[93] but this is apparently the only real channel to the Agency because other civil rights groups in the area refer complainants to the NAACP.[94] On the other hand, some civil rights leaders will not bother to make referrals. They view the FEPC as a last resort to be used only when their own methods fail and backup powers are needed.[95] Others apparently

87. *Ibid.*

88. 1961–1962 CALIFORNIA FEPC REP. 21.

89. Statistics concerning the Spanish surname population of California are taken from CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME (1964) (compiled from the 1960 census by the Division of Labor Statistics and Research, California Department of Industrial Relations).

90. Statistics concerning the Negro population of California are taken from CALIFORNIA FEPC, NEGRO CALIFORNIANS (1963) (compiled from the 1960 census by the Division of Labor Statistics and Research, California Department of Industrial Relations).

91. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965. See *Hearings Before California FEPC on Mexican-American Problems*, Nov. 10, 1964, at 8–9 (presentation of Mexican-American State Citizens' Committee).

92. See note 120 *infra* for a discussion of this problem.

93. Interview With Albert Barringer, Labor and Industry Chairman, Stanford–Palo Alto NAACP, in Palo Alto, Jan. 31, 1965.

94. This conclusion is based on the writer's visits to each civil rights or related organization in the Palo Alto area to inquire what advice he would be given if he were discriminated against and how to take advantage of the facilities of the FEPC. Only the NAACP was well-informed, and most other offices suggested he contact the NAACP.

95. Interview With Harry Bremond, Vice President, South San Mateo NAACP, in Palo Alto, Feb. 5, 1965.

are not concerned enough with the long-range possibilities of the FEPC to be bothered with referrals.[96] Although the major civil rights groups in the urban centers are typically well informed on the law and active in directing people to the FEPC, this is not universally true. The President of the Los Angeles NAACP not only was limited in his own knowledge of the FEPC to what he "read in the papers," but also was unable to recommend any more knowledgeable member of his chapter.[97]

The Spanish surname worker is not served as well as the Negro by civil rights groups acting as channels to the FEPC. Although there are many Mexican-American community organizations, none of them are staffed to give the kind of service to their community that the NAACP offers the Negro. The FEPC has sought various ways of contacting the Spanish surname minority. Staff members have, for example, visited outlying areas, leaving literature at the office of the Labor Commissioner. However, the Agency has lacked the resources to make much progress in the metropolitan Spanish surname community, and it has been especially restricted in the rural areas, where much of the Spanish-speaking population is employed.[98]

It would be desirable to establish local FEPC offices within minority communities to provide ready access and information for the people who suffer the greatest discrimination. Oakland in 1960, for example, had a Negro population of 83,618—over one-third of all Negroes in the San Francisco–Oakland metropolitan area.[99] Yet there is no FEPC office in Oakland, nor in any other center of minority population in the area. Some people within the Agency argue that there is an overriding virtue in the complainant's finding someone who cares in the State Building.[100] However, the number of persons who actually go to the FEPC and are satisfied is small enough to negate the symbolic value of the FEPC's being there. Of course the number deterred by the FEPC's remoteness is incalculable; and of those who do make the effort, it has been estimated that not more than 50 per cent are satisfied.[101] Although the opening of offices in minority population centers would probably not change the percentage of dissatisfied complainants, it would make the Agency's services available to a much wider minority public and probably increase the number of complaints, and correspondingly the number of satisfied complainants. The FEPC has done all it can with its present budget to make its services known and available, but because of limited resources the Agency remains remote.

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96. One official of a group which "endeavors to open up new employment opportunities to applicants" reported that she seldom advised using the FEPC because it was too slow in acting. Summing up her attitude, she said, "We're concerned with people, not policy."

97. Interview With President, Los Angeles NAACP, in Los Angeles, March 18, 1965.

98. See *Hearings*, *supra* note 91, at 8–10; Interview With Rafael Vega, Consultant, FEPC, in Los Angeles, March 18, 1965.

99. CALIFORNIA FEPC, OAKLAND SCHOOLS 5 (1964); CALIFORNIA FEPC, NEGRO CALIFORNIANS 12 (1963).

100. Interview With Hugh Taylor, Consultant, FEPC, in San Francisco, Feb. 25, 1965.

101. The writer asked each interviewee how many complainants he estimated were satisfied. Estimates ranged downward from 50%. This dissatisfaction is due to a number of factors, chief among which are the high number of dismissed complaints due to failure to find probable cause and the length of time taken to settle complaints.

3. *Carrying the work load.*

As previously noted, individual complaints average four months to settle and broader compliance actions average about eleven months.[102] Consultants typically carry an average caseload of twenty-eight individual complaints and eight other types of actions.[103] Although this is more favorable than in the past, the Chairman estimates it is about a 400 per cent overload.[104]

With regard only to the burden of individual complaints, which the Agency by law cannot refuse, providing a larger staff would result in three improvements. First, the time for case settlement could be reduced, ending a widely echoed complaint about the FEPC. If the individual complaint system is to work, the complainant must be guaranteed an expeditious treatment of his case. Frequently circumstances destroy the effectiveness of a delayed FEPC solution—the complainant may find another job, or move. Second, a larger staff would give the FEPC a greater ability to follow up orders and compliance agreements. The Agency Chief reports that at present follow-up is done irregularly, as time and staff availability allow.[105] The overwhelming burden of current complaints makes it clear that this allowance is small indeed.

The Agency should be able to revisit all respondents at regular intervals to insure that compliance agreements are performed and to guard against future violations. The Agency might review respondents' records and interview their officers, former complainants, and minority persons in respondents' employ. This would not only avoid the possibility that negotiated adjustments might be ignored, but it would also negate the danger of respondents' hiring complainants and then searching for a plausible pretext to fire them.[106]

Chairman Graham argues that follow-up is of limited value in individual cases because the parties would inform the FEPC if trouble developed.[107] This view is questionable. For one thing, satisfactory adjustments may not include hiring of the individual complainant, either because of the nature of the solution reached[108] or because the complainant no longer wants the job. The agreement might include a promise by the respondent to cease all discriminatory practices, but, because the job in question had been filled, not provide relief for the complainant. Furthermore, adjustments often involve many steps beyond hiring or promoting the particular complainant, and he cannot be expected to police a broad agreement. In addition, complainants may fear further retaliatory action if they go back

102. See text accompanying notes 58, 65, 72 *supra*.

103. *Graham Testimony* 11. The other types of actions are section 1421 investigations, affirmative actions, and housing cases.

104. *Ibid.*

105. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.

106. An interesting problem, in this context, is whether an FEPC should allow a minority dismissal on a technically valid basis, even though a nonminority person would not have been treated so harshly. The California FEPC would not. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965. A study of the Massachusetts Commission Against Discrimination, however, indicated that that commission would not consider this to be discrimination. Kramer, Enforcement of a Fair Employment Practice Law, May 1, 1964, at 45–46 (unpublished paper on file at Stanford Law School).

107. Interview With Clive Graham, Chairman, FEPC, in Long Beach, March 19, 1965.

108. See MANUAL § 110.5. See also note 48 *supra*.

to the FEPC; or they may take further discrimination as evidence of the FEPC's impotence to help them and despair of aid from the government.

The third improvement resulting from a larger staff to handle individual complaints would be more complete solutions. At present some cases must be closed short of an agreement ending all discriminatory employment practices. In 20 per cent of the cases in which discrimination is found a fair employment policy is neither promulgated nor strengthened.[109] One respondent's lawyer cites such a case, in which the FEPC found probable cause and threatened to take the employer to hearing after failure of conciliation but failed to do anything about it. Perhaps such cases represent a policy decision to avoid public battles. Or they might indicate decisions that the employer has gone as far as he will and no sufficient basis for hearing exists. But sources within the Agency indicate that such cases may also be dropped simply for lack of time.

4. *Expanding the FEPC's more productive activities.*

Three FEPC activities promise more productivity than the present concentration on individual complaints: educational programs, section 1421 investigations, and affirmative actions. While concrete results of educational work are most difficult to assess, nevertheless the education program attacks discrimination in employment closer to its roots than any other Agency activity. Informing minority persons of the law not only encourages them to assert their rights, it also motivates them to strive for achievements they may have thought beyond their reach—and the demand for minority persons with skill and training far exceeds the supply.[110] Furthermore, educational work informs the potential respondent of his obligations and encourages him to take affirmative steps to discharge them by going out of his way to recruit minority job applicants. Educational activity is also noncontroversial, since it is approved by even those who do not approve of the FEPC as an investigatory agency.[111] Finally, more educational funds would enable the FEPC to hire a much needed research officer to compile statistics on the progress of fair employment, thus enabling the Agency to see in which direction it should be going and what changes in the law governing its powers, jurisdiction, and method of operation it should recommend to the legislature.

Opinion is nearly unanimous that the most productive FEPC compliance activities are section 1421 investigations and affirmative actions. By dealing with large employers and unions in cases that will result in wide-ranging plans for equal employment opportunity, the Agency can open up whole plants, firms, and industries. The number of jobs for minority workers that result from such programs can probably never be measured with any degree of precision; but no one doubts that they far exceed the number of jobs produced by the painstaking individual complaint process, in which respondents may control an insignificant

109. See 1963–1964 CALIFORNIA FEPC REP. ——.

110. Interview With Walter Hooke, Urban League Skills Bank Director, in San Francisco, Jan. 30, 1965.

111. Interview With Hon. Clark Bradley, State Senator, in Sacramento, Feb. 3, 1965. Interview With William Smith, Executive-Secretary, Federated Employers of the Bay Area, in San Francisco, Feb. 11, 1965.

number of jobs. Yet the Agency's resources are so tied to individual complaint investigations that these more productive activities must be given a secondary role.[112]

B. *The Need for New Legislation*

Three important legislative innovations that could improve the California fair employment law would be to eliminate exceptions to the law, terminate the compulsory investigation of individual complaints, and extend the initiation power.[113] The latter two suggestions are so intertwined that they will be discussed together.

1. *Elimination of exceptions.*

The present fair employment law does not cover as complainants members of employers' families or domestic servants. Nor does it cover as respondents those employing less than five persons; social and fraternal clubs; nonprofit charitable, educational, or religious associations or corporations; or employers with respect to their employment of agricultural workers residing on the land where they are employed.[114] In addition, jobs requiring bona fide occupational qualifications[115] are exempt from the law.[116]

The exceptions for employers of fewer than five persons and for family and domestic servants serve a dual function: they keep the Commission out of trivia in terms of job opportunities, and out of situations too personal for the law to effect a satisfactory solution. These exceptions should be retained. On the other hand, the private club exception is too broad and should be abandoned. Although it is said to protect ethnic and religious organizations, it excludes from the operation of the law a number of institutions, such as hospitals employing large numbers of workers and serving the public, which present no valid claim for exemption. The bona fide occupational qualification exemption should adequately protect any such organization deserving of protection, such as a restaurant maintaining an ethnic atmosphere or an ethnic fraternal group.[117]

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112. See *Graham Testimony* 12; text accompanying note 21 *supra*.

113. Among other, less useful, suggestions for strengthening the law, the most frequently repeated is that "the law should have more teeth," *i.e.*, civil and criminal penalties beyond the present provision of CAL. LABOR CODE § 1430, which fixes a maximum $500 fine or six months in jail or both for wilfully violating an order of the FEPC. Such additional penalties would probably be undesirable. Better results are accomplished in an atmosphere of cooperation than in an atmosphere of forced employment. In fact, more than 99% of the cases are presently settled before the point where penalties would be imposed, which makes the expected gains from the imposition of stiffer penalties seem illusory. Furthermore, guilt is not easily placed in cases of discrimination—most civil rights leaders agree that inertia or force of habit account for a large amount of discrimination and that there is a minimum of pathological prejudice. Finally, stiffer penalties might induce stiffer resistance by respondents to the FEPC's efforts, and such penalties might arouse an adverse public reaction.

114. A 1965 act of the legislature amends CAL. LABOR CODE § 1413 to end the agricultural workers exception for persons whose employment begins after Sept. 18, 1965. Cal. Stat. 1965, ch. 1185, § 1.

115. "Bona fide occupational qualifications" refers to the racial or ethnic background essential for particular jobs; for example, portraying a historical or well-known personality on stage, screen, or television when a close likeness is required.

116. The various exceptions to the law are listed at CAL. LABOR CODE §§ 1413, 1420.

117. A bona fide occupational qualification was recognized for a restaurant designed to be a replica of a Tokyo dining place, but was applied only to employes who were visible to the public. California FEPC, Fair Employment Newsletter, Jan.–Feb. 1962. The Commission's policy is to require requests for such exemptions in writing and to judge them strictly. MANUAL § 400.

2. *Curtailment of the compulsory investigation of individual complaints and extension of the initiation power.*

Ideally, the FEPC should be provided with more resources and with more efficient methods of operation. However, given a legislative unwillingness to provide significant increases in funds, two changes in the law, taken together, would allow the Agency to allocate present resources more productively. The FEPC should be allowed discretion in the investigation of individual complaints and should be given the power to initiate without a complaint enforceable actions against uncooperative employers.

Given the limitations of the existing framework of resources and powers, it is hard to disagree with one commissioner who declares, "The present method of operation is the optimum in methodology."[118] The Agency must by present law investigate *all* valid individual complaints, and it is so backlogged in such cases that no significant shifting of resources is possible. Moreover, these individual cases burden the Agency beyond its capacity to deal quickly and efficiently with such complaints and cause it to turn away from opportunities promising more fruitful action. This is made more serious by the fact that the individual complaint system fails to reflect accurately the incidence of discrimination.[119] For one thing, many individuals who suffer discrimination fail to file a complaint;[120] for another, firms and whole industries reputed to discriminate will not, because of this reputation, receive applications from minorities, and no opportunity for a complaint arises.

Nevertheless, abandonment of the complaint system is not advocated here; rather, a simpler solution lies in granting the FEPC discretion as to which individual complaints should be investigated. In many cases the Agency might proceed as it presently does. But in others it would not be forced to miss an opportunity to pursue a large-scale employer through a 1421 action in order to investi-

118. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965.

119. Edward Howden, Chief, FEPC, stated: "There is, I believe, a broad consensus among the state and local FEPC's and students of their work to the effect that limitation of such an agency to a compliance program stemming only from the receipt of miscellaneous individual complaints is to hold it to a haphazard, piecemeal, and wholly inadequate method of operation." *Hearings*, *supra* note 68, at 231. See also Girard & Jaffe, *supra* note 74, at 115; Hill, *supra* note 74, at 24.

120. Some of the reasons complaints are not filed, even when discrimination clearly occurs, are lack of information, lack of courage to go to a state agency, length of time needed to settle complaints, psychological accommodation to discrimination, pessimism and cynicism, reluctance to get involved, and language and cultural barriers. Interview With Edward Howden, Chief, FEPC, and Charles Wilson, Senior Legal Counsel, FEPC, in San Francisco, Dec. 14, 1964. It is often difficult to get minority persons even to approach an agency such as the State Department of Employment, and it is accordingly more difficult to bring them to approach an enforcement agency such as the FEPC. Interview With Mrs. Carol Green, Bayshore Employment Service, in East Palo Alto, Jan. 22, 1965.

The Spanish surname worker who suffers discrimination may fail to complain for reasons not mentioned above: dislike of being classified in a minority and hope of being considered an Anglo-American; a fatalistic, all-suffering attitude carried over from his status in other countries; and a wish to avoid places where he is not welcome. Discrimination against the Spanish surname worker is also frequently of a special nature. He is typically not rejected at the hiring gate, but is hired because he can be discriminated against on the job. Fear of losing his job and fear of deportation may keep him from complaining in this situation. Interview With Rafael Vega, Consultant, FEPC, in Los Angeles, March 18, 1965. In fact, only about 4–5% of the individual complaints come from the Spanish surname community, although 9.1% of California's population is of Spanish surname descent. CALIFORNIA FEPC, CALIFORNIANS OF SPANISH SURNAME 5 (1964); Vega, FEPC and the Mexican-American Community, Nov. 12–15, 1964, at 1, on file with *Stanford Law Review*.

gate an employer with only a few positions available. Those who would oppose such a change give both philosophical and practical reasons for maintaining the present complaint system. It is said the system emphasizes the importance of the individual, giving him an outlet for his grievance and letting him know someone cares. However, the same people who make this argument testify, in the next breath, that the number of satisfied complainants is few and that two-thirds of the complaints are dismissed for inadequate evidence of discrimination.[121] In addition, complaint processing with present resources averages four months, and the final adjustment, when made, may even then fail to give the complainant a job.[122] Thus the number of individuals who find satisfaction is small enough to weaken the individualism argument for retention of the complaint system. Furthermore, if the Agency could devote larger percentages of resources to 1421 investigations and affirmative actions, the number of individual complaints would diminish in the long run.

Supporters of the individual complaint system also stress, however, its practical importance in revealing wider areas of discrimination and suggesting fields for 1421 investigations and affirmative actions. But, as pointed out above, individual complaints still would have their place in the system, and under a discretionary system they could be used selectively to seek out discrimination beyond the individual case. Nor is there any reason to expect that civil rights groups which have been active in referring cases of discrimination to the Agency would not continue to do so; rather, referrals would undoubtedly increase as wider results were obtained.

An important additional device which should be granted to the Agency under the suggested selective enforcement system is the ability to initiate enforceable actions. While the experience of the California FEPC in 1421 investigations to date has been one of meeting a generally cooperative attitude on the part of employers, it is vital that the power of the FEPC to deal with the recalcitrant employer, now available only through individual complaints, be expanded. Otherwise, the FEPC might divert its resources into more productive types of actions only to find itself frustrated when the targets of the action refused to cooperate.

Theoretically, the Agency can obtain enforcement jurisdiction over any respondent through the power of the Attorney General to act as complainant.[123] This device might be used more extensively than it presently is,[124] but the Attorney General is apparently reluctant to act unless his own investigation indicates a case of discrimination.[125] This procedure duplicates the FEPC's efforts; and, in fact, the Attorney General does not have a civil rights division staffed to handle this work. The result is a bottleneck that could be eliminated simply by enabling

121. This figure is 80% among complaints from the Spanish surname community. Vega, *op. cit. supra* note 120, at 2.

122. Of the total number of cases closed by satisfactory adjustment through 1964, only 47% resulted in an offer of immediate hire, reinstatement, or promotion. Some other agreements were less immediately, but nevertheless ultimately, helpful to the complainant. For example, 64% of the agreements included a commitment to hire or promote at the first opportunity and 88% included a commitment to consider hiring or promoting at the first opportunity. 1963–1964 CALIFORNIA FEPC REP. ——.

123. CAL. LABOR CODE § 1422.

124. See note 24 *supra* and accompanying text.

125. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

the FEPC to initiate enforceable actions on its own—that is, by adding sanctions to section 1421 investigations.[126]

C. *Agency Policy*

The general attitude of the FEPC is reflected in various policies the Agency pursues. While they are nowhere spelled out, the policies of the Agency concerning public disclosure of its activities and its relations with the business community and the labor unions are particularly revealing.

1. *Public disclosure of FEPC activities.*

Section 1421 forbids the Commission and its staff to disclose what transpired in the course of the conciliation conference, on penalty of being found guilty of a misdemeanor and subjected to discipline under the state Civil Service Act. Nothing else is required by law to be kept secret, and Commission policy specifically allows disclosure of information obtained through investigation and mutually accepted final terms of conciliation.[127] Public reports on progress in affirmative actions are periodically issued when a case is already in the public arena.[128] Furthermore, the assigned commissioner and the Division Chief have general authority to issue any publicity they feel ought to be issued.[129] These apparently liberal publicity policies conceal a practice of secrecy that makes it almost impossible for an independent observer to uncover information about specific cases. Although the FEPC freely discusses unidentified fact situations in its publications and in personal interviews, the Agency is apprehensive about revealing details of individual complaint cases,[130] such as names of complainants and respondents,[131] investigation records, and settlement terms.

This policy is a controversial one, both within and without the Agency.[132] It meets a mixed reaction with the Agency's staff. It finds support from such diverse sources as the President of the San Francisco Congress of Racial Equality[133] and

126. A majority of FEPC's already possess this power. KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 217 (1961). Another possibility for expanding the initiation power would be to extend it generally to private groups. The Ohio and Rhode Island statutes expressly provide for this, OHIO REV. CODE ANN. §§ 4112.01(A), 4112.05(B) (1965), R.I. GEN. LAWS ANN. § 28–5–17 (1956), and New York has reached the same result by judicial decision, American Jewish Congress v. Carter, 19 Misc. 2d 205, 206, 190 N.Y.S.2d 218, 220 (Sup. Ct. 1959). The California law is phrased in terms of a "person claiming to be aggrieved," CAL. LABOR CODE § 1422, but there is no apparent reason why this should not be interpreted to include private groups. Section 1413(a) defines "person" to include associations or corporations, and the only issue would be whether such groups were "aggrieved." Such an interpretation should be possible in light of the provision in § 1431 suggesting liberal construction of the act. However, little use has been made of the group complaint privilege where it is available. 68 HARV. L. REV. 685, 692 (1955).

127. MANUAL § 500.3. CAL. LABOR CODE § 1421.1, added in 1965, requires the Commission to inform respondents as to whether a particular discussion, or portion thereof, is part of the nondisclosable conciliation conference, or of the investigation, which is disclosable. Cal. Stat. 1965, ch. 1463, § 1.

128. MANUAL § 502.1.

129. MANUAL § 501.2.

130. This secrecy, however, does not extend to 1421 investigations or affirmative actions.

131. In the past this information was not even subject to discretionary disclosure. California FEPC, Fair Employment Newsletter, Aug.–Sept. 1961.

132. See Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFFALO L. REV. 100, 111–13 (1964), for a brief but illuminating discussion of this problem.

133. Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 25, 1965.

attorneys who have represented respondents in negotiations with the FEPC. And it is reflected in the policies of civil rights groups, many of which are remarkably reluctant to disclose names of persons they have referred to the FEPC.[134]

The reasons given for secrecy are varied. FEPC personnel support the policy because of a belief that the success of the Agency is dependent on the quiet method by which it deals with respondents,[135] because of fears aroused by years of opposition,[136] and because of the fear of being accused of trial by headline.[137] Others suggest that more publicity should be avoided as notoriety would give ammunition to the opponents of the FEPC and aid them in repealing the law.[138] A fear of embarrassing the complainant is also present in the thoughts of those who favor secrecy.

These reasons merit consideration. Although it is not clear from whom a complainant would have anything to fear except his employer or potential employer—who must know about the complaint anyway—complainants apparently often do have a nebulous but compelling fear of some sort of retaliation;[139] and consultants frequently tell of persons who refuse to sign complaints they themselves initiated. Furthermore, publicity could endanger the FEPC's relations with respondents by turning situations of possible cooperation into adversary ones. Respondents who might have complied in fear of a public hearing could well decide to resist instead if complaints were made public. Furthermore, respondents who did cooperate would nevertheless suffer from publicity along with the recalcitrant.

There are, however, strong arguments for publicity. Some civil rights leaders contend that public opinion is behind fair employment and that aggressive use of publicity would bring public pressure to bear on violators.[140] Publicity might also promote minority group confidence in the FEPC and encourage bringing more grievances to the Agency; for although the number of complaints is more than can be efficiently handled at present, few observers suppose that it is anywhere near the number of cases of discrimination that occur. Still another advantage would be that publicity might induce compliance in employers who had not been respondents—just as spot income tax checkups and scattershot antitrust prosecutions serve to deter violations.

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134. Interview With Miss Elsa Alsberg, Executive Director, Palo Alto Fair Play Council, in Palo Alto, Jan. 21, 1965; Interview With Albert Barringer, Labor and Industry Chairman, Stanford–Palo Alto NAACP, in Palo Alto, Jan. 31, 1965.

135. Interview With Elton Brombacher, Commissioner, FEPC, in San Francisco, Feb. 9, 1965.

136. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965. Mr. Dellums was a part of the movement for an FEPC from the earliest days. In 1946 a proposal to establish an FEPC was put on the ballot in the form of an initiative proposition and soundly defeated. See San Francisco Chronicle, Nov. 8, 1946, p. 3, cols. 5–6. For a brief history of the attempts to institute an FEPC in California prior to the establishment of the present Agency in 1959 see Tobriner, *California FEPC*, 16 HASTINGS L.J. 333–34 (1965).

137. Interview With Arthur Padilla, Consultant, FEPC, in San Francisco, Feb. 11, 1965. This justification may be quite sound in relation to the law-protected conciliation conferences. The FEPC describes it thus: "[I]n the event of public hearings or court actions [respondents] are protected against implications of guilt which might be found in a recital of their settlement offers made during conciliation efforts." California FEPC, Fair Employment Newsletter, Aug.–Sept. 1961.

138. Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 26, 1965; Interview With Hon. W. Byron Rumford, Assemblyman, in Sacramento, Feb. 4, 1965.

139. Perhaps there is some fear of potential future employers who would be unaware of the complainant's action in the absence of publicity.

140. Interview With Don Smith, President, Los Angeles CORE, in Los Angeles, March 18, 1965.

Resolving these conflicting arguments is difficult. But present FEPC policy not only restricts information that might embarrass complainants and cooperative respondents, it also impedes helpful publicity and legitimate investigation into the progress the FEPC is making. Secrecy gives as much ammunition to the FEPC's critics as would a completely open disclosure policy. Furthermore, with the Agency receiving an average of around 800 individual complaints a year, and engaging in section 1421 investigations and affirmative actions in significant numbers, no respondent is likely to be subjected to any significant amount of annoying or harmful publicity; although the number of cases may not be large compared with the amount of discrimination that occurs, it is sufficient to make any given case reasonably anonymous. If each case were given routine publicity, any specific case would become a highly unnewsworthy event.[141] Finally, experience in other states indicates that completely open disclosure procedures apparently have no deleterious effect on the persuasion process. The Washington State Board Against Discrimination, for example, not only invites the public to all meetings but distributes lists of cases to be discussed and provides mimeographed copies of the reports and recommendations of investigators without impeding the success of its compliance activities.[142] It is therefore recommended that the FEPC abandon all secrecy except with regard to what transpires in conciliation conferences, which is all that the law strictly requires.

2. *The FEPC's relations with business and labor.*

The two respondent communities with which the FEPC primarily deals are business and organized labor. The attitudes that have grown out of these relationships understandably differ, but each exercises a degree of constraint on the activities of the FEPC.

The FEPC is less responsive to the business community than to labor unions or the political world. The Agency owes nothing to business because the FEPC was created over its almost unanimous opposition. Indeed, a large part of the Agency's function is to police that community; and the FEPC is, in a sense, a free lawyer for those who feel that they have suffered at the hands of business. Although the Agency makes every effort to be neutral, the law itself presupposes a bias for fair employment which necessarily restricts business discretion in hiring; the members and staff of the FEPC are and must be selected to reflect that bias. In spite of the FEPC's regulatory stance, an era of good feeling appears to be emerging between the FEPC and, at least, big business. This is partly due to increasing pressure on business from civil rights groups, which makes the FEPC appear to be a neutral agency in comparison; it is also a reflection of pressure for fair employment from the federal government and a growing social conscience in large corporations. But this appearance of good feeling is deceptive, for it masks opposition that has gone underground in the belief that open resistance is no longer useful or out of fear that the FEPC or the state or federal government will

141. A previous attempt at monthly press releases on nonconfidential information was ended because nobody used them except a few minority group weeklies. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

142. See Note, 74 HARV. L. REV. 526, 546–47 (1961).

somehow retaliate.[143] The Agency does, however, endeavor to develop a cooperative relationship with the business community. This policy is not necessitated by the political power of business opponents; instead, cooperation is sought simply because it is the most efficient path to fair employment. However, since the FEPC must consider the impact of various actions on its business relations due to the greater number of jobs that can be opened through cooperation, a more vigorous program is to some extent held back by fear of business opposition.

On the other hand, although strongly denied by some FEPC officials,[144] the impression is widespread that the FEPC is soft on union discrimination. The FEPC cannot, of course, control the incidence of individual complaints that come to it; but it has control over its section 1421 and affirmative action dockets, and it is here that its lack of vigor in pursuing union discrimination appears. Only eight of the more than 100 section 1421 investigations and only a single affirmative action have dealt with unions.[145] This mildness is not, apparently, due to any direct pressure from the labor movement. Indeed, labor has been one of fair employment's best friends, at least officially. Organized labor was instrumental in financing the drive to establish the FEPC,[146] and the AFL-CIO hierarchy maintains a vigorous stand in favor of fair employment. However, there is much autonomy in union structure, and the attitude of statewide leaders is not necessarily that of local leaders or the rank and file.

There are both practical and political reasons for the FEPC's failure to push a union antidiscrimination campaign. Extending the antidiscrimination campaign against unions would be practically less productive than against business because of the difference in nature and structure of a union and a business. Unless the FEPC has an enforceable complaint, few sanctions are available that will affect the union. First of all, unions are not dependent on profit and public image and are therefore more immune from demonstrations and boycotts by civil rights groups or from the pressure of publicity. Thus it is unlikely that a recalcitrant union would be overly concerned with the publicity of a 1421 investigation or would cooperate in an affirmative action. Union leaders are dependent on and responsive to the wishes of their voting and dues-paying members. Moreover, a union's governing structure is composed of boards, councils, and committees that proceed by meetings and majority votes in such a way that union leaders cannot make policy decisions with the same freedom as management.

The FEPC's inattentiveness to union discrimination is also explained by what might be called a camaraderie of liberal politics. A political attitude which appears

143. Members of the California Senate Subcommittee on Race Relations and Urban Problems, which met all over the state to hear testimony in 1964 and early 1965, reportedly were approached privately by businessmen who feared the FEPC and felt it was abusive, but who were unwilling to be identified as opposing it for fear of recriminations. Off-the-Record Interview With Member of State Senate Subcommittee on Race Relations and Urban Problems, in Sacramento, Feb. 3, 1965.

144. *E.g.*, Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965.

145. Interview With Mrs. Betty Miller, Staff, FEPC, April 7, 1965. Civil rights leaders indicate that their organizations, too, have failed to attack union discrimination as aggressively as they have business discrimination. Interview With Dr. Thomas Burbridge, Former President, San Francisco NAACP, in San Francisco, Feb. 9, 1965; Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 25, 1965.

146. Interview With C. L. Dellums, Commissioner, FEPC, in Oakland, Feb. 26, 1965. The other major sources of finance were the NAACP and individual contributors.

dominant in the FEPC was expressed by one civil rights leader who, after discussing the practical reasons why so little attention had been paid to unions and indicating that his organization was about to move into this area, added, "Still, civil rights groups need their alliances with friendly unions."[147] Similarly, union financing of FEPC drives and support of top union leadership have created a tie to labor that often prevents the proponents of fair employment from seeing the evils in unions.

Unions, however, can and do discriminate through their hiring halls or through agreements with management. And apparent FEPC bias toward unions damages the Agency's public image and undoubtedly lessens cooperation by business. The answer to this problem is a series of vigorous 1421 investigations against some of the more offensive unions and an attempt to engage unions in the kind of affirmative actions that have been entered into with management.[148] Furthermore, recalcitrant unions could be met with an enforceable action entered through the Attorney General's office or, if the law were changed as suggested above, through an action brought directly by the FEPC. Only by such an all-out attack on discriminatory practices can the FEPC fully carry out its mandate and erase the impression of union favoritism.[149]

D. *General Political Considerations*

The FEPC has often been accused of an excess of timidity in exercising its powers. One interviewee within the Agency sums up the problem bitterly:

> The potential of the FEPC is not realized due to political appointees. Action on certain cases shows a hesitancy to go ahead due to the political implications. The Agency is afraid both of the people and of special pressures. It has a tendency to caution because of the controversial nature of the area. It neglects its responsibilities. . . . It is afraid of reaction against political incumbents.

One civil rights leader reports that "the Commission avoids politically dangerous projects. There are political appointments at the top. The commissioners slow things down. Nothing is done about unions . . . a militant doesn't fit within the structure. You need to have a wishy-washy approach to operate there."[150] But even such critics as these admit that it is difficult to distinguish political expediency from the practical reasons for the FEPC's timidity. The present legal powers and budget of the Commission, if not its very existence, are on shaky political ground. Every job within the Agency and every nickel of expenditure must meet the approval of the state legislature each year. While this may not differ from the situation in other state agencies, nevertheless it ties the FEPC so closely to the legislature that no matter how broad the policy of the fair employment law, the Agency

147. Interview With William Bradley, President, San Francisco CORE, in San Francisco, Feb. 25, 1965.

148. The FEPC is not unaware of the problem. It is presently engaged in exploring methods of coping with union discrimination, particularly to determine how the Agency can wield an effective sanction in the absence of an enforceable complaint.

149. For a brief discussion of this problem with suggested solutions see NORGREN & HILL, TOWARD FAIR EMPLOYMENT 272–75 (1964).

150. Interview With Harry Bremond, Vice President, South San Mateo NAACP, in Palo Alto, Feb. 5, 1965.

cannot go beyond what the legislature and the Governor want. Thus, whatever discrepancy exists between the vigorous language of the act and the timid attitude of the FEPC can ultimately and more justly be traced to a lack of complete support of the FEPC by the legislative and executive branches of the state government.

The law creating the Commission seems to require an all-out attack on discrimination. It states that the denial of equal employment opportunities substantially and adversely affects the interests of employes, employers, and the public in general,[151] and declares the opportunity to be employed without discrimination a civil right.[152] The Agency is formally empowered to prevent all unlawful employment practices,[153] and the provisions of the act are to be liberally construed to accomplish the announced objectives.[154] In spite of this, the Agency has been reluctant to suggest that it be given wider powers on the theory that this might boomerang into a reexamination of the whole act that would result in lessening the Agency's power.[155] This is a practical policy which reflects the known attitude of the legislature. Many of the defects and exceptions in the original act were the result of political compromises.[156] And the continuing timidity of the Agency seems justified by the fate of attempts to effect substantive amendments to the law. For example, in 1963 a bill to give the Commission the initiation power possessed by most other FEPC's was killed in the Assembly Judiciary Committee.[157] Commissioner Garcia states that requests for a significant increase in funds would receive a flat rejection.[158] Conversations with legislators confirmed this view. While there are some legislators who have always been opposed to the existence of the FEPC,[159] the real danger to the Agency's effectiveness lies in the political fears of the FEPC's friends. "There is no need to strengthen the Commission now," reports one assemblyman. "This is not the time for the initiation power. It is important for the Agency just to survive for a few more years."[160]

Another problem is that the concept held by many legislators of what the FEPC should be doing and the demands of the situation are entirely different. These legislators view the proper role of the FEPC as passive. They contend that people should come to the Agency and that it should not search for cases.[161] Some even object to the FEPC giving notice of its existence,[162] as it does to management and minority groups through its educational programs. They fear an overzealous FEPC and think that giving it too much power might make the Agency

151. CAL. LABOR CODE § 1411.
152. CAL. LABOR CODE § 1412.
153. CAL. LABOR CODE § 1421.
154. CAL. LABOR CODE § 1431.
155. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.
156. Interview With Hon. W. Byron Rumford, Assemblyman, in Sacramento, Feb. 4, 1965.
157. Interview With Edward Howden, Chief, FEPC, in San Francisco, Dec. 14, 1964.
158. Interview With Louis Garcia, Commissioner, FEPC, in San Francisco, Jan. 26, 1965.
159. Interview With Hon. Clark Bradley and Hon. Jack Schrade, State Senators, in Sacramento, Feb. 3, 1965.
160. Interview With Hon. Lester McMillan, Assemblyman, in Sacramento, Feb. 3, 1965.
161. Interview With Hon. John Holmdahl, State Senator, in Sacramento, Feb. 3, 1965.
162. Interview With Hon. W. Byron Rumford, Assemblyman, in Sacramento, Feb. 4, 1965. Assemblyman Rumford reports the existence of these views among legislators, but he does not share their view.

too ambitious.[163] In spite of the mandate of the law that empowers the FEPC to prevent unlawful employment practices, and the apparently obligatory duty to investigate whenever "it shall appear . . . that an unlawful employment practice *may have been* committed . . . ,"[164] the California legislature and executive have debilitated the law, both by a failure to provide the funds and powers to carry out the policy of the law and by a negative attitude toward the FEPC, which attitude prompts the Agency's timidity.

A discussion of political considerations would not be complete without recognizing that legislators reflect the attitudes of their constituents. Thus, the ultimate source of restraint on a vigorous prosecution of California's fair employment policy may be the attitude of the people of California. Recent popular reaction to fair housing laws indicates that public acceptance of the principle of fair employment cannot be assumed.[165]

III. Conclusion

Statistics to measure the precise effect the FEPC has had on fair employment are unavailable, and opinions of knowledgeable observers vary widely. The consensus, however, seems to be that the FEPC has been effective and useful to some extent, but not in proportion to the magnitude of the problem. Few contend that the Agency does not have its heart in the struggle for equal employment opportunities. It is staffed by high-caliber people dedicated to their cause; however, some useful changes could be made within the Agency. Among these are the abandonment of the veil of secrecy that surrounds so much of the FEPC's functioning and the launching of a vigorous program designed to bring labor unions into line with the law. But most defects stem from a lack of resources and powers. There is no reason why the most populous state in the Union cannot spend as much as New York, which would provide an approximate quadrupling of present resources.[166] Staff should be increased and upgraded, offices geographically dispersed and located in areas of minority concentration, commissioners designated to serve on a full-time basis, and adequate funds made available for massive increases in the affirmative action program and for expediting the processing of individual complaints. Research funds should be made available to enable the Agency to determine where and why problems exist. The education program should be expanded. The private club exception should be eliminated. If, however, resources adequate to maintain a large-scale program of section 1421 investigations and affirmative actions and to expedite individual complaint handling are still to be denied the Agency, the legislature should make it possible for existing resources to be used more efficiently through broader actions by eliminating the burden of compulsory investigation of individual complaints and by authorizing

163. *Ibid.*
164. Cal. Labor Code § 1421. (Emphasis added.)
165. See note 6 *supra.*
166. California is presently spending over $90 million on the mentally retarded, as opposed to the $640,000 allocated to combat employment discrimination. California Study Comm'n on Mental Retardation, The Undeveloped Resource: A Plan for the Mentally Retarded in California 36 (1965).

the Agency to initiate enforceable actions. Ideally, both increased resources and more flexible powers should be provided. Finally, the hostile attitude in Sacramento toward a vigorous pursuit of the goals set by the legislature itself should be replaced by full support for the FEPC. Only when it is clear that California really means to back up words with action will its minorities have faith in the ultimate attainment of equal employment opportunities through the law.

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