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# COMMENTS

## SELECTING A REMEDY FOR PRIVATE RACIAL DISCRIMINATION: STATUTES IN SEARCH OF SCOPE

### I. Introduction

Racial discrimination in the United States has been effectively attacked in both the legislatures and the courts for over a hundred years. Enslavement of blacks in the American South prompted adoption of the thirteenth amendment<sup>1</sup> and the Reconstruction Civil Rights Acts<sup>2</sup> enacted pursuant to the amendment's enabling clause.<sup>3</sup> These laws sought primarily to elevate the status of the black freedman by granting him rights equal to those enjoyed by white citizens. The most far-reaching of these statutes is 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866,<sup>4</sup> which insures to all persons the same right to make and enforce contracts.<sup>5</sup>

Until quite recently, section 1981 had been an obscure and little-used declaration of rights. This resulted in part from the refusal of courts to recognize the section as a remedy for purely private dis-

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1. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII.

2. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *re-enacted*, Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 144 (codified at 42 U.S.C. §§ 1981-82 (1970)).

3. "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

4. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *re-enacted*, Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 144 (codified at 42 U.S.C. §§ 1981-82 (1970)). Due to a codifier's error, some doubt arose as to whether the entire 1866 act had been re-enacted by the Enforcement Act of 1870, with the result that some jurisdictions considered 42 U.S.C. § 1981 to be derived from the 1870 Act. *See, e.g.,* Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972). However, the Supreme Court has recognized that § 1981 is directly descended from the Civil Rights Act of 1866. Georgia v. Rachel, 384 U.S. 780, 786-89 (1966); *see Note, Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972).

5. "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1970).

criminary acts. They instead insisted that a showing of "state action" was an essential element of any cause of action thereunder.<sup>6</sup> In the landmark decision of *Jones v. Alfred H. Mayer Co.*<sup>7</sup> the Supreme Court, however, ruled for the first time that section 1981 was intended to prohibit all acts of racial discrimination,<sup>8</sup> including those by private parties not acting under color of law. To support this finding, Justice Stewart examined the historical circumstances surrounding the passage of the 1866 Act and concluded that the law had been intended to eradicate both government-supported and purely racial private discrimination as "badges and incidences of slavery."<sup>9</sup>

Since *Jones*, section 1981 has enjoyed a judicial resurrection of sorts, particularly in cases involving allegations of job-related discrimination by private employers. Prevailing plaintiffs in job discrimination actions have been awarded both damages and injunctive relief,<sup>10</sup> the latter remedy frequently taking the form of judicially-imposed "affirmative action" decrees.<sup>11</sup>

However, the explosive growth of litigation brought pursuant to section 1981 has not gone totally uncontrolled. The statute speaks only of discrimination grounded in *racial* bias. Attempts to expand the coverage of the statute beyond its unequivocal terms—for example, to include sex-based discrimination—have generally met with failure.<sup>12</sup> Even a claim by a plaintiff that he has been deprived of

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6. See, e.g., *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949).

7. 392 U.S. 409 (1968).

8. "If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals." *Id.* at 438-39.

9. *Id.* at 440. Justice Douglas, in a concurring opinion, noted:

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. . . . The men who sat in Congress in 1866 were trying to remove some of the badges . . . of slavery when they enacted § 1982.

*Id.* at 445-49.

10. Such awards are authorized by 28 U.S.C. § 1343(4) (1970); see *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956).

11. See, e.g., *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371 (3d Cir. 1974); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972).

12. See, e.g., *Abshire v. Chicago & E. Ill. R.R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Marshall*

civil rights solely on account of race does not guarantee that the courts will take cognizance of his complaint under section 1981.<sup>13</sup> Two reasons are usually given to explain the courts' reluctance to apply the statute. First, some courts, looking to the historical facts which prompted enactment of the Reconstruction Acts, insist that section 1981 was designed to protect the Negro only, and that whites may not use it to press a claim under any circumstances.<sup>14</sup> Second, certain forums believe that Title VII of the Civil Rights Act of 1964,<sup>15</sup> which provides certain remedies for private discrimination preempts the subject matter, and that any section 1981 action is improper, the grievant's race notwithstanding.<sup>16</sup> Title VII proscribes employment discrimination on the basis of race,<sup>17</sup> national origin, color, sex, or religion. It establishes the Equal Employment Opportunity Commission (EEOC),<sup>18</sup> which is charged with investigating all claims of discrimination, racial, or otherwise. Should the EEOC determine that an unlawful practice has occurred, it must attempt to conciliate the claim.<sup>19</sup> The aggrieved party may not resort to litigation unless EEOC conciliation efforts are unsuccessful or fail to reach a settlement within 180 days' time.<sup>20</sup> To allow actions for private discrimination under section 1981, it is felt, would effectively permit aggrieved parties to bypass the EEOC conciliation route and flood the courts with unnecessary lawsuits.<sup>21</sup>

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v. Plumbers and Steamfitters Local 60, 343 F. Supp. 70 (E.D. La. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972); *Schetter v. Heim*, 300 F. Supp. 1070 (E.D. Wis. 1969).

13. See text accompanying notes 68-88 *infra*.

14. *McDonald v. Santa Fe Transp. Co.*, 513 F.2d 90 (5th Cir.), *cert. granted*, 96 S.Ct. 264 (1975); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973); *Balc v. United Steelworkers of America*, 6 Empl. Prac. Dec. 6037 (W.D. Pa. 1973), *aff'd*, 503 F.2d 1398 (3d Cir. 1974).

15. 42 U.S.C. §§ 2000e to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to e-17 (Supp. III, 1973).

16. *Kinsey v. Legg, Mason & Co., Inc.*, 60 F.R.D. 91 (D.D.C. 1973).

17. 42 U.S.C. § 2000e-2 (1970), *as amended*, (Supp. III, 1973).

18. *Id.* § 2000e-4(a) (Supp. III, 1973); see text accompanying notes 70-77 *infra*.

19. 42 U.S.C. § 2000e-5(b) (Supp. III, 1973) provides:

If the Commission determines after . . . investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

20. 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973); see *Fekete v. United States Steel Corp.*, 424 F.2d 331 (3d Cir. 1970).

21. See, e.g., *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515 (N.D. Okla. 1970).

Where courts have acknowledged the existence of a cause of action under section 1981, liberal relief has been granted. Not content merely to enjoin present and future discrimination, the federal district courts have taken it upon themselves to undo the effects of past discrimination.<sup>22</sup> To attain this goal, courts have often directed employers to erase these effects by granting certain groups not merely equal, but *preferential* treatment in future hiring and advancement.<sup>23</sup> Such "affirmative action" decrees have been widely criticized on the ground that they protect one group's civil rights at the expense of all others'.<sup>24</sup>

These conflicting views regarding section 1981's proper sweep have produced conflicting decisions in the federal courts.<sup>25</sup> When the plaintiff seeking relief from racial bias under section 1981 is white, the courts may dispose of the action in several ways, none of them totally satisfactory. For example, they can deny the claim and refer the plaintiff to Title VII of the 1964 Civil Rights Act; but if speedy injunctive relief is needed to avoid irreparable harm, or if plaintiff is not within the classes of persons protected by Title VII, procuring adequate relief may be impossible.<sup>26</sup> Conversely, the court may recognize the claim, but so opting permits the plaintiff to effectively side-step the EEOC.<sup>27</sup> Furthermore, by granting whites a cause of action, the courts may have to overturn prior "affirmative action" decrees in order to insure the equality of rights guaranteed by section 1981.<sup>28</sup>

This Comment shall attempt to evaluate section 1981's proper place in the enforcement of civil rights by examining whether section 1981 was intended to benefit whites as well as blacks, the propriety of asserting a section 1981 claim without first seeking recourse

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22. *Louisiana v. United States*, 380 U.S. 145 (1965); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *United States v. Mississippi*, 339 F.2d 679 (5th Cir. 1964).

23. See *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371 (1974); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

24. See text accompanying notes 135-43 *infra*.

25. Compare *Kinsey v. Legg, Mason & Co., Inc.*, 60 F.R.D. 91 (D.D.C. 1973); *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515 (N.D. Okla. 1970) (favoring elimination of § 1981 as a cause of action) with *Hollander v. Sears, Roebuck & Co., Inc.*, 392 F. Supp. 90 (D. Conn. 1975) (regarding § 1981 as a separate and distinct remedy from Title VII).

26. See text accompanying notes 89-94 *infra*.

27. See text accompanying notes 82-88 *infra*.

28. See text accompanying notes 134-52 *infra*.

under Title VII, and the effect of section 1981 actions by white plaintiffs upon the power of the district courts to impose "affirmative action" decrees.

## II. Availability of § 1981 to White Plaintiffs

While blacks have been most heavily scarred by "badges of slavery," whites are also susceptible to discrimination grounded in race. In *Hollander v. Sears, Roebuck & Co.*<sup>29</sup> a white college student brought an action pursuant to section 1981, alleging that defendant refused to consider him for employment in the Sears Summer Internship Program for Minority Students solely because he was white and not a member of a minority group. Defendant moved to dismiss on the ground that the statute, which provides that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"<sup>30</sup> granted a cause of action for non-whites only.<sup>31</sup> While conceding that some support existed for defendant's broad claim,<sup>32</sup> the court denied the motion to dismiss,<sup>33</sup> holding that the phrase "as is enjoyed by white citizens" ought not to be read as restricting the scope of the statute, but merely as emphasizing the racial nature of the rights being protected.<sup>34</sup>

### A. § 1981's Legislative History

The decision in *Hollander* seems well-supported by the legislative history of section 1981. As originally passed by the Senate, section 1 of the Civil Rights Act of 1866 did not contain the controversial phrase; it was added by amendment in the House of Representatives.<sup>35</sup> During Senate debate on the original bill, opponents of the measure decried it as providing federal protection for black citizens which had never been accorded whites.<sup>36</sup> Senator Lyman Trumbull of Illinois, the proposal's floor manager, contended in reply: (1) that

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29. 392 F. Supp. 90 (D. Conn. 1975).

30. 42 U.S.C. § 1981 (1970) (emphasis added).

31. 392 F. Supp. at 92.

32. *Perkins v. Banster*, 190 F. Supp. 98 (D. Md.), *aff'd per curiam*, 285 F.2d 426 (4th Cir. 1960); *Balc v. United Steelworkers of America*, 6 Empl. Prac. Dec. 6037 (W.D. Pa. 1973), *aff'd*, 503 F.2d 1398 (3d Cir. 1974); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973).

33. 392 F. Supp. at 95.

34. *See Georgia v. Rachel*, 384 U.S. 780 (1966).

35. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

36. *Id.* at 599.

the bill applied to white men as well as black men, with equal force; (2) that no provision in the proposed statute could fairly be read as extending relief to blacks only; and (3) that "the very object of the bill is to break down all discrimination between black men and white men."<sup>37</sup> After the phrase "as is enjoyed by white citizens" was added in the House, and the bill was resubmitted to the Senate for consideration of the House amendments, Senator Trumbull convinced his colleagues that the new words were superfluous and in no way altered the meaning of the bill.<sup>38</sup> The Senate thereupon approved the amendment without further debate.<sup>39</sup> The phrase had been added by Iowa Congressman James F. Wilson, the bill's floor manager in the House, who provided virtually no explanation for his amendment;<sup>40</sup> but there is no mention of the phrase in the House debates which would conflict with the Senate's understanding.<sup>41</sup> In light of these facts, *Hollander* concluded that the phrase did not place a limitation upon the scope of protection afforded by section 1981.<sup>42</sup>

Although the rights enjoyed by whites are used as the measuring stick under § 1981, whites themselves may be denied the rights which are normally available to members of their race. When that occurs within the scope of activities protected by § 1981, and it is a result of racial discrimination, § 1981 provides them with a cause of action.

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37. *Id.* at 599-600. Senator Trumbull commented that the bill would add nothing to the federal authority if the states would "fully perform their constitutional obligations." *Id.* at 600. However, Trumbull and his fellow proponents of the measure considered the legislation necessary because Negroes might be "oppressed and in fact deprived of freedom" not only by hostile laws but also by prevailing public sentiment. *Id.* at 77. Only if by local legislation the states provided for "the real freedom of their former slaves" would the bill become superfluous. *Id.* See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

38. CONG. GLOBE, 39th Cong., 1st Sess. 1413 (1866).

39. *Id.* at 1118.

40. *Id.* at 474.

41. See *Hollander v. Sears, Roebuck & Co.*, 392 F. Supp. 90, 93 (D. Conn. 1975).

42. *Id.* at 94. The court also expressed its belief that its interpretation of the statute comported with the settled rule of statutory construction set forth in *Federal Deposit Ins. Corp. v. Tremaine*, 133 F.2d 827 (2d Cir. 1943). Judge Learned Hand stated in the *Tremaine* case:

There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.

*Id.* at 830.

## B. § 1981 in the Courts

But *Hollander* was by no means the first decision to acknowledge that whites have standing to sue under section 1981. As early as 1905, in *Kentucky v. Powers*,<sup>43</sup> part of the Reconstruction Civil Rights Acts<sup>44</sup> had been interpreted to apply to discrimination against whites as well as those of other races.<sup>45</sup> In *Walker v. Pointer*,<sup>46</sup> white plaintiffs alleged that they had been evicted from their apartment because they had entertained Negro guests there. They brought an action under 42 U.S.C. § 1982, which, together with section 1981, had in original form been part of section 1 of the Civil Rights Act of 1866.<sup>47</sup> In holding that the action had been properly brought, the court stated that to limit the availability of relief from discrimination to blacks only would be to give the statute a "racist construction incompatible with the due process clause of the Fifth Amendment."<sup>48</sup> Congress, by enacting section 1981, sought to abolish racial discrimination in contracting. In *WRMA Broadcasting Co. v. Hawthorne*,<sup>49</sup> it was argued that courts should not unnecessarily limit the operation of the statute. While Congress in 1866 was primarily concerned with eliminating white discrimination against freedmen, the obvious intent of the statute ought not to be ignored should discrimination by blacks arise in some rare

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43. 201 U.S. 1 (1906) (dictum).

44. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, re-enacted, Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144.

45. 201 U.S. at 32.

46. 304 F. Supp. 56, 57 (N.D. Tex. 1969). The holding and logic of *Walker*, at least insofar as it concerns the capacity of whites to sue under § 1982, should be applied to § 1981, the other section of the Civil Rights Act of 1866 enacted at the same time. As was stated in *Gannon v. Action*, 303 F. Supp. 1240, 1244 (E.D. Mo. 1969), modified, 450 F.2d 1227 (8th Cir. 1971), "[t]he history and purposes of these sections are so similar that any distinction would be artificial."

47. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted, Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 144 (codified at 42 U.S.C. §§ 1981-82 (1970)). See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

48. 304 F. Supp. at 58.

[R]udimentary application of the Thirteenth Amendment freedom from involuntary servitude was not extended on a basis of racial qualification but rather was responsive to whether any individual suffered from the wrong the Amendment was created to cure. Making relief available to the white victim of discrimination against black people adheres to this earlier, established Thirteenth Amendment principle.

*Id.*

49. 365 F. Supp. 577, 581 (M.D. Ala. 1973).



instances.<sup>50</sup> As indicated in *Central Presbyterian Church v. Black Liberation Front*,<sup>51</sup> nothing in section 1981 limits its application to cases where the civil rights of non-whites are being violated. "Indeed, it would be unfair to deprive white Americans of the benefit of these sections . . . ."<sup>52</sup>

The notion that section 1981 protects all victims of racial discrimination is implicitly buttressed by several cases which have held that whites who allege *nonracially* motivated discrimination under the statute have no standing to sue.<sup>53</sup> Courts have repeatedly held that only suits based on racial discrimination may be maintained under section 1981, since the statute's plain purpose is "to provide for equality of rights as between persons of different races."<sup>54</sup>

By contrast, decisions denying whites redress under section 1981 for alleged racial discrimination have often been vague and conclusory in their reasoning. For example, in *Perkins v. Banster*,<sup>55</sup> a white plaintiff asserted that he had been injured by acts of racial bias, and sought relief under section 1981. The court declined to exercise jurisdiction over the claim, stating:<sup>56</sup>

Section 1981 is the equal rights section giving to non-white persons the same rights which are enjoyed by white persons. Since the plaintiff, obviously and admittedly, is a white person, Section 1981 serves as no basis for jurisdiction in this case.

No further rationale or authority in support of the decision was offered. Apparently, the *Perkins* court believed that section 1981's grant of freedom to contract extended to non-whites only.<sup>57</sup> The statute's legislative history, however, as traced in *Hollander*, seems to indicate that Congress intended a contrary interpretation.<sup>58</sup> *Ripp*

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50. *Id.*

51. 303 F. Supp. 894, 899 (E.D. Mo. 1969).

52. *Id.* at 899.

53. *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973); *Willis v. Chicago Extruded Metals Co.*, 358 F. Supp. 848 (N.D. Ill. 1973); *Abshire v. Chicago & E. Ill. R.R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Marshall v. Plumbers and Steamfitters Local 60*, 343 F. Supp. 70 (E.D. La. 1972).

54. *Snowden v. Hughes*, 321 U.S. 1 (1944); *Agnew v. City of Compton*, 239 F.2d 226, 230 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957).

55. 190 F. Supp. 98 (D. Md.), *aff'd per curiam*, 285 F.2d 426 (4th Cir. 1960).

56. *Id.* at 99.

57. *See id.*

58. *See text accompanying notes 35-42 supra.*

*v. Dobbs Houses, Inc.*<sup>59</sup> involved a white plaintiff's claim that he was illegally discharged by defendant employer because of his association with and sociable attitudes toward his fellow employees who were of the black race.<sup>60</sup> Defendants urged that section 1981 was inapplicable since plaintiff's complaint did not include an allegation of racial discrimination and that section 1981 was not available to "white citizens."<sup>61</sup> The court pointed to cases limiting section 1981's scope to racial discrimination only,<sup>62</sup> and concluded that plaintiff's complaint was grounded not in racial bias, but rather in a claim that he had been denied freedom of association.<sup>63</sup> Furthermore, the court agreed that section 1981 was not subject to use by whites, citing *Perkins* as controlling.<sup>64</sup> However, the court in a footnote took notice of the fact that white plaintiffs had in the past been successful in asserting claims under the statute, but insisted that the cases "represent aberration from the prevailing authority."<sup>65</sup> Presumably, the court in *Ripp* agreed that section 1981 was enacted for the benefit of non-whites only.

Prior to *Hollander*, a clear judicial trend was beginning to emerge; courts more often than not held that section 1981 applied to "all citizens" regardless of race and not merely to those groups which had been the targets of prior discrimination.<sup>66</sup> *Hollander* reinforced

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59. 366 F. Supp. 205 (N.D. Ala. 1973).

60. *Id.* at 207.

61. *Id.* at 211.

62. See *Abshire v. Chicago & E. Ill. R.R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Marshall v. Plumbers & Steamfitters Local 60*, 343 F. Supp. 70 (E.D. La. 1972); *William v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (D.C. Cal. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972); *Schetter v. Heim*, 300 F. Supp. 1070 (E.D. Wis. 1969).

63. 366 F. Supp. at 208. The court said:

In paragraph 6 of his complaint, plaintiff alleges that he was discharged because he refused to discriminate against black employees; further he alleges he was ordered "not to associate" with black employees. While plaintiff makes these allegations concerning his allegedly restricted associations, he also avers that defendant engaged in unlawful employment practices which operate to discriminate against white employees. Fairly stated, the gravamen of plaintiff's complaint is that defendants have abridged his freedom to associate with persons of his own choosing.

*Id.* The court concluded that plaintiff had not stated a claim for relief based on an allegation that "he had suffered any detriment on account of his race." *Id.* at 208-09.

64. *Id.* at 211.

65. *Id.* at 211 n.2.

66. See *WRMA Broadcasting Co. v. Hawthorne*, 365 F. Supp. 577 (M.D. Ala. 1973); *Walker v. Pointer*, 304 F. Supp. 56 (W.D. Tex. 1969); *Central Presbyterian Church v. Black*

that trend and demonstrated conclusively the Congressional intent that section 1981 be employed to protect all citizens, including whites victimized by acts of racial discrimination.<sup>67</sup> In so doing, it undercut the assumptions in *Perkins* and *Ripp* concerning the proper scope of the statute.

### III. Effect of Title VII on the Propriety of § 1981 Actions

Although courts considering the bare question of whether whites may sue to enforce their civil rights under section 1981 generally answer in the affirmative,<sup>68</sup> this does not mean that victims of proven racial discrimination—be they black or white—will automatically be deemed entitled to relief under the statute. Some courts take the position that the subject matter area of purely racial private discrimination has been pre-empted by Title VII of the Civil Rights Act of 1964.<sup>69</sup>

#### A. Operation of Title VII

The EEOC's purpose is to settle claims of private discrimination which may arise under Title VII by means of conciliation, conferences, and persuasion.<sup>70</sup> Under the procedure set out in the statute, a grievant living in a state or subdivision which has a law prohibiting the employment practices alleged must first present his claim to local authorities for investigation and possible action.<sup>71</sup> The EEOC may not commence consideration of the complaint until local authorities discontinue their investigation or fail to achieve a

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Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969); *Kentucky v. Powers*, 139 F. 452 (C.C.E.D. Ky. 1905), *rev'd*, 201 U.S. 1 (1906).

67. See text accompanying notes 35-42 *supra*.

68. See text accompanying notes 29-54 *supra*.

69. See, e.g., *Kinsey v. Legg, Mason & Co.*, 60 F.R.D. 91, 97-98 (D.D.C. 1973); *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515, 521 (N.D. Okla. 1970).

70. 42 U.S.C. § 2000e-5(b) (Supp. III, 1973).

71. *Id.* § 2000e-5(c). This section provides in pertinent part:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the persons aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

*Id.*

satisfactory solution to the problem within sixty days.<sup>72</sup> If the EEOC determines that an unlawful practice has occurred, it must attempt to conciliate the claim out-of-court.<sup>73</sup> Should conciliation efforts prove unsuccessful within thirty days, the EEOC may act in either of two ways: (1) it can send the petitioner a "90 day letter," informing him that conciliation has failed and that petitioner has ninety days from the time of receipt of the letter to file a lawsuit in the federal district court;<sup>74</sup> or (2) it may bring suit in its own name, relieving petitioner of the necessity of having to finance the lawsuit.<sup>75</sup>

The EEOC has no specific enforcement powers; however, it may compel compliance with an order issued by a district court in any action brought pursuant to the alternatives mentioned above.<sup>76</sup> Dismissal of a complaint by the EEOC, or the failure of the EEOC to sue in its own name, does not prevent petitioner from commencing an action in his own behalf.<sup>77</sup>

### B. Title VII—Exclusive or Parallel Remedy?

The Civil Rights Act of 1964, then, provides administrative investigation, conciliation, and (to some extent) enforcement, as well as litigation in the federal district courts. The elaborate structure of procedures evidences a statutory purpose favoring administrative action and consensual settlements—litigation is to be avoided whenever possible. At the time of its enactment, Title VII was widely heralded as the first effort by the federal government to outlaw discrimination in private employment on the basis of race, national origin, color, sex, or religion.<sup>78</sup> Congressional debates regarding the statute reflect no hint that the Civil Rights Act of 1866 had already rendered private discrimination unlawful and actionable in the federal courts.<sup>79</sup> Of course, these debates took place

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72. *Id.* § 2000e-5(c).

73. *Id.* § 2000e-5(b).

74. *Id.* § 2000e-5(f)1. *See also* Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970).

75. 42 U.S.C. § 2000e-5(f)2 (Supp. III, 1973).

76. *Id.* § 2000e-5(i).

77. *Id.* § 2000e-5(f).

78. *See* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND IX OF THE CIVIL RIGHTS ACT OF 1964, at 11 [hereinafter cited as HISTORY].

79. *Id.* at 3075-98.

four years before the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,<sup>80</sup> so Congress had no judicial indication that section 1981 and the other provisions of the Reconstruction Acts prohibited private discrimination.<sup>81</sup>

The notion that Title VII should be the only remedy for private discrimination enjoys widespread acceptance. In *Smith v. North American Rockwell Corp.*,<sup>82</sup> three employees (occupying different positions) brought suit against defendant employer, seeking redress for acts of alleged racial discrimination under section 1981. The court refused to construe section 1981 as supporting subject matter jurisdiction, contending that such a reading of the statute would make Title VII "a redundancy and in large part an absurdity."<sup>83</sup> Pointing to the fact that it was being asked to simultaneously assess the rights of individuals in three essentially different situations, the court noted that a proper adjudication would require a series of complex judgments to determine whether employees, each with different skills, abilities, qualifications, and seniority had been accorded treatment by individual supervisors on a basis which did not consider their race.<sup>84</sup> In declining to apply section 1981 to the situation, the court noted:<sup>85</sup>

Any construction of 42 U.S.C. § 1981 as a jurisdictional basis for judicial decision in this complicated area of employment practices would be an unsupported avoidance of the evident purpose and meaning of Title VII of the Civil Rights Act of 1964 and particularly of the elaborate administrative and litigative machinery provided thereunder.

Since the provisions of Title VII were, in the court's estimation, more specific and comprehensive, the action was deemed fit only for administrative disposition by the EEOC.<sup>86</sup> *Smith*, together with *Kinsey v. Legg, Mason & Co., Inc.*,<sup>87</sup> serves as a warning that section 1981 is not a carte blanche authorization to circumvent and undermine the preferred policy of exhausting administrative remedies

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80. 392 U.S. 409 (1968); see text accompanying notes 7-9 *supra*.

81. HISTORY 3090.

82. 50 F.R.D. 515 (N.D. Okla. 1970).

83. *Id.* at 518.

84. *Id.* at 520.

85. *Id.* at 520-21.

86. *Id.* at 525.

87. 60 F.R.D. 91, 98 (D.D.C. 1973).

and utilizing the EEOC's conciliatory procedures.<sup>88</sup>

However, there is ample evidence to support the contention that section 1981 provides a parallel, but substantially independent and distinct remedy for private discrimination in employment from that conferred by Title VII.<sup>89</sup> While the aim of both statutes is the elimination of racial bias in the private sector, each statute treats different aspects of the problem. First, Title VII proscribes many different types of discrimination, including preference grounded in race, national origin, color, sex, or religion,<sup>90</sup> whereas section 1981 is limited to racial discrimination only.<sup>91</sup> Second, Title VII applies only to discrimination practiced by specified groups of employers, labor unions, and employment agencies. Only employers involved in interstate commerce and having more than 15 employees are subject to Title VII scrutiny;<sup>92</sup> moreover, private clubs<sup>93</sup> and educational religious institutions are not within the purview of the statute.<sup>94</sup> Presumably, section 1981 provides the only cause of action an aggrieved party can assert against any of these employers. Third, Title VII permits discrimination on the basis of sex, religion, or national origin where it is "reasonably necessary" for business, although racial discrimination is not permitted for any reason.<sup>95</sup> Section 1981 does not recognize business necessity as a valid ground for denying a party equal contract rights under any circumstances. Fourth, actions brought pursuant to Title VII must be commenced either (1) within thirty days of notification that state investigation has ceased<sup>96</sup> or (2) within ninety days of notification that EEOC conciliation efforts have failed.<sup>97</sup> No statute of limitations is included in section 1981; the district courts use the statute of limitations for comparable actions under state law as a yardstick for judging the

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88. 50 F.R.D. 515, 521 (N.D. Okla. 1970).

89. See, e.g., *Young v. ITT*, 438 F.2d 757 (3d Cir. 1971); *Battle v. National City Bank*, 364 F. Supp. 416 (N.D. Ohio 1973). See also *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973).

90. 42 U.S.C. § 2000e-2 (1970), as amended, (Supp. III, 1973).

91. *Id.* § 1981 (1970); see note 5 *supra*.

92. *Id.* § 2000e-2(b) (1970).

93. *Id.*

94. *Id.* § 2000e-1 (Supp. III, 1973).

95. *Id.* § 2000e-2(e) (1970). See also Note, *Business Necessity under Title VII of the Civil Rights Act of 1964; A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

96. 42 U.S.C. § 2000e-5(c) (Supp. III, 1973).

97. *Id.* § 2000e-5(e) (1970), as amended, (Supp. III, 1973).

timeliness of section 1981 actions.<sup>98</sup> This usually results in a more liberal time for filing complaints than is allowed under Title VII.<sup>99</sup>

The fact that Title VII and section 1981 are not precisely co-extensive goes far to rebut the argument that the more recent act repealed the older one. As indicated previously,<sup>100</sup> there could have been no intentional repealer, since in 1964 the Congress had no inkling that section 1981 prohibited private discrimination.<sup>101</sup> Repeal by implication is disfavored,<sup>102</sup> and can only exist where the new statute is irreconcilable with the old, or where the latter act covers the whole subject matter of the earlier one, and is clearly intended as a substitute.<sup>103</sup> But in either case, the intention of the legislature to repeal must be "clear and manifest";<sup>104</sup> otherwise the second act is construed as a continuation of the first.

Federal courts have recognized the similarities and differences between the two statutes and have come to the conclusion that section 1981 exists as an independent and separate remedy. In *Brady v. Bristol-Myers, Inc.*,<sup>105</sup> plaintiff alleged racially-motivated discrimination by defendant employer and sought redress under both Title VII and section 1981. The district court dismissed the Title VII claim as time-barred and refused to consider section 1981 a separate ground for jurisdiction,<sup>106</sup> relying heavily on the language of Chief Judge Barrow in *Smith v. North American Rockwell Corp.*<sup>107</sup> The Eighth Circuit reversed, holding that plaintiff was entitled to be heard on her section 1981 claim, notwithstanding that her title VII cause of action was barred by the statute of limitations.<sup>108</sup> Basing its decision largely on the decision in *Jones v. Alfred H. Mayer Co.*,<sup>109</sup> the court said:<sup>110</sup>

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98. *Young v. ITT*, 438 F.2d 757, 763 (3d Cir. 1971).

99. *Id.*

100. See text accompanying notes 78-80 *supra*.

101. HISTORY 3090. See also 110 CONG. REC. 8452, 8456 (1964).

102. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

103. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

104. *Id.*

105. 332 F. Supp. 995 (E.D. Mo. 1971), *rev'd*, 459 F.2d 621 (8th Cir. 1972).

106. *Id.* at 998-1001.

107. 50 F.R.D. 515, 520-21 (N.D. Okla. 1970); see text accompanying note 83 *supra*.

108. 459 F.2d at 623.

109. 392 U.S. 409 (1968); see text accompanying notes 7-9 *supra*.

110. 459 F.2d at 623.

An obvious parallel, and potential substantive overlap and conflict, existed between § 1982 and Title VII of the Civil Rights Act of 1964. Nevertheless, the two statutes were allowed to stand independently, and both are today available to civil rights litigants seeking to attack private discrimination in transactions involving the sale or exchange of real or personal property. It would seem more accordant with reason that § 1981 receive a similar interpretation . . . .

The court concluded that section 1981 extended beyond state action to reach private racially discriminatory employment practices.<sup>111</sup> Similarly, *Young v. ITT*<sup>112</sup> indicated that nothing in the language of Title VII evidenced an intention to deprive the courts of any pre-existing jurisdiction, known or unknown.<sup>113</sup>

### C. Choosing an Appropriate Remedy

Given that both statutes exercise concurrent jurisdiction over the subject matter, how does a victim of discrimination go about bringing an action? Is exhaustion of administrative remedies under Title VII a jurisdictional prerequisite for the maintenance of an action under section 1981? Most circuit courts which have considered the question hold that Title VII does not create a barrier to any action brought pursuant to section 1981 and that there is no "choice of remedies doctrine" which comes into play.<sup>114</sup> However, the Seventh Circuit, in *Waters v. Wisconsin Steel Works of International Harvester Co.*,<sup>115</sup> stated that an aggrieved party may proceed directly under section 1981 only if he has first exhausted his EEOC administrative remedies, or has pleaded a "reasonable excuse" for his failure to exhaust such remedies.<sup>116</sup> *Waters'* "reasonable excuse" test was adopted in *Tolbert v. Daniel Construction Co.*<sup>117</sup> where plaintiff sued defendant under Title VII for alleged acts of racial discrimination. Defendant moved to dismiss, claiming that plaintiff had not acted within the time allowed by statute to file his claim. Plaintiff amended his complaint to include a cause of action under section

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111. *Id.*

112. 438 F.2d 757 (3d Cir. 1971).

113. *Id.* at 763.

114. *Gresham v. Chambers*, 501 F.2d 687 (2d Cir. 1974); *Caldwell v. National Brewer Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Young v. ITT*, 438 F.2d 757 (3d Cir. 1971); *Hardy v. Bucyrus-Erie Corp.*, 398 F. Supp. 64 (E.D. Wis. 1975).

115. 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

116. *Id.* at 487.

117. 332 F. Supp. 772 (D.S.C. 1971).



1981. Although plaintiff's Title VII claim was barred by the statute of limitations, the court held that plaintiff's delay in filing suit was a "reasonable excuse" and that the court could take cognizance of the section 1981 complaint.<sup>118</sup>

Despite the fact that section 1981 relief remains available to victims of racial discrimination in the private sector, the conciliation features of Title VII should not be disregarded. As *Smith v. North American Rockwell Corp.*<sup>119</sup> makes clear, the complex nature of many modern controversies in the field of employment practices calls for extended fact-finding procedures plus decision making at many levels. The district courts are not so well-equipped to perform these functions as is the EEOC.<sup>120</sup> Even if conciliation fails, there remains the chance that the EEOC may decide to assume petitioner's burden in the district courts, achieving thereby the same saving of time, effort, and money.<sup>121</sup> However, if justice can be rendered only by granting an aggrieved party rapid injunctive relief, section 1981 would seem more tailored to the task of preserving the ultimate remedy. Similarly, if the racial discrimination complained of does not occur in the context of employment, or is practiced by employers not within the scope of Title VII, recourse to section 1981 is proper.<sup>122</sup> If, for example, the employer involved is a small businessman, a district court may be able to grasp the situation quickly and issue appropriate orders to enjoin the unlawful acts; but if a large corporate employer is involved, lengthy conciliation proceedings may be necessary merely to reach an understanding of the issues involved.<sup>123</sup>

Section 1981 is far from a dead statute, but it is unlikely that courts will permit it to be abused. Congress' clear intent is to avoid litigation in the field of racial discrimination by private employers whenever possible, and this intent will be carried into force by the

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118. *Id.* at 774-75.

119. 50 F.R.D. 515 (N.D. Okla. 1970); see text accompanying notes 82-88 *supra*.

120. 50 F.R.D. at 520. A second advantage of the conciliation route is that if the petitioner's claim is resolved by either state authorities or the EEOC, he will avoid the costs inherent in maintaining a lawsuit. See text accompanying note 75 *supra*.

121. See text accompanying notes 74-75 *supra*.

122. See text accompanying notes 89-99 *supra*.

123. See text accompanying notes 89-99 *supra*.

courts. Intelligent decisions must be made before a proper remedy is selected; but as *Young v. ITT* points out:<sup>124</sup>

By fashioning equitable relief with due regard to the availability of conciliation and by encouraging in appropriate cases a resort to the EEOC during the pendency of § 1981 cases the courts will carry out the policies of both statutes.

#### IV. Section 1981 and Affirmative Action

The courts have long acknowledged the legitimacy of erasing the effects of past racially-discriminatory practices.<sup>125</sup> Accordingly, when it is determined that such practices have in fact occurred, the courts may not only enjoin continuance of the practices, but may additionally require the guilty party to "act affirmatively" to undo the effects of past discrimination.<sup>126</sup> Such action may include the hiring or reinstatement of employees, except that the court may not direct hiring of an individual who was validly discharged, refused employment, suspended, or expelled for any reason other than discrimination.<sup>127</sup> Affording such relief is not merely discretionary with the court; the courts themselves are said to be under an affirmative duty to undo the effects of past discrimination and to prevent further discrimination.<sup>128</sup> In formulating appropriate remedies, courts

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124. 438 F.2d 757, 764 (3d Cir. 1971).

125. *E.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *United States v. Mississippi* 339 F.2d 679 (5th Cir. 1964).

126. 42 U.S.C. § 2000e-5(g) (Supp. III, 1973) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) . . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

127. *Id.*

128. *United States v. Mississippi*, 339 F.2d 679, 684 (5th Cir. 1964).

may suspend, ignore, or otherwise invalidate valid state laws.<sup>129</sup> To promote fair employment practices, courts have created numerous plans and formulae aimed at equalizing opportunities for all persons. Courts have on occasion directed immediate hiring of certain specified individuals,<sup>130</sup> or of a certain number of unspecified members of a particular minority group,<sup>131</sup> and have, on occasion, ordered that minority group members be hired in ratio to non-minority employees.<sup>132</sup> On one occasion, a court ordered an employer to hire 30 percent minority personnel for its next group of trainees, although the percentage of minority workers in the area was but seven percent of the work force.<sup>133</sup>

#### A. Affirmative Action: Preferences and Ratios

"Affirmative action" programs have been criticized on the ground that they create a state of "reverse discrimination" as court directives demanding preference for members of one group may disqualify from consideration non-group members with equal or superior credentials.<sup>134</sup> In *Carter v. Gallagher*,<sup>135</sup> officers of the Minneapolis Fire Department appealed from a district court ruling which ordered preferential treatment for blacks seeking appointment to the Department. The district court had invalidated the procedure by which applicants were selected for the Department, finding it to be *de facto* discriminatory. To correct racial imbalance within the Department which had resulted from prior discrimination, the district court commanded that black applicants for appointment were to be given an absolute preference in hiring until the percentage of black

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129. See *id.*

130. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The court argued that federal district courts enjoy a wide range of powers to ease the effects of discrimination by imposing affirmative action programs, and that this power is not curtailed by the anti-preference provisions of Title VII of the 1964 Civil Rights Act. *Id.* at 553.

131. *United States v. Central Motor Lines, Inc.*, 325 F. Supp. 478 (W.D.N.C. 1970). The court ordered defendant to hire six black drivers immediately and to maintain a one to one ratio of blacks to whites hired in the future. *Id.* at 479.

132. *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371 (1974); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

133. *United States v. Ironworkers Local 86*, 443 F.2d 544, 550-511 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

134. See *Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

135. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

firefighters fairly represented the percentage of black residents in the city.<sup>136</sup> The effect of this "absolute preference" was to disqualify white applicants with equal or better credentials simply because they were white.<sup>137</sup> Officers of the Department sought to enjoin implementation of the order, charging that it violated section 1981's bar on discrimination in the making of contracts. Acknowledging that section 1981 was available to white plaintiffs, the Court of Appeals for the Eighth Circuit overturned this absolute preference provision, stating:<sup>138</sup>

We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks.

The court thus expressed its hesitancy to protect one group's constitutional guarantees at the expense of another group's rights. Still, *Carter* did not wholly eliminate the element of preference from the Fire Department's hiring procedures; instead, it directed that a ratio be implemented, whereby the Department would hire one black worker for every three white workers hired, until the racial composition of the Department more realistically reflected the racial character of the city.<sup>139</sup>

Ratios, such as employed in *Carter*, are not per se unconstitutional. In fact the Supreme Court has noted them as being helpful as a "starting point in the process of shaping a remedy."<sup>140</sup> Yet some jurists feel that the distinction between a ratio and an absolute preference is perhaps too slight to be tenable. Judge Oosterhout, dissenting in *Carter*, argued that the ratio provision set up by the majority was vulnerable to the same constitutional infirmity that had felled the district court's absolute preference plan.<sup>141</sup> Whereas a ratio might not discriminate against *as many* white applicants as would the absolute preference, it would still, he urged, operate to give some minority persons an undeserved edge over white applicants with equal or superior credentials.<sup>142</sup> Oosterhout further noted

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136. *See id.* at 318.

137. *Id.* at 325; *see* 34-PITT. L. REV. 130 (1972).

138. 452 F.2d at 325.

139. *Id.* at 331.

140. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

141. 452 F.2d at 332.

142. *Id.*

that the blacks currently applying for appointment to the Fire Department had not been victimized by their white fellow applicants; therefore, he felt that they should not receive preferential treatment of right, and their white counterparts should not be unduly penalized.<sup>143</sup>

The philosophy expressed by the dissent in *Carter* has gained acceptance in other forums. In *Castro v. Beecher*,<sup>144</sup> Black plaintiffs alleged discrimination in the method by which members of the Boston Police Department were selected, and they suggested a plan for insuring that blacks would be appointed to the force in proportion to their representation in the general population. This plea was rejected by the court, which stated that there was no reason to put blacks, for example, ahead of Indians, Chinese, whites, or any other minority which might be in a comparable plight. The court pointed out:<sup>145</sup>

[I]t is a fallacy to suppose that the Constitution entitles blacks to police selected like jurors as representatives of a cross-section of a community. Blacks have no more a constitutional right to a quota of black policemen than a quota of black judges or legislators or state-employed teachers. What blacks and other minorities have a right to is that public employees like policemen shall be selected by criteria that are significantly related to a job.

Supporters of the view taken in *Beecher* insist that preferential hiring violates certain Title VII anti-preference provisions.<sup>146</sup> However, their arguments often fall on deaf ears, since district courts are vested with a great measure of discretion in shaping their decrees;<sup>147</sup> appellate courts generally do not interfere with that discretion unless gross abuse can be shown.<sup>148</sup>

## B. Using Title VII to Circumvent "Affirmative Action"

Affirmative action programs are a tightrope on which the courts

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143. *Id.*

144. 334 F. Supp. 930 (D. Mass.), *aff'd*, 459 F.2d 328 (1st Cir. 1971).

145. *Id.* at 949.

146. 42 U.S.C. § 2000e-2(j) (1970) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist . . . .

147. See *Mitchell v. Robert DeMario Jewelry Co.*, 361 U.S. 288 (1965).

148. See *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

must perform a balancing act. On one hand, they must try to implement the clear Congressional policy of eliminating discrimination and its effects; on the other, they must avoid imposing "new badges of slavery" by their actions. Some courts, as in *Beecher*, have satisfied themselves to stop present discrimination, believing that the passage of time will cure racial imbalance occasioned by past bias. More ambitious courts, as in *Erie Human Relations Commission v. Tullio*,<sup>149</sup> have sought to achieve a balance of interests by minimizing the adverse effects of preferential treatment on all parties involved. *Tullio* involved a controversy concerning the procedure for appointing cadets to the Police Department of Erie, Pennsylvania. The district court found the established practice to be racially discriminatory<sup>150</sup> and ordered that fifty percent of all new appointees were to be black, such ratio to endure until ten blacks had been appointed to the force.<sup>151</sup> In this manner, the court sought to undo the effects of prior racial bias. On appeal, the third Circuit Court of Appeals refused to overturn the system, claiming that the public interest mandated the ratio.<sup>152</sup>

Indeed, given the sensitive and highly visible role played by the police in maintaining racial peace and harmony, we feel that we should commend the district court since its order acts decisively and yet at the same time is carefully limited so that its adverse impact on others is minimized. Imposition of a 50% quota limited to the next 20 positions is not reversible error in these circumstances.

The growing judicial recognition that whites may maintain actions under section 1981 promises to add more fuel to the affirmative action controversy. If, as *Hollander v. Sears, Roebuck & Co.*<sup>153</sup> proclaims, whites have full and equal rights to use section 1981 to bar discrimination as to themselves, it is entirely conceivable that the statute will be used to challenge judicially-imposed "affirmative action" programs. In *Carter v. Gallagher*,<sup>154</sup> the court used its discretion merely to modify the type of relief sought. Yet as the dissent

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149. 493 F.2d 371 (3d Cir.), cert. denied, 419 U.S. 834 (1974).

150. 357 F. Supp. 422, 426 (W.D. Pa. 1973), aff'd, 493 F.2d 371 (3d Cir.), cert. denied, 419 U.S. 834 (1974).

151. 493 F.2d at 375.

152. *Id.*

153. 392 F. Supp. 90 (D. Conn. 1975).

154. 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972).

there pointed out, there is no real reason why white citizens should not be able to use section 1981 to overturn any affirmative action program which grants a preference to non-whites.<sup>155</sup> Two unfavorable results flow from such a reading of the statute. First, the wide discretion permitted the district courts in fashioning relief in cases involving discrimination would be severely limited.<sup>156</sup> Second, whites would be allowed to employ section 1981 to sidestep the preferred administrative remedies provided by Title VII and the EEOC. Hence, a situation might develop where whites could employ the statute to circumvent the consequences of decrees entered pursuant to Title VII authority and thereby undermine Title VII's preferred remedies.<sup>157</sup>

### V. Conclusion

To date, there is no doctrine of "election of remedies" in Title VII cases; a plaintiff may seek to vindicate his rights before as many bodies as have jurisdiction to help him.<sup>158</sup> The sole condition to this is that a plaintiff may not sue under Title VII in the district courts until the claims which form the grievance have been considered by the EEOC and that body has issued a "right to sue" letter.<sup>159</sup> Clearly, a statute should be enacted providing such a doctrine and containing guidelines for deciding which statute a discrimination

155. See text accompanying notes 141-43 *supra*.

156. See, e.g., *Mitchell v. Robert DeMario Jewelry Co.*, 361 U.S. 288 (1965); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971).

157. *But see Haber v. Klassen*, 10 F.E.P. Cas. 1446 (N.D. Ohio 1975), where the court held that whites may not seek relief under Title VII for racial discrimination. The opinion relies heavily upon a statement in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that

the complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing  
(1) *that he belongs to a racial minority*

*Id.* at 802 (emphasis added). However, the *McDonnell-Douglas* case does not stipulate how the term "minority" is to be defined, *i.e.*, nationally, regionally, etc., or whether a prima facie case of racial discrimination may be proven in more than one manner.

The court in *Haber* further states that the intention of Congress in enacting Title VII was to achieve equality of employment opportunities and "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 10 F.E.P. Cas. at 1447, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Yet the EEOC has traditionally afforded relief to whites seeking redress for racial bias. See, e.g., *Hollander v. Sears, Roebuck & Co.*, 302 F. Supp. 90 (D. Conn. 1975).

158. See *Bulls v. Holmes*, 403 F. Supp. 475 (E.D. Va. 1975)

159. 42 U.S.C. § 2000e-5(f), as amended, (Supp. III, 1973).

suit should be brought under—section 1981 or Title VII. Three methods for providing a choice of remedies come immediately to mind.

First, all restrictions on the scope of Title VII could be removed, making the statute proper recourse for all claims of private racial discrimination. This would of course reduce section 1981 to a simple declaration of rights once again. On the negative side, it might be improper to subject all discrimination claims to administrative processing, particularly where quick injunctive relief is necessary.

A second alternative would be to amend section 1981 to exclude all cases which fall within the purview of Title VII. While this might eliminate much confusion and duplication of effort, it would still interfere with a plaintiff's ability to obtain injunctive relief, especially when such plaintiff is within the scope of Title VII.

Enactment of an entirely new statute, providing flexible guidelines for action, is the third and perhaps the most sensible option. Such a statute should provide: (1) that a party may not use section 1981 unless he can show that "irreparable harm" would occur if he were forced to wait for Title VII relief; (2) that all section 1981 claims should first be presented to state authorities in order to minimize litigation in the federal courts; and (3) a statute of limitations for section 1981 actions. The aim of the statute should be to avoid litigation in discrimination cases, to provide the best possible fact-finding procedures in complex employment relation cases, and to carry into effect, as far as possible, the policies of both section 1981 and Title VII. This would, in turn, provide a statutory framework where grievants would be able to determine how precisely to proceed in order to procure relief. In addition, it would preserve the discretion of the district courts in fashioning remedies to erase discriminatory practices and their effects.

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