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The Varieties of Numerical Remedies

Eric Schnapper
University of Washington School of Law

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On July 2, 1986, the Supreme Court finally resolved a 17 year controversy [1] regarding whether race conscious[2] numerical orders[3] could be utilized to enforce Title VII of the 1964 Civil Rights Act. In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[4] six members of the Court agreed that federal courts could in some instances issue such orders, even if the beneficiaries of the decrees might not themselves be the actual victims of an employer's past discrimination.[5] In a companion case, *Local 93, International Association of Firefighters v. Cleveland*,[6] six Justices held that a federal court could order into effect a consent decree containing a race conscious numerical order even if that court might have lacked the authority to impose that order on a non-

* Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.; Lecturer in Law, B.A., Johns Hopkins University, 1962; M.A.,, Johns Hopkins University 1963; B. Phil., Oxfor University, 1965; LL.B., Yale University, 1968. Columbia University.

1. The earliest appellate decision on this issue is United States v. Ironworkers Local 86, 443 F.2d 544, 551-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

2. Although this article refers most often to remedial orders in race discrimination cases, the issues involved are similar to those in cases involving discrimination on the basis of sex, national origin, or other impermissible considerations. Because the basis for court-ordered numerical relief is essentially practical, however, in any particular case such relief could well be more appropriate for one group or position than for others. *See, e.g.*, United States v. New York, 475 F. Supp. 1103, 1110 (N.D.N.Y. 1979). The practical and legal problems raised by court-ordered numerical remedies are, in most circumstances, the same regardless of whether the underlying claim is based on the fourteenth amendment or one of the civil rights laws; the courts have treated constitutional and statutory lawsuits as raising essentially identical legal issues, and this article does so as well.

3. The various types of orders that have been issued requiring that a particular number or proportion of women or minorities be hired or promoted or laid off are all referred to in this article, for simplicity, as numerical remedies. In the opinions discussed herein these orders are at times called "numerical remedies," "goals," or "preferences," or are given no name at all. Although there are clear differences in the stringency and flexibility of these various orders, *see* text accompanying notes 160-276 *infra*, there is no generally accepted rule of law or common usage dictating the particular circumstances that might separate, for example, a "numerical remedy" from a "goal." In an attempt to capture the semantic high ground, opponents of particular numerical remedies denounce them as "quotas," while proponents insist the remedies are merely "goals." In that context, "quota" often means little more than "a numerical remedy disfavored by the speaker." To suggest, as some judges and commentators have, that "goals" are permissible but "quotas" are not is to convey little of substance absent an explanation of the author's personal definitions of those terms. This article deliberately eschews this sort of vague but provocative terminology.

4. 106 S. Ct. 3019 (1986).

5. *Id.* at 3024 (plurality opinion); *id.* at 3054 (Powell, J., concurring); *id.* at 3062 (White, J., dissenting). Justice O'Connor apparently acquiesced in this holding. *Id.* at 3057 (O'Connor, J., dissenting).

6. 106 S. Ct. 3063 (1986).

consenting defendant.[7] The decisions in *Sheet Metal Workers'* and *Firefighters* were consistent with the views of the lower courts, which had uniformly agreed that race conscious numerical remedies were permissible in a Title VII case.[8]

But neither *Sheet Metal Workers'* nor *Firefighters* established a definitive standard for determining whether a numerical remedy may or must be imposed in a particular case. Among the lower courts there has been widespread judicial disagreement and confusion regarding when such remedies should be imposed and what form particular remedies should take. The district and circuit courts considering the propriety of numerical remedies have regarded that dispute as presenting a single issue of legal and constitutional principle, and those courts quickly arrived at a consensus in favor of permitting such remedies. The decisions about the propriety of using numerical remedies in any specific case, on the other hand, have remained largely ad hoc in nature. Several of the circuits that have endorsed numerical remedies in the abstract have been quite critical of the use of such remedies in particular cases.[9] A number of circuits, on the other hand, have generally affirmed such orders.[10] The standards to be applied in framing a numerical remedy, and in determining whether to impose one at all, have varied from case to case in an apparently unpredictable manner. In one particularly notable decision, a panel of the Second Circuit, recognizing that previous decisions in that circuit had proposed conflicting standards, despaired of resolving that conflict, and instead remanded a nu-

7. *Id.* at 3072.

8. *Id.; Sheet Metal Workers',* 106 S. Ct. at 3037 n.28.

9. Since 1975, the District of Columbia Circuit has reversed or modified all lower court remedies imposing numerical remedies. *See* Segar v. Smith, 738 F.2d 1249, 1293-95 (D.C. Cir. 1984) (numerical order vacated and remanded for reconsideration and additional findings), *cert. denied,* 471 U.S. 1115 (1985); McKenzie v. Sawyer, 684 F.2d 62, 78-80 (D.C. Cir. 1982) (numerical order modified to eliminate interim goals); Thompson v. Sawyer, 678 F.2d 257, 293-96 (D.C. Cir. 1982) (numerical remedy reversed).

The Fourth Circuit has reversed three of the four appeals involving such remedies. *See* Chisholm v. United States Postal Serv., 665 F.2d 482, 498-99 (4th Cir. 1981) (numerical remedy affirmed); Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625, 647-50 (4th Cir. 1978) (numerical remedy reversed), *cert. denied* 440 U.S. 981 (1979); White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091-92 (4th Cir. 1977) (numerical remedy reversed); Patterson v. American Tobacco Co., 535 F.2d 257, 273-75 (4th Cir.) (numerical remedy reversed), *cert. denied,* 429 U.S. 920 (1976).

Between 1975 and 1980 the Second Circuit overturned in whole or in part five of the six numerical remedies it reviewed. *See* Guardians Ass'n of the N.Y. Police Dep't, Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 112-13 (2d Cir. 1980) (numerical remedy reversed), *cert. denied,* 452 U.S. 940 (1981); Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 312-14 (2d Cir. 1979) (numerical remedy vacated and remanded); EEOC v. Sheet Metal Workers' Int'l Ass'n Local 638, 565 F.2d 31, 34-36 (2d Cir. 1977) (numerical remedy affirmed); EEOC v. Sheet Metal Workers' Int'l Ass'n Local 638, 532 F.2d 821, 831-32 (2d Cir. 1976) (specific numerical remedies reversed); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427-30 (2d Cir. 1975) (numerical remedy reversed). Since 1981, the Second Circuit has reviewed four court ordered numerical remedies and upheld them all.

10. The First, Fifth, Eighth, and Ninth Circuits have upheld both the imposition and terms of every court-ordered numerical remedy that was the subject of an appeal.

merical remedy case to the district court with a direction that the trial judge announce his own views so that those ideas could be considered in a subsequent appeal.[11]

This article seeks to provide a coherent account of why the federal courts have used numerical remedies and an analysis of the types of cases in which they should do so. Part I describes the evolution of court ordered numerical remedies in Title VII and other employment cases and discusses the appellate courts' failure to establish any clear standards for adopting and framing such remedies. Part II argues that this lack of a coherent set of standards is due to a failure to recognize that the lower courts have been utilizing numerical remedies in six quite distinct types of cases, each with its own rationale. The analysis delineates both the differing circumstances under which each of these six types of numerical remedies is warranted and the differences in the forms of such orders that are appropriate in each case. Part III urges that the trial courts, in deciding whether to order or deny numerical relief, should analyze more carefully the rationale and evidence on which that proposed relief is based, and that, where this has occurred, the appellate courts should subject such orders or denials only to the limited scrutiny appropriate to other factually based determinations.

I. The Emergence of Numerical Remedies

The fashioning of a coherent set of principles for framing and using numerical remedies must begin with an understanding of how and why those remedies came into use. From the entry of the first such order, just two years after the effective date of Title VII, this body of jurisprudence has emerged as an essentially practical response to a recurring set of problems. The decisions that have emerged have on the whole been both substantially consistent and theoretically incoherent.

Existing case law regarding numerical remedies has two peculiar and seemingly contradictory characteristics. First, despite the ongoing public controversy about such orders, and the fact that a substantial majority of the public appears to find these orders, at the least, distasteful, the federal courts have unanimously held that such decrees may be used as remedies in employment discrimination cases. Every circuit that has decided that issue has reached the same conclusion. Most judicial objections have been limited to the propriety of particular orders, or to their necessity in specific cases.[12] Since the adoption of Title VII only a handful of lower court judges have ever argued that such reme-

11. *Association Against Discrimination in Employment*, 594 F.2d at 313-14.

12. *See* Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 762-63 (6th Cir. 1983) (numerical relief imposed in error because sufficient remedy in good faith recruitment of minority faculty members and other remedial measures); McKenzie v. Sawyer, 684 F.2d 62, 79-80 (D.C. Cir. 1982) (long-term goals allowable but specific affirmative action timetables unnecessary in light of the sweeping changes in promotion practices and hiring goals already adopted); *Guardians Ass'n of the N.Y. Police Dep't, Inc.*, 630 F.2d at 109-13 (absent showing of deliberate

dies are absolutely forbidden no matter what the circumstances.[13] Second, despite eighteen years of litigation concerning numerical remedies in employment cases, the case law regarding when such remedies may or should be used remains quite confused. The same judges who have repeatedly agreed that numerical remedies are proper under some circumstances have been unable to reach any meaningful consensus about what those circumstances are.

This situation is quite unlike the pattern of decisions in most other areas of legal controversy. Ordinarily in such matters a clear difference of opinion about some fundamental issue will emerge and be resolved by a court of appeals en banc or by the Supreme Court, and the principles established in that appellate decision will then be administered in a fairly coherent and predictable manner. In the early years of Title VII litigation, for example, there was a sharp dispute about whether the statute forbade practices that, although not adopted for a discriminatory purpose, had a discriminatory effect on minorities.[14] The Supreme Court resolved that dispute in 1971, holding in *Griggs v. Duke Power Co.*[15] that a Title VII action could be based on such a discriminatory effect. Subsequent Supreme Court decisions,[16] together with guidelines issued by several federal agencies,[17] have further refined and clarified the principles announced in *Griggs*. These developments are typical of Title VII jurisprudence, which in most instances has become increasingly clear and predictable during the same period that decisions regarding numerical remedies have become steadily more confused.

This judicial confusion has arisen because court ordered numerical remedies have come into use, not as a result of any appellate decision interpreting Title VII to require such orders, but because federal trial judges under a wide variety of circumstances have found that some form of numerical order was necessary, as a practical matter, to prevent

intent to discriminate, use of numerical remedies unwarranted); *Patterson*, 535 F.2d at 274-75 (numerical hiring goal reversed because company's current hiring practices sufficient).

13. *Patterson*, 535 F.2d at 276-77 (Widener, J., concurring in part and dissenting in part); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 634-39 (2d Cir. 1974) (Hays, J., dissenting); Morrow v. Crisler, 491 F.2d 1053, 1061-64 (5th Cir.) (en banc) (Coleman, J., dissenting), *cert. denied*, 419 U.S. 895 (1974); Carter v. Gallagher, 452 F.2d 315, 332 (8th Cir. 1971) (en banc) (Van Oosterhout, J., dissenting), *cert. denied*, 406 U.S. 950 (1972); Carson v. American Brands, Inc., 446 F. Supp. 780, 787-88 (E.D. Va. 1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979), *rev'd*, 450 U.S. 79 (1981).

14. *Compare* Griggs v. Duke Power Co., 420 F.2d 1225, 1232-34 (4th Cir. 1970) (discriminatory purpose required), *rev'd*, 401 U.S. 424 (1971) *with* United Paperworkers Local 189 v. United States, 416 F.2d 980, 992-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (discriminatory purpose not required if system carries past discrimination into the present) *and* United States v. Sheet Metal Workers' Int'l Ass'n Local 36, 416 F.2d 123, 139-40 (8th Cir. 1969) (discriminatory purpose not required).

15. 401 U.S. 424, 429-33 (1971).

16. Connecticut v. Teal, 457 U.S. 440 (1982); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

17. Uniform Guidelines on Employee Selection Procedures, 5 C.F.R. § 300.103(1) (1986).

or deter future acts of discrimination or to redress discrimination that had already occurred. The emergence of numerical remedies has not been a matter of statutory construction, except insofar as courts have concluded that neither Title VII nor the fourteenth amendment precludes such remedies, but has resembled the evolution of equity remedies in the early centuries of English law. During the first two decades of Title VII litigation, judges required to frame remedial injunctions have quite properly been primarily concerned with the peculiar circumstances of the particular violations before them. The fashioning of any numerical order, like the framing of the other portions of these decrees, has necessarily been dictated largely by intensely practical considerations.

It is hardly surprising that neither trial nor appellate judges have found in either Title VII or the fourteenth amendment any substantial guidance for fashioning such remedies. No member of Congress in 1964, or 1866, could have anticipated the remedial problems that would arise in the 1970s and 1980s, and none seriously attempted to do so. The Congress that framed Title VII knew from bitter experience the unusually difficult and complex problems that a court might well face in preventing and redressing class-wide racial discrimination. Intransigent Southern election officials had been extraordinarily successful in denying blacks the right to vote guaranteed by the fifteenth amendment and federal statutes,[18] and a decade after *Brown v. Board of Education*[19] the federal courts were still struggling to find some form of decree that would result in effective desegregation and undo the all too enduring effects of past discriminatory practices.[20] Against that background, the Eighty-eighth Congress sensibly neither prescribed any

18. The well known history of discrimination in registration was summarized by the Supreme Court in South Carolina v. Katzenbach, 383 U.S. 301, 311-13 (1966). The voting rights provisions of both the Civil Rights Act of 1957, 71 Stat. 634, and the Civil Rights Act of 1960, 74 Stat. 86, had proved insufficient. The various tactics used by southern registrars to disenfranchise blacks were discussed at length during the hearings that led to the adoption of the Civil Rights Act of 1964, 78 Stat. 241 (1964). In explaining the voting rights provisions of the Civil Rights Act of 1964, seven members of the House Judiciary Committee noted "the intricate methods employed by some state or county voting officials to defeat Negro registration." H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 5 (1963). The Congress that framed Title VII also had before it a report of the United States Commission on Civil Rights describing those tactics. U.S. COMM. ON CIVIL RIGHTS, VOTING (1961).

19. 347 U.S. 483 (1954).

20. This basic problem was stated in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971):

> Over the 16 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of those dilatory tactics has been noted frequently by this Court and other courts.

Title VII of the Civil Rights Act of 1964 was adopted, in part, to overcome the continued resistance to *Brown*. Several members of the House Judiciary Committee, in a statement of

particular remedial formula, nor withdrew from the arsenal of possible remedies any weapon that later experience might prove essential. In extraordinarily broad language, section 706(g) authorized federal judges to "order such affirmative action . . . as the court deems appropriate."[21] That mandate, to do whatever might be necessary to enforce the law, was sensibly construed by *Sheet Metal Workers'* to permit the use of numerical remedies where appropriate,[22] yet it is a legislative mandate that, virtually by definition, provides no guidance as to when such remedies might be proper.

Had the adoption of Title VII been followed by prompt and uniform compliance with the law, the subsequent dispute about hiring and promotion remedies might well never have arisen. The public accommodations provisions of the 1964 Civil Rights Act were widely and quickly obeyed; because restaurants and hotels, with only rare exceptions, admitted minorities immediately following the passage of the 1964 Act, no court ever ordered quota dining or quota lodging. The response of employers and unions to Title VII, unfortunately, was in many instances very different. Many employers and unions, of course, did begin to change their practices following the adoption of Title VII. But other, more intransigent employers and unions embarked upon a program of disobedience and dissembling that rivaled the tactics of the most vehement proponents of white supremacy.[23]

A substantial majority of all court-ordered numerical remedies have been imposed in cases in which blacks, other minorities, or women were virtually excluded from the jobs at issue despite the passage of Title VII. In over a quarter of the reported cases there was not a single

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supplemental views included in the report on the 1964 Act, emphasized the magnitude and success of that resistance:

> [T]here are almost as many segregated school districts in late 1963 as there were at the end of 1959. . . . [A]t this pace, it will still take until the year 2063 before the compliance order of the 1955 Supreme Court decision which called for school desegregation in biracial school districts "with all deliberate speed" will be carried out. . . . During the past decade vigorous opposition to desegregation has led to legal measures aimed at restricting and circumventing the mandate of the *Brown* decision. The various legal attempts to avoid the consequences of desegregation can be divided into four major categories: (1) A number of Southern States have introduced one or more of the multiple variables of the pre-Civil War doctrines of interposition and nullification. . . . (2) Other states have entered upon a course of action aimed at disqualifying potential plaintiffs . . . from bringing court actions to end segregation. . . . (3) A number of States have implemented pupil placement and assignment laws which alter the theoretical basis of separation. . . . (4) The fourth category comprises the various devices employed to separate the operation of the schools from the state. . . . [T]he net result has been massive delay in implementing the mandate of the Court.

H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 20-21 (1963).

21. 42 U.S.C. § 2000e-5(g) (1982).

22. *Sheet Metal Workers'*, 106 S. Ct. at 3034 (plurality opinion).

23. The lack of progress in ending employment discrimination was a major consideration in the decision of Congress to strengthen Title VII in 1972. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 3-5 (1971); S. REP. No. 415, 92d Cong., 1st Sess. 4-8 (1971).

black or woman in the disputed job.[24] This phenomenon was not limited to the days immediately following enactment of Title VII; well into the 1970s and beyond the courts have continued to face all-white or all-male unions,[25] police departments,[26] fire departments,[27] and jobs or units of other employers.[28] In another quarter of the reported cases, the number of minorities or women remained at token levels, frequently under 2 percent, in cities where the proportion of minorities or women in the area workforce was often ten times higher.[29] In a number of instances the proportion of minorities on a defendant's workforce was not only low, but actually declining.[30] Neither test had

24. There are a total of 89 court-ordered numerical remedies reported in volumes 1-35 of the Bureau of National Affairs, Fair Employment Practices Cases. This publication includes all employment discrimination cases officially reported in the Federal Supplement and Federal Reporter, as well as a large number of decisions and orders not otherwise reported. Of these decisions, 24 involved cases in which there were no blacks, women, or other minorities in the position at issue. *See* E. Schnapper, List of Employment Discrimination Cases (1987) (on file with the *Stanford Law Review*). The very first case in which a numerical remedy was ordered under Title VII was such a case. *See* Vogler v. McCarty, Inc., 294 F. Supp. 368, 370 (E.D. La. 1967) (no blacks or Mexican-Americans), *aff'd sub nom.* International Ass'n of Heat and Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

25. *See, e.g.*, EEOC v. Local 2P Lithographers Int'l Union, 412 F. Supp. 530, 534 (D. Md. 1976); United States v. Sheet Metal Workers Local 10, 6 Fair Empl. Prac. Cas. (BNA) 1036, 1039 (D.N.J. 1973).

26. *See, e.g.*, United States v. San Diego County, 21 Fair Empl. Prac. Cas. (BNA) 402, 408 (S.D. Cal. 1979) (0% black deputy sheriffs; 0% Hispanic deputy sheriffs in 1977 and 1.3% (one person) in 1979); *see also* NAACP v. Allen, 493 F.2d 614, 616 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1055 (5th Cir.) (en banc) (no blacks at time of trial), *cert. denied*, 419 U.S. 895 (1974); Reed v. Lucas, 11 Fair Empl. Prac. Cas. (BNA) 153, 154 (E.D. Mich. 1975) (no black deputy inspectors); Pennsylvania v. Sebastien, 368 F. Supp. 854, 855 (W.D. Pa. 1972), *aff'd*, 480 F.2d 917 (3d Cir. 1973).

27. *See, e.g.*, Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 105, (D. Conn. 1979) (in 1975 department had 427 whites, no blacks, one Hispanic), *aff'd in part and vacated in part*, 641 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Arnold v. Ballard, 6 Fair Empl. Prac. Cas. (BNA) 287, 288 (N.D. Ohio 1973); *see also* Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971).

28. *See, e.g.*, Bentley v. City of Thomaston, 32 Fair Empl. Prac. Cas. (BNA) 1476, 1478 (M.D. Ga. 1983) (35 of 68 city job classifications had never been held by a black; 12 of the remaining 33 had only had one black); Thompson v. Boyle, 499 F. Supp. 1147, 1149 (D.D.C. 1979) (all supervisors and all craft bookbinders were male; 98% of all craftsmen were male); Sherrill v. J.P. Stevens & Co., 410 F. Supp. 770, 775-77 (W.D.N.C. 1975) (no blacks in office, clerical or supervisory positions; no blacks in shop or maintenance positions until 1974), *aff'd*, 551 F.2d 308 (4th Cir. 1977); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 397 (3d Cir. 1976) (no women ever served as first class machine operators), *cert. denied*, 429 U.S. 1041 (1977); Meadows v. Ford Motor Co., 6 Fair Empl. Prac. Cas. (BNA) 795, 801 (W.D. Ky. 1973) (no women hired prior to 1973).

29. *See, e.g.*, United States v. City of Philadelphia, 28 Fair Empl. Prac. Cas. (BNA) 1560, 1562 (E.D. Pa. 1979) (women 1.6% of police department); Patterson v. Youngstown Sheet & Tube Co., 659 F.2d 736 (7th Cir. 1979) (union 1.3% black), *cert. denied*, 454 U.S. 1100 (1981); United States v. New York, 21 Fair Empl. Prac. Cas. (BNA) 1286, 1314 (N.D.N.Y. 1979) (state police less than 1% black in 1978); Abron v. Black & Decker Mfg. Co., 654 F.2d 951 (4th Cir. 1981) (blacks less than 1% of craftsmen, office, and clerical workers); Davis v. County of Los Angeles, 566 F.2d 1334, 1337 (9th Cir. 1977), (blacks and Hispanics together only 3.3% of firemen), *vacated as moot*, 440 U.S. 625 (1978); *see also* note 27 *supra*.

30. *See, e.g.*, Firefighters Inst. for Racial Equality v. City of St. Louis, 588 F.2d 235, 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); United States v. City of Chicago, 411 F. Supp. 218, 230 (N.D. Ill. 1976), *aff'd in part and rev'd in part*, 549 F.2d 415 (7th Cir. 1977); United

been, or could be, validated as job related. In such extreme situations stern measures were clearly required; no sensible judge could have concluded that a union or employer that had remained in brazen violation of Title VII for years would change its ways merely because of a general injunction reiterating the long disregarded statutory prohibition against discrimination.[31] Where trial judges familiar with all the circumstances of these cases concluded that numerical remedies were among the necessary remedial measures, the appellate courts were understandably and properly reluctant to substitute their own judgments.

In a substantial number of the cases in which numerical relief was ordered, the order occurred only after, and because, earlier racially neutral decrees had been violated by the defendants. In November, 1969, for example, a Lathers Union local in New York City agreed to a consent decree which forbade racial discrimination, established a detailed, racially neutral procedure for making referrals to new jobs, and required the union to develop fair and objective standards for selecting new members. Eighteen months later the district judge who had approved the decree found that the union had continued to engage in wholesale discrimination, disregarded and circumvented the referral procedure established by the decree, proposed membership standards that were "trivial and superficial," and violated the decree in a number of other respects.[32] The trial court consequently held the union in contempt and ordered into effect a numerical provision for issuing union work permits.[33] Similar situations occurred in Chicago,[34]

States v. Bricklayers Local 1, 5 Fair Empl. Prac. Cas. (BNA) 863, 867 (W.D. Tenn. 1973); Pennsylvania v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977).

Despite Title VII's restriction on the use of testing procedures with an adverse effect on protected groups, several cities used tests that excluded 100 percent of female or minority applicants. *See Association Against Discrimination in Employment,* 479 F. Supp. at 108-09; *Ballard,* 6 Fair Empl. Prac. Cas. (BNA) at 288; *see also* Pennsylvania v. Flaherty, 477 F. Supp. 1263, 1265 (W.D. Pa. 1979) (as a result of test, pool of applicants ranking high enough for promotions to lieutenant was 100% white); Berkman v. City of New York, 536 F. Supp. 177, 186 (E.D.N.Y. 1982), *aff'd,* 705 F.2d 584 (2d Cir. 1983). Neither test had been, or could be, validated as job related.

31. In ordering or approving numerical remedies, judges have repeatedly insisted that it would be insufficient to issue an injunction which merely reiterated the non-discrimination requirement of Title VII or the Constitution. *See, e.g.,* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974) (district court properly granted "more drastic relief than a mere prohibition against future discriminatory conduct"); United States v. International Bhd. of Elec. Workers Local 38, 428 F.2d 144, 151 (6th Cir.) (district court injunction lacking numerical remedy criticized as a "pro forma" judgment), *cert. denied,* 400 U.S. 943 (1970); United States v. Sheet Metal Workers' Int'l Ass'n Local 36, 416 F.2d 123, 132 n.18 (8th Cir. 1969) (quoting *International Ass'n of Heat and Frost Insulators,* 407 F.2d at 1051-52 (district court not limited to "simply parroting the Act's prohibitions")).

32. United States v. Lathers Local 46, 328 F. Supp. 429, 431-40 (S.D.N.Y. 1971).

33. United States v. Lathers Local 46, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973); *see also* EEOC v. Local 638, 401 F. Supp. 467, 488-93 (S.D.N.Y. 1975) (numerous violations of prior decree), *modified,* 532 F.2d 821 (2d Cir. 1976), *aff'd sub nom.* Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986).

34. In 1976, following the issuance of a preliminary injunction against discrimination on the basis of sex, the Chicago Police Department took a series of steps that, in the words of the

Bridgeport,[35] and St. Louis.[36] In a number of instances courts which initially ordered only flexible hiring or promotion goals later found that the defendant employers abused the discretion accorded by those decrees and continued in their old ways, forcing the courts to impose more stringent remedies.[37] In *Sheet Metal Workers'* itself the district court grounded its decision to use a numerical remedy on the fact that the defendant had repeatedly violated a series of federal and state court orders.[38]

The practical inadequacy of nonnumerical decrees was not limited to cases in which the defendants brazenly violated the injunction. In a substantial number of instances the effects of past discriminatory practices were so severe and enduring that even a racially neutral hiring or promotion procedure was as discriminatory as the invidious policies it replaced. The most celebrated cases of this type were *NAACP v. Allen*[39]

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trial judge, "exacerbated the situation": administering a test whose results were not used, adopting new requirements that created "an almost impossible hurdle for women," and continuing to refuse to promote any female officers. United States v. City of Chicago, 411 F. Supp. at 230-31.

35. The Bridgeport Fire Department, which as recently as 1975 had no black officers in a city that was 16 percent black, drafted a plan to correct that situation, but refused to adopt the plan until threatened with a termination of all federal assistance, and then after adoption made no effort to comply with its own plan. *Association Against Discrimination in Employment,* 479 F. Supp. at 101; *cf.* STATISTICAL ABSTRACT OF THE UNITED STATES 22 (1986) (noting minority population of Bridgeport).

36. St. Louis, following decisions or acknowledgements that the procedures used for making promotions were illegal under Title VII, avoided promoting any minorities by the simple expedient of refusing to make any further promotions and declining to adopt new lawful procedures. *Firefighters Inst. for Racial Equality,* 588 F.2d at 240; Western Addition Community Org. v. Alioto, 369 F. Supp. 77 (N.D. Cal. 1973), *aff'd,* 514 F.2d 542 (9th Cir.), *cert. denied,* 423 U.S. 1014 (1975); *see also* Guardians Ass'n of N.Y. Police Dep't v. Civil Serv. Comm'n, 484 F. Supp. 785, 798 (new unlawful test adopted after earlier test declared illegal), *aff'd in part and vacated in part,* 630 F.2d 79 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); EEOC v. AT&T, 13 Fair Empl. Prac. Cas. (BNA) 390, 421 (E.D. Pa. 1975) (consent decree numerical provision justified by violation of prior decree).

37. *See* Clayton v. Children's Hosp. Medical Center, 30 Fair Empl. Prac. Cas. (BNA) 996, 997 (N.D. Cal. 1979) (consent decree extended for 5 years; 2 year deadline established for achieving 15% minority employment level); EEOC v. Bartenders, 28 Fair Empl. Prac. Cas. (BNA) 1575, 1577 (N.D. Cal. 1979) (minimum minority levels of membership in union increased from 10% Asian-American and 8% Black to 14.7% Asian-American and 12% Black); Morgan v. O'Bryant, 671 F.2d 23, 24 (1st Cir.) (50% hiring order changed to require sufficient minority hiring to increase minority staff proportion by 1.5% each year), *cert. denied,* 459 U.S. 881 (1982); Brown v. Neeb, 644 F.2d 551, 556 n.4 (6th Cir. 1981) (in face of contempt motion for violation of prior decree disavowing numerical remedies but requiring recruiting efforts to increase fire department employment of minorities to population proportion, defendant agreed to new consent decree specifying number of minority firefighters to be hired each year from 1977 through 1983); United States v. San Diego County, 21 Fair Empl. Prac. Cas. (BNA) 402, 404-05 (S.D. Cal. 1979) (following violation of decree requiring the defendant "to seek to achieve the interim goal" of promoting minorities and women at a rate twice their proportion in the relevant pool, court ordered that specified number of minorities and women must be given next promotions); Officers for Justice v. Civil Serv. Comm'n, 621 F. Supp. 1221 (N.D. Cal. 1985) (numerical order extended to temporary promotions to prevent evasion of order regarding permanent promotions).

38. 106 S. Ct. at 3027.

39. 493 F.2d 614 (5th Cir. 1974).

and *Morrow v. Crisler*,[40] both decided by the Fifth Circuit in 1974. The facts of these cases were remarkably similar. In July 1970, a federal court in *NAACP v. Allen*[41] had enjoined the State of Alabama from continuing to discriminate against blacks in hiring state troopers. That order also established detailed nonnumerical provisions for assuring an end to discrimination, including stringent controls on the civil service certification procedure, an end to all segregation of employee facilities, mandatory announcements in all public advertisements of a nondiscriminatory hiring policy, and an extensive program of recruitment of minority job applicants.[42] Nineteen months later, the district judge found that not a single black had been hired as state trooper or into the civilian positions connected with the troopers.[43]

In *Morrow*,[44] a different federal judge issued a similarly explicit nonnumerical injunction intended to end discrimination in the all-white Mississippi Highway Patrol.[45] In April, 1973, the first appellate panel

40. 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974). An earlier panel decision in *Morrow* upholding the trial court's denial of numerical relief is reported at 479 F.2d 960 (5th Cir. 1973).

41. The original order was part of a broader injunction regarding Alabama civil service appointments entered in United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970). The trial court in *Allen* considered the request for a numerical order in that case as a motion for further relief in *Frazer*. *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972) *aff'd*, 493 F.2d 614 (5th Cir. 1974). For simplicity, all these proceedings are referred to as *NAACP v. Allen*, the name by which the case was known in the court of appeals.

42. *Frazer*, 317 F. Supp. at 1091-93. The recruiting portions of paragraph VII of that decree provided:

> (2) The defendants shall advise the public in all advertisements and announcements that they will appoint and employ persons on an equal opportunity, merit basis, without discrimination on the ground of race or color. . . . (3) The defendants shall adopt and implement a program of recruitment and advertising which will fully advise the Negro citizens of the State of Alabama of the employment opportunities available to them with the State of Alabama agencies. This program shall include a rearrangement of regular places for administering merit system examinations so that at least 25 percent of those places consist of predominantly Negro high schools or other institutions. The defendants shall also revise their permanent mailing list of the State Personnel Department to include all predominantly Negro educational institutions and vocational schools, and radio and television stations and newspapers; and for positions in which a high school education or less is required, the defendants shall be required to mail announcements of such positions, together with other related materials, to all the institutions indicated above, as well as to predominantly Negro high schools. (4) The defendants shall institute regular recruitment visits to predominantly Negro high schools, business and vocational schools, and colleges and universities throughout the State of Alabama.

Id. at 1093. This is precisely the sort of decree which the Department of Justice now insists simply could not fail.

43. *Allen*, 340 F. Supp. at 705.

44. 4 Fair Empl. Prac. Cas. (BNA) 674 (S.D. Miss. 1971), *aff'd*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).

45. The *Morrow* decree, entered in October 1971, forbade the use of non-job-related tests, required desegregation of all employee facilities, prohibited special treatment for applicants who were friends or relatives of existing officers, banned the use of recruiting films showing only white patrolmen, mandated radio, newspaper, and television advertisements announcing a nondiscriminatory policy, and required "recruitment efforts to be made at as many predominately black colleges, junior colleges, and high schools within the state as nearly feasible and practicable." 4 Fair Empl. Prac. Cas. (BNA) at 674-76.

to consider a challenge to the adequacy of that order insisted that the decree should be given a chance to prove its effectiveness:

> There is no evidence that the enforced recruitment measures ordered by the District Court will not be sufficient to assure all interested members of the minority class that they will be hired by the Department, if qualified. There is no evidence that the present qualifications need be changed in order to open the doors to black applicants . . . . Time may prove that the District Court was wrong, *i.e.*, that the relief ordered was not sufficient to achieve a nondiscriminatory system and eliminate the effects of past discrimination. But until the affirmative relief the District Court has ordered has been given a chance to work, we cannot tell. There is no way that this Court can determine that the relief the Court ordered will not achieve the remedy to which the plaintiffs are entitled.[46]

When *Morrow* was decided by the Fifth Circuit, en banc, however, the court of appeals concluded that the district court had in fact been wrong, emphasizing that during the two years the decree had been in effect only six blacks had been hired onto the Highway Patrol.[47]

Neither the district court decision in *Allen* nor the appellate decisions in *Allen* and *Morrow* asserted that the defendants had violated the nonnumerical decrees that had originally been entered; these decisions concluded, rather, that the decrees involved, even if obeyed, were incapable of ending the pattern of discrimination.[48] In other cases, courts that initially denied numerical relief found that lesser methods subsequently proved inadequate.[49] The history of these cases necessarily affected the attitudes of judges in other litigation. Practical experience had demonstrated that in a significant number of instances a general injunction forbidding discrimination, or an order establishing flexible goals and timetables, simply would not be obeyed. Subsequent violations could be detected, and provide a basis for harsher measures, but during the intervening years the defendants remained in violation of both the law and the earlier decree. Even if obeyed, detailed decrees of the type used in *Allen* and *Morrow* often proved ineffective. Faced with what were often longstanding violations of Title VII or the Constitution, judges were understandably reluctant to risk further postponing the implementation of an effective remedy while they experimented with a mild decree of a type that had demonstrably failed in past cases.

It seems likely that the type of jobs at issue in most of the cases in which numerical remedies were sought has affected the willingness of

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46. 479 F.2d at 964.

47. *Morrow*, 491 F.2d at 1055.

48. *Id.* at 1055-56; *Allen*, 493 F.2d at 621.

49. EEOC v. Sheet Metal Workers Local 636, 565 F.2d 31, 35 (2d Cir. 1977) (numerical order justified by "the long litigation history", which included an earlier decree which had had little effect), *aff'd sub nom.* Sheetmetal Workers' Local 28 v. EEOC, 106 S. Ct. 3019 (1986); Chmill v. City of Pittsburgh, 14 Fair Empl. Prac. Cas. (BNA) 62, 64 (Pa. C.P. 1976) (prior federal decree requiring new examinations and recruitment of minorities unsuccessful), *rev'd*, 31 Pa. Commw. 98, 375 A.2d 841 (1977), *rev'd*, 488 Pa. 470, 412 A.2d 860 (1980).

courts to impose such remedies. Much of the opposition to affirmative action has focused on positions, such as college faculty appointments, where the abilities of the applicants vary enormously and, to a significant degree, measurably. But none of the numerical remedy cases has involved such jobs. Approximately one-quarter of all such orders were imposed in cases involving membership in, or referrals by, craft unions.[50] In most of these cases the issue was how to select unskilled applicants for admission to an apprenticeship program. Few Americans may be able to teach Russian syntax, even with the best of education, but a substantial majority of the population can be trained to lay bricks[51] or mix drinks.[52] About 40 percent of all numerical remedies were utilized in police and fire department cases.[53] There was some initial suggestion that critical differences of ability were at stake here; Judge Coleman, in a dissenting opinion in *Morrow,* warned darkly that it would be "too late to weep when some under-educated, subnormally intelligent individual, white or black, armed with deadly weapons, unjustifiably launches a human being into eternity . . . ."[54] But such remarks are not to be found in the dissents in later quota cases. Even Judge Coleman acknowledged that there was an adequate supply of well-qualified blacks to staff the Mississippi Highway Patrol.[55] A large portion of the police and fire department cases involved successful challenges to job relatedness of hiring or promotion standards.[56] The

50. Of the 89 numerical orders reported in volumes 1 through 35 of Fair Empl. Prac. Cases, 25 involved police departments, 20 craft unions, and 13 fire departments. Five cases concerned discrimination in layoffs of previously hired public school teachers. Most of the remaining orders were framed to correct discrimination in the hiring or assignment of blue collar workers. Among numerical orders reviewed on appeal, the reversal rate was lower for orders involving unions (10%) police (12%), firefighters (14%) and teacher layoffs (17%) than for other positions (42%). *See* E. Schnapper *supra* note 24 (listing all cases). The earliest decisions in the Second, Fifth, Sixth, Seventh, and Ninth Circuits upholding numerical remedies all involved discrimination by craft unions. United States v. International Bhd. Elec. Workers Local 212, 472 F.2d 634 (6th Cir. 1973); United States v. Lathers Local 46, 471 F.2d 408 (2d Cir. 1972), *cert. denied,* 412 U.S. 939 (1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971); Int'l Ass'n Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

51. *See, e.g.,* United States v. Bricklayers, Local 1, 5 Fair Empl. Prac. Cas. (BNA) 863 (W.D. Tenn. 1972).

52. *See, e.g.,* EEOC v. Bartenders, Local 41, 28 Fair Empl. Prac. Cas. (BNA) 1575 (N.D. Cal. 1979).

53. *See* notes 26-27, 29 *supra*; notes 267-268 *infra.* The earliest appellate decisions approving court ordered numerical remedies in the First, Third, Fourth, and Eighth Circuits involved either police or fire departments. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) (fire); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc) (police); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (police); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (fire), *cert. denied,* 406 U.S. 950 (1972).

54. *Morrow,* 491 F.2d at 1062.

55. *Id.*

56. *See, e.g.,* Firefighters Inst. for Racial Equality v. City of St. Louis, 588 F.2d 235, 237 (8th Cir. 1978), *cert denied,* 443 U.S. 904 (1979); Davis v. County of Los Angeles, 566 F.2d 1334, 1337-47 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1978); United States v. City of Chicago, 549 F.2d 415, 428-29 (7th Cir. 1977); Bridgeport Guardians v. Civil Serv. Comm'n,

liability findings in such litigation demonstrated, ipso facto, that the defendant officials either did not know how to identify the better qualified applicants, or that the qualifications of those applicants were so similar that the use of an essentially arbitrary test posed no threat to the quality of the workforce. On such a record, and in the light of a series of such cases, federal judges were likely to view with justified skepticism pleas that numerical remedies were unfair to "better qualified" applicants.[57]

The manner in which numerical remedies have been approved and imposed reflects the intensely practical concerns underlying that judicial action. The appellate courts have never treated such orders as an ordinary or routine remedy, as they do back pay[58] or counsel fees.[59] On the contrary, the courts of appeals have repeatedly insisted that numerical remedies, although among the remedial devices in the chancellor's arsenal,[60] are to be imposed only when necessary or as a last resort—not, of course, last in the sense that all possible alternatives must be tried first, but last in the sense that nonnumerical alternatives must be considered and are to be preferred. Thus, although there are more than a score of cases in which a numerical order imposed by a trial court was overturned or limited on appeal,[61] there is not a single reported instance in which an appellate court, on reviewing the same record that was before a trial judge who had denied numerical relief, held that the denial of that relief was erroneous.[62] Even in *Morrow*,

482 F.2d 1333, 1335 (2d Cir. 1973); *O'Neill*, 473 F.2d at 1030-31; Castro v. Beecher, 459 F.2d at 733-36.

57. In NAACP v. Allen, 493 F.2d 614, (5th Cir. 1974), the court reasoned:

> [N]o applicant for public employment can base any claim of right under the Fourteenth Amendment's equal protection or due process clauses upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. This is so because by definition such criteria have not been shown to be predictive of successful job performance. Hence, there is no reliable way to know that any accepted applicant is truly better qualified than others who may have been rejected. Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional 'reverse' discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.

Id. at 618; *see also Carter*, 452 F.2d at 331 .

58. Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-25 (1975).

59. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); Newman v. Piggie Park Enters., 390 U.S. 400 (1968).

60. *See* note 8 *supra*.

61. *See* note 9 *supra*.

62. In two instances, in addition to *Morrow*, appellate courts have required "affirmative relief" on remand, but in both these cases the final decision whether to use a numerical remedy was left to the trial judge. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-45 (10th Cir. 1979); United States v. International Bhd. Elec. Workers Local 38, 428 F.2d 144, 151-52 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *see also* Wells v. Meyer's Bakery, 561 F.2d 1268, 1273 (8th Cir. 1977) (appellant's request that Eighth Circuit order numerical remedy denied, but district court on remand to "fashion whatever affirmative remedy deemed necessary to eliminate all vestiges of discrimination. . ."). In the two reported cases in which numerical remedies were ordered in the first instance by a court of appeals, the trial court had earlier denied relief because it mistakenly believed that there was no violation of the law to remedy. Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 355, 362-64

where subsequent events convinced the Fifth Circuit that the original nonnumerical decree had failed, the court of appeals declined to order a numerical remedy itself, but left the fashioning of further relief to the district court.[63] In a number of instances where the appellate courts have had doubts about the propriety of a numerical order attacked on appeal, they have remanded the case for additional findings and proceedings, rather than attempt to make their own judgment on the matter.[64]

The use of numerical remedies by district courts has on the whole been similarly sensitive and selective. Requests for numerical orders have been denied where the trial courts thought them unnecessary.[65] Because of the difficulty of predicting the efficacy of nonnumerical remedies, those denials have frequently been accompanied by an admonition that a numerical order would be imposed later if necessary.[66] The same district judges who have granted such remedies in one case have denied them in others.[67] The practice and attitude of district judges

(8th Cir. 1980) (district court had denied preliminary injunction because it found plaintiffs had not established a likelihood of success on the merits); United States v. N.L. Indus., 479 F.2d 354, 358, 377 (8th Cir. 1973) (district court had found no discrimination). The unwillingness of the Eighth Circuit in these two cases to remand the framing of a remedy to the trial judge may have stemmed from the fact that in both cases the trial judges' earlier opinions had been reversed once before, and appellate court's earlier decisions did not appear to have been adhered to on remand. *See* 479 F.2d at 358 n.2.

63. *Morrow*, 491 F.2d at 1056.

64. Segar v. Smith, 738 F.2d 1249, 1294-95 (D.C. Cir. 1984) *cert. denied*, 471 U.S. 1115 (1985); Thompson v. Sawyer, 678 F.2d 257, 291-95 (D.C. Cir. 1982); United States v. City of Buffalo, 633 F.2d 643, 648-49 (2d Cir. 1980); Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 312 (2d Cir. 1980); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 402 (3d Cir. 1976) *cert. denied*, 429 U.S. 1041 (1977); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 632-33 (2d Cir. 1975).

65. Trout v. Hidalgo, 31 Fair Empl. Prac. Cas. (BNA) 281 (D.D.C. 1981), *aff'd in part and rev'd in part*, 702 F.2d 1094 (D.C. Cir. 1983), *vacated*, 465 U.S. 1056 (1984); Williams v. Owens-Illinois, 665 F.2d 918, 932 (9th Cir. 1982) *cert. denied*, 459 U.S. 971 (1982); United States v. County of Fairfax, 25 Fair Empl. Prac. Cas. (BNA) 662, 671 (E.D. Va. 1981); Dawson v. Pastrick, 441 F. Supp. 133, 142 (N.D. Ind. 1977), *aff'd in part and rev'd in part*, 600 F.2d 70 (7th Cir. 1979); United States v. County of Fairfax, 19 Fair Empl. Prac. Cas. (BNA) 753, 760 (E.D. Va. 1979), *vacated*, 629 F.2d 932 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); Miller v. Continental Can Co., 13 Fair Empl. Prac. Cas. (BNA) 1585, 1603 (S.D. Ga. 1976), *later proceeding*, 544 F. Supp. 210 (S.D. Ga. 1981).

66. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 649-650 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); EEOC v. Riss Int'l, 35 Fair Empl. Prac. Cas. (BNA) 430, 432 (W.D. Mo. 1982); *Dawson*, 441 F. Supp. at 143; Morrow v. Dillard, 412 F. Supp. 494, 502 (S.D. Miss. 1976), *aff'd in part and rev'd in part*, 580 F.2d 1284 (5th Cir. 1978); Miller v. Continental Can Co., 13 Fair Empl. Prac. Cas. (BNA) at 1603; Jordan v. Wright, 417 F. Supp. 42, 45-46 (M.D. Ala. 1976); Pennsylvania v. Glickman, 370 F. Supp. 724, 737 (W.D. Pa. 1974); Wade v. Mississippi Coop. Extension Serv., 372 F. Supp. 126, 146 (N.D. Miss. 1974); Hogue v. Bach, 5 Fair Empl. Prac. Cas. (BNA) 754, 757 (D. Colo. 1972); United States v. Operating Eng'rs Local 3, 4 Fair Empl. Prac. Cas. (BNA) 1088, 1095 (N.D. Cal. 1972).

67. *Compare* EEOC v. Riss Int'l, 35 Fair Empl. Prac. Cas. (BNA) at 432 (Sachs, C.J.; numerical remedy denied) *with* EEOC v. Cook Paint & Varnish, Co., 35 Fair Empl. Prac. Cas. (BNA) 437, 440-42 (W.D. Mo. 1981) (Sachs, C.J.) (numerical remedy granted); *compare Jordan*, 417 F. Supp. at 45-46 (Johnson, C.J.) (numerical remedy denied) *with* NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) (Johnson, C.J.) (numerical remedy granted), *aff'd*, 493 F.2d 614 (5th Cir. 1974); *compare* Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1213 (D. Md. 1973)

was aptly described by one judge in 1975 when, in explaining his decision to award such a remedy, he found that "in this case . . . it appears to be the only possible means of relief for racial discrimination," and emphasized that numerical "relief is an unusual and extraordinary remedy and does not automatically follow from the finding of any kind of discrimination."[68] Notwithstanding the perceived practical necessity for numerical remedies in certain cases, judicial sanction for such relief was not a foregone conclusion. The use of such remedies has at times been as personally distasteful to judges as it is to many members of the public.[69]

Many of the same circumstances that led to a judicial consensus in favor of the permissibility of numerical remedies also contributed to the present confusion about when such remedies should be used. For years the employers, unions, and white intervenors who objected to numerical remedies argued only that such injunctions were always and necessarily impermissible as a matter of law.[70] In some instances litigants probably declined to criticize the scope of the order at issue because they objected as much to admitting or hiring a single minority member as they did to accepting a larger number. More often the anti-quota argument seemed to acquire such a momentum of its own that litigants found themselves fighting for a cause that could not be com-

(Young, D.J.; numerical remedy denied), *aff'd sub. nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) *with* Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095, 1117 (D. Md. 1977) (Young, D.J.; numerical remedy granted); *compare* Thornton v. East Texas Motor Freight, 7 Fair Empl. Prac. Cas. (BNA) 1239, 1243 (W.D. Tenn. 1973) (Wellford, D.J.; numerical remedy denied), *aff'd in part and rev'd in part,* 497 F.2d 416 (6th Cir. 1973) *with* United States Bricklayers Local 1, 5 Fair Empl. Prac. Cas. (BNA) 863, 882 (W.D. Tenn. 1973) (Wellford, D.J.; numerical remedy granted), *modified sub. nom.* United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); *compare* Pennsylvania v. Glickman, 370 F. Supp. at 734-38 (Teitelbaum, D.J.; numerical remedy denied) *with* Pennsylvania v. Sebastien, 368 F. Supp. 854, 856 (W.D. Pa. 1972) (Teitelbaum, D.J.; numerical remedy granted), *aff'd,* 480 F.2d 917 (3d Cir. 1973). Orders granting or denying numerical remedies in a particular case have frequently been modified in light of subsequent events. *Compare* Western Addition Community Org. v. Alioto, 369 F. Supp. 77 (N.D. Cal. 1973) (numerical remedy granted) *with* 360 F. Supp 733, 739-40 (N.D. Cal. 1973) (numerical remedy denied).

68. Crockett v. Green, 388 F. Supp. 912, 921 (E.D. Wis. 1975).

69. *See, e.g.,* Taylor v. Jones, 495 F. Supp. 1285, 1296 (E.D. Ark. 1980).

70. EEOC v. Int'l Union of Elevator Constructors Local 5, 538 F.2d 1012, 1019 (3d Cir. 1976) (rejecting argument that numerical remedies are prohibited by sections 703(j) and 703(h) of Title VII); Patterson v. American Tobacco Co., 535 F.2d 257, 273-74 (4th Cir. 1976) (rejecting argument that numerical remedies are prohibited by section 703(j)), *cert. denied,* 429 U.S. 920 (1976); Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 772 n.3 (2d Cir. 1975) (same), *cert. denied,* 427 U.S. 911 (1976); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974) (same), *cert. denied,* 421 U.S. 910 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 630-31 (2d Cir. 1974) (rejecting argument numerical remedies are prohibited by section 703(j)); United States v. Lathers Local 46, 471 F.2d 408, 412-13 (2d Cir. 1973) (same), *cert. denied,* 412 U.S. 939 (1973); United States v. Ironworkers Local 86, 443 F.2d 544, 552-53 (9th Cir. 1971) (same), *cert. denied,* 404 U.S. 984 (1971); EEOC v. AT&T, 419 F. Supp. 1022, 1044-56 (E.D. Pa. 1975) (rejecting argument that numerical remedies are prohibited by sections 703(a), 703(h) and 703(j) of Title VII, Executive Order 11246, the National Labor Relations Act, and the Constitution), *aff'd,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978).

promised by suggesting the existence of any intermediate position. Defendants have declined to respond to evidence offered in support of requests for proposed numerical orders[71] while others have declined to attack the fact-finding on which such orders were based.[72] In *Allen*, for example, the Alabama Department of Public Safety objected strenuously to the district court order imposing a 1:1 hiring ratio until 25 percent of the state troopers were black, but did not suggest that either the hiring ratio or cut-off percentage was too high.

In many of the early situations the facts were so extreme that the courts saw little need to articulate a theory as to why numerical remedies, if permissible as a matter of law, were warranted in that particular case. If numerical remedies were ever justified, they were surely justified in *Morrow* and *Allen*; the resolution of such appeals thus did not require a detailed analysis of the standards that might be applied in later, harder cases. The breadth of the oft-quoted passage from *Louisiana v. United States* calling for the eradication of the effects of past discrimination[73] provided a firm foundation for utilizing numerical orders, but also afforded almost no guidance as to when they should be used. A requirement that discrimination and its effects be ended was easy to apply in *Allen* and *Morrow*, since either discrimination or its effects were obviously present. There was little need in such cases to analyze precisely what those effects were, or how discrimination might have continued in the face of the earlier detailed decrees. Almost any theory for numerical remedies was likely to be applicable to a case in which there were still no minority employees at all. In justifying a numerical order for a city fire department which as late as 1975 had not a single black member, a district court, directed by the Second Circuit to explain that decree,[74] recounted half a dozen different possible justifications for such relief and found them all applicable.[75] When harder cases began

71. United States v. Lathers Local 46, 341 F. Supp. 694, 697 (S.D.N.Y. 1972) ("The Apprenticeship Committee, which had tossed out a suggestion that there should be a 'hearing' on some 'facts' proposed no concrete occasion for any such hearing. The union did not make or press the suggestion."), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1103 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973):

> Unfortunately, the defense of this case to date has been characterized by overreaction at the emotional level, and underreaction at the rational, practical level. The raw statistics, and the probable results of plaintiffs' statistical studies, have been known for more than a year. The defendants have made no independent studies of their own.

72. NAACP v. Allen, 493 F.2d 614, 617 (5th Cir. 1974).

73. 380 U.S. 145, 154 (1965) ("[T]he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.").

74. Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 310-11 (2d Cir. 1979).

75. Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101 (D. Conn. 1979), *aff'd in part and vacated in part*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). The district court concluded, inter alia, that a numerical remedy was "necessary to redress 'a clear-cut pattern of long-continued and egregious racial discrimi-

to arise, the propriety of numerical relief was so firmly established that courts often did not bother to explain why that remedy was being provided under the particular circumstances at issue.

Lacking any guidance as to when, why, or in what form numerical remedies are appropriate, the practices of lower courts have varied enormously. The proportion of women and/or minorities to be hired or promoted ranges from 1.7 percent to 100 percent,[76] although almost half of all court-ordered numerical remedies are 50 percent,[77] apparently because this was the first ratio used[78] and is now the most common figure. In other cases the proportion varied by job[79] or by year,[80] or was simply described as whatever number proved necessary to reach a particular employment level by a given date.[81] The duration of these orders has varied in even more complex ways. In the largest number of cases the order continues until a particular proportion of the workforce is reached, usually based on the area workforce in the region,[82] or, in the case of supervisors, on the proportion of minorities or

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nation,' " 479 F. Supp. at 112, that it was "particularly appropriate here because the city is a public employer," *id.* at 113; and that a requirement of non-discrimination coupled with recruitment of minorities "would be inadequate . . . 'to assure prospective minority candidates that applying is no longer futile.' " *Id.*

76. Berkman v. City of New York, 536 F. Supp. 177, 217 (E.D.N.Y. 1982) (45 of 2,666 hires, or 1.7%), *aff'd,* 705 F.2d 584 (2d Cir. 1983); EEOC v. Cook Paint & Varnish Co., 35 Fair Empl. Prac. Cas. (BNA) 437, 442 (W.D. Mo. 1980) (33.3%); McKenzie v. Saylor, 508 F. Supp. 641, 653 (D.D.C. 1981) (90%), *aff'd in part and vacated in part sub. nom.* McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 363 (8th Cir. 1980) (100% of next 8 vacancies, then 33%), *cert. denied,* 452 U.S. 938 (1981).

77. *See, e.g.,* Arthur v. Nyquist, 712 F.2d 816, 819 (2d Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); Bentley v. City of Thomaston, 32 Fair Empl. Prac. Cas. (BNA) 1476, 1480 (M.D. Ga. 1983); Guardians Ass'n of N.Y. Police Dep't v. Civil Serv. Comm'n, 484 F. Supp. 785, 799 (S.D.N.Y. 1980), *aff'd in part and vacated in part,* 630 F.2d 79 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 488 F. Supp. 988, 992 (E.D. Pa. 1979), *aff'd,* 648 F.2d 922 (3d Cir. 1981).

78. Int'l Ass'n of Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047, 1051 (5th Cir. 1969).

79. Stamps v. Detroit Edison Co., 30 Fair Empl. Prac. Cas. (BNA) 1805, 1810 (E.D. Mich. 1978) (50% of supervisors, 66% of certain jobs); *McKenzie,* 508 F. Supp. at 653, 655 (80% and 90%); Hill v. Western Elec. Co., 13 Fair Empl. Prac. Cas. (BNA) 1157, 1165 (E.D. Va. 1976) (33 1/3%, 60%, 66 1/3%).

80. *Stamps,* 30 Fair Empl. Prac. Cas. (BNA) at 1810 (30% by 1980); EEOC v. Bartenders Int'l, 28 Fair Empl. Prac. Cas. (BNA) 1575, 1577 (N.D. Cal. 1979) (separate goals for each of several six month periods); Chisholm v. United States Postal Serv., 516 F. Supp. 810, 883 (W.D.N.C. 1980) (different deadlines for each job), *modified,* 665 F.2d 482 (4th Cir. 1981); Jones v. Milwaukee County, 441 F. Supp. 455, 457 (E.D. Wis. 1977).

81. Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 488 F. Supp. at 993.

82. *Arthur,* 712 F.2d at 817-18; *Bentley,* 32 Fair Empl. Prac. Cas. (BNA) at 1480; Taylor v. Jones, 495 F. Supp. 1285, 1296 (E.D. Ark. 1980) (16% goal reflects "the labor pool of qualified persons available"), *modified,* 653 F.2d 1193 (8th Cir. 1981); United States v. New York, 475 F. Supp. 1103, 1110 (N.D.N.Y. 1979); *see also Cook Paint & Varnish Co.,* 35 Fair Empl. Prac. Cas. (BNA) at 442 (order continues until workforce is 25% female, which is the average proportion of applicants who are female); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 21 Fair Empl. Prac. Cas. (BNA) at 439-40 (proportion varies by population of region).

females in the subordinate positions from which the supervisors are chosen.[83] Other orders are to remain in effect until the creation of objective hiring standards,[84] the fashioning of a valid test,[85] the hiring or promotion of a particular number of minority or female employees,[86] the passing of a given number of years,[87] the exhaustion of a particular pool of minorities or women,[88] or further order of the court.[89] Only occasionally do trial courts offer an account of how they determined the numerical order's level or duration. Because the circumstances of these cases diverge widely, it is not possible to say that the decrees are necessarily inconsistent with one another, but the differences are nonetheless unexplained.

The confusion among the appellate courts regarding the circumstances under which numerical orders may be imposed is equally apparent. The ten circuits that have spoken on the issue have among them established no fewer than a dozen different criteria for deciding whether a court should order numerical relief, standards which would presumably also be relevant to determining the form and duration of such relief. Not one of these criteria is recognized as relevant in all ten circuits, and many are sanctioned in only a few. Six circuits hold that the use of a numerical remedy must be "necessary."[90] A different group of six circuits attach importance to the degree of egregiousness

83. *Chisholm,* 516 F. Supp. at 883; Kirkland v. New York State Dep't of Correctional Servs., 11 Fair Empl. Prac. Cas. (BNA) 36, 37 (S.D.N.Y. 1974), *aff'd in part and rev'd in part,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976).

84. *Heat & Frost Insulators,* 407 F.2d at 1055; Eubanks v. Pickens-Bond Constr. Co., 24 Fair Empl. Prac. Cas. (BNA) 892, 895 (E.D. Ark. 1979), *aff'd in part and vacated in part,* 635 F.2d 1341 (8th Cir. 1980).

85. *Firefighters Inst. for Racial Equality,* 588 F.2d at 237-38; Pennsylvania v. Rizzo, 13 Fair Empl. Prac. Cas. (BNA) 1468, 1474 (E.D. Pa. 1974), *aff'd,* 530 F.2d 501 (3d Cir. 1976), *cert. denied,* 426 U.S. 921 (1976); *Kirkland,* 11 Fair Empl. Prac. Cas. (BNA) at 37.

86. *Firefighters Inst.,* 616 F.2d at 363-64; Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 114-16 (D. Conn. 1979), *aff'd in part and vacated in part,* 641 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982).

87. Louisville Black Police Officers Org., v. City of Louisville, 511 F. Supp. 825, 840 (W.D. Ky. 1979), *aff'd,* 700 F.2d 268 (6th Cir. 1983).

88. Association Against Discrimination in Employment v. City of Bridgeport, 17 Fair Empl. Prac. Cas. (BNA) 1308, 1314 (D. Conn. 1978) (all qualified 1975 minority applicants), *order vacated,* 594 F.2d 306 (2d Cir. 1979); Morgan v. Kerrigan, 14 Fair Empl. Prac. Cas. (BNA) 304, 305 (D. Mass. 1974), *aff'd,* 509 F.2d 599 (1st Cir. 1975); Western Addition Community Org. v. Alioto, 369 F. Supp. 77, 81 (N.D. Cal. 1973), *aff'd,* 514 F.2d 542 (9th Cir.), *cert. denied,* 423 U.S. 1014 (1975).

89. United States v. New York, 475 F. Supp. at 1111; United States v. City of Chicago, 411 F. Supp. 218, 242 (N.D. Ill. 1976), *aff'd in part and rev'd in part,* 549 F.2d 415 (7th Cir. 1977), *cert. denied,* 434 U.S. 875 (1977); *see also* United States v. City of Philadelphia, 28 Fair Empl. Prac. Cas. (BNA) 1560, 1562 (E.D. Pa. 1979) (order limited to one entering class of police cadets); Segar v. Smith, 28 Fair Empl. Prac. Cas. (BNA) 935, 938 (D.D.C. 1982) (order continues for 5 years or until position 10% black, whichever is sooner), *aff'd in part and vacated in part,* 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985).

90. *Segar,* 738 F.2d at 1294 (alternatives must be considered); Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 763-64 (6th Cir. 1983); United States v. County of Fairfax, 629 F.2d 932, 942 (4th Cir. 1980) (numerical order proper "only in the most extraordinary circumstances and where there is a compelling need"), *cert. denied,* 449 U.S. 1078 (1981); United States v. City of Chicago, 549 F.2d at 437; Kirkland v. New York State Dep't of Correctional

of the earlier discriminatory practices.[91] Another group of six circuits accords the trial court some degree of discretion in framing any numerical remedy.[92] Four circuits take into consideration any voluntary action taken by the employer to remedy past violations,[93] and three circuits hold that numerical remedies are more permissible if they are short in duration.[94] A variety of other considerations command support in only one or two circuits.[95] Within a single circuit the list of officially sanctioned standards often varies from opinion to opinion.[96]

Servs., 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied,* 429 U.S. 823, *reh'g denied,* 429 U.S. 1124 (1976); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974).

91. Berkman v. City of New York, 705 F.2d 584, 596 (2d Cir. 1983); Williams v. Vukovich, 720 F.2d 909, 924 (6th Cir. 1983); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982) (numerical orders may be appropriate for "a dilatory or obstructive employer"); Chisholm v. United States Postal Serv., 665 F.2d 482, 499 (4th Cir. 1981); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-45 (10th Cir. 1979); NAACP v. Allen, 493 F.2d at 620-22; Erie Human Relations Comm'n v. Tullio, 493 F.2d 371, 375 n.7 (3d Cir. 1974).

92. *Berkman,* 705 F.2d at 594; *Chisholm,* 665 F.2d at 498; Morrow v. Dillard, 580 F.2d 1284, 1295 n.13 (5th Cir. 1978); United States v. City of Chicago, 549 F.2d at 436; Davis v. County of Los Angeles, 566 F.2d 1334, 1342-44 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979); *Morgan,* 509 F.2d at 600-01; *Tullio,* 493 F.2d at 374. As Judge Goldberg noted in his dissent in Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1973), *aff'd* 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974), these cases have generally involved challenges to the scope of a numerical remedy, not to a decision to deny such a remedy entirely:

> The deference that was being paid on appeal—rejecting claims that the relief had been too extensive—was that the precise contours of affirmative relief are best left to the district court. They should not be read as holding that the question of affirmative relief *vel non* is purely a matter of district court discretion.
>
> . . . As we have only too often experienced in cases of racial discrimination, the nature of the remedy is often the only relevant substantive issue at stake, and to permit broad notions of "discretion" to supplant our duty to insure effective relief is an unfortunate abdication.

Id. at 972 (citations omitted).

93. *Segar,* 738 F.2d at 1294; *Lee Way Motor Freight, Inc.,* 625 F.2d at 943-44; Sledge v. J.P. Stevens & Co., 585 F.2d 625, 647 (4th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 636-32 (2d Cir. 1974).

94. Williams v. City of New Orleans, 729 F.2d 1554, 1564 (5th Cir. 1984) (en banc); *Thompson,* 678 F.2d at 294; United States v. City of Buffalo, 633 F.2d 643, 647 (2d Cir. 1980); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 402 (3d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977), *reh'g denied,* 430 U.S. 911 (1979).

95. *Thompson,* 678 F.2d at 294-95 (preference for numerical order with less harsh impact on whites; order to "target the numerical remedy specifically at the discrimination to be brought to an end"); Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 281 (2d Cir. 1981) (use of numerical order to be made in a "gingerly" manner). Second Circuit decisions adhere to a rule, not applied elsewhere, that numerical remedies may not adversely affect a small number of identifiable whites; in practice this appears to preclude the use of numerical remedies in most promotion cases. *See, e.g., id.* at 283-84; EEOC v. Sheet Metal Workers' Int'l Ass'n Local 638, 532 F.2d 821, 827-28 (2d Cir. 1976), *aff'd sub nom.* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); *Kirkland,* 520 F.2d at 427, 429. *But see* Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 310 (2d Cir. 1979). Justice O'Connor endorsed consideration of this particular criterion in her dissenting opinion in *Sheet Metal Workers' Int'l Ass'n Local 638,* 106 S.Ct. at 3061.

96. *See Berkman,* 705 F.2d at 594-96 (distinguishing three types of numerical remedies); *Association Against Discrimination in Employment,* 647 F.2d at 280-83 (numerical remedy appropriate only if (1) long standing discrimination, (2) egregious discrimination, and (3) no harm to a small number of identifiable whites); *City of Buffalo,* 633 F.2d at 647 (numerical remedy appro-

Even when a number of circuits agree on the relevance of a particular factor, there are often fundamental differences regarding how that factor is to be applied. Thus while many circuits agree that court-ordered numerical remedies may not be imposed unless necessary, this nominal consensus in fact masks a critical dispute about how likely it must be that non-numerical alternatives would prove insufficient. The Fifth Circuit in *Morrow* divided on precisely that issue. The majority of the original panel in *Morrow* initially upheld the denial of a numerical remedy because there was at least a possibility that the non-numerical relief that had been granted might succeed, emphasizing that there was "no showing"[97] that the relief awarded would prove inadequate, and that "[t]here is no way that this Court can determine" that that relief would prove insufficient.[98] The court of appeals, sitting en banc, concluded that the plaintiffs should not have been required to run the risk that a possibly inefficacious injunction might fail, and insisted that the trial court "fashion an appropriate decree which will have the certain result of increasing the number of blacks on the Highway Patrol."[99] Subsequent Fifth Circuit decisions have reiterated this requirement of certainty of success, thus limiting the authority of trial judges to experiment with non-numerical remedies whose adequacy is a matter of speculation.[100] In other circuits, however, the requirements of "necessity" and "compelling need" seem to suggest that numerical remedies cannot be utilized unless it is certain that the available alternatives will fail.[101] In the District of Columbia, trial courts are required to examine such alternatives before ordering a numerical remedy, although the standard to be applied in that examination is unclear.[102] Because of the difficulty in predicting the efficacy of a non-numerical decree, the propriety of numerical relief will often turn on whether the plaintiff or

priate only if (1) long-standing discrimination, (2) significant impact on minority employment levels, and (3) numerical remedy is as short term as possible); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 112-13 (2d Cir. 1980) (numerical remedy appropriate only if (1) intentional discrimination, or (2) a pattern of significant prior discrimination or "flagrant disparity" in employment levels), *cert. denied,* 452 U.S. 940 (1981).

97. 479 F.2d 960, 964 (5th Cir. 1973), *aff'd,* 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974).

98. *Id.*

99. 491 F.2d at 1055.

100. United States v. City of Miami, 614 F.2d 1322, 1336 (5th Cir. 1980) ("affirmative relief is *required* to ensure that the effects of past discrimination are eliminated") (emphasis in original), *modified,* 664 F.2d 435 (5th Cir. 1981) (en banc); NAACP v. Allen, 493 F.2d at 617 ("feasible, workable, effective. . .and promise realistically to work and to work now").

101. *See* note 90 *supra.*

102. Segar v. Smith, 738 F.2d 1249, 1294 (D.C. Cir. 1974), *cert. denied,* 471 U.S. 1115 (1985). District court decisions regarding the presence or absence of necessity are often quite summary. *Compare* Taylor v. Jones, 495 F. Supp. 1285, 1296 (E.D. Ark. 1980) (necessity present), *modified,* 653 F.2d 1193 (8th Cir. 1981) *and* Erie Human Relations Comm'n v. Tullio, 360 F. Supp. 628, 629 (W.D. Pa. 1973) (necessity present), *aff'd in part and remanded in part,* 493 F.2d 371 (3d Cir. 1974) *with* Western Addition Community Org. v. Alioto, 360 F. Supp. 733, 739 (N.D. Cal. 1973) (necessity not present) *and* Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1214 (D. Md.) (necessity not present), *modified,* 486 F.2d 1134 (4th Cir. 1973).

the defendant bears the burden of proof, an issue which most courts demanding necessity simply have not addressed squarely.

Other apparent agreements among the circuits are often equally superficial. Virtually all the decisions citing the existence of district court discretion are in opinions affirming trial court decisions to order or deny numerical relief;[103] appellate opinions reversing such trial court orders rarely mention that discretion. Voluntary affirmative efforts seem to be a virtual bar to numerical relief in the Fourth Circuit,[104] but numerical remedies have been ordered despite such activities by the Sixth[105] and Seventh[106] Circuits, and the Ninth Circuit will accept in place of a numerical order only affirmative action that is demonstrably as effective as that order would be.[107] The level of past discrimination relevant to the imposition of numerical relief is measured, variously, by the extent to which minorities or women have been excluded from the jobs at issue,[108] by the egregiousness of the violation,[109] by the length of time during which discrimination persisted[110] and by the recalcitrance[111] of the defendants. This last criterion might seem to limit numerical remedies to instances of intentional violations of the law, but such a restriction has been rejected by every circuit that has expressly considered it.[112] Several circuits that favor numerical remedies of short duration also prefer numerical orders in which the proportion or number of minorities or women to be hired or promoted is relatively low.[113] These two standards are ordinarily quite inconsistent; where,

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103. *See* note 92 *supra*.

104. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 644-50 (4th Cir. 1978), held that the district court in that case had erred in issuing a numerical hiring order since minority hiring had risen prior to trial, although this increase was due in part to the fact that whites no longer wanted the low paying jobs at issue. Patterson v. American Tobacco Co., 535 F.2d 259, 272-74 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), held that the same pattern of promotions which proved intentional discrimination also demonstrated the existence of sufficient affirmative action to preclude the use of numerical remedies. Both of these appellate decisions appear to be unwarranted by the facts of the cases involved.

105. United States v. Int'l Bhd. Elec. Workers Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

106. United States v. Local 520, Int'l Union of Operating Eng'rs, 476 F.2d 1201, 1203-04 (7th Cir. 1973).

107. Davis v. County of Los Angeles, 566 F.2d 1334, 1343-44 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

108. Williams v. Vukovich, 720 F.2d 909, 924 (6th Cir. 1983); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371, 375 n.7 (3d Cir. 1974).

109. Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 763 (6th Cir. 1983) ("egregious"); McKenzie v. Sawyer, 684 F.2d 62, 80 (D.C. Cir. 1982) (defendant "especially dilatory"); Chisholm v. United States Postal Serv., 665 F.2d 482, 499 (4th Cir. 1981) ("egregious, purposive or blatant").

110. Berkman v. City of New York, 705 F.2d 584, 596 (2d Cir. 1983); *Chisholm*, 665 F.2d at 499; Association Against Discrimination in Employment v. City of New York, 647 F.2d 256, 281 (2d Cir. 1981) ("long-continued"), *cert. denied*, 455 U.S. 988 (1982).

111. United States v. Lee Way Motor Freight Co., 625 F.2d 918, 944 n.18 (10th Cir. 1979).

112. NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974); *Tullio*, 493 F.2d at 373-74.

113. Williams v. City of New Orleans, 729 F.2d 1554, 1564 (5th Cir. 1984) (en banc);

as is often the case, the purpose of the order is to bring about the hiring or promotion of a particular total number of individuals, an order with a lower ratio will of necessity last longer, and a decree can only be shortened in duration by making it more stringent in substance. These circuits also regard the egregiousness of the past discrimination as supporting a numerical remedy,[114] but the more complete the past exclusion of women or minorities, the more severe or long 'lasting the remedy will have to be.

Appellate opinions that identify the considerations relevant to the framing and imposition of a numerical remedy rarely provide substantial guidance as to how any particular standard is applied. Decisions declaring the degree of past discrimination to be relevant, for example, do not provide any indication of how much past discrimination is enough to justify a numerical remedy, or what degree of past discrimination dictates what type of order. Similarly, the appellate decisions provide little if any indication of how to balance the multiple considerations, such as how much recent affirmative action could cancel out a particular level of past discrimination that would otherwise warrant a numerical order. These problems do not, of course, have any simple mechanical solution. But no criterion can be intelligently weighed, and no set of competing factors can be balanced, unless there is a coherent understanding of why that criterion or those factors are relevant.

This present state of the law is more than merely theoretically inelegant. If, as all appellate courts agree, there are circumstances in which numerical remedies are both appropriate and necessary remedial tools, then the absence of standards for the application of such remedies is an open invitation to abuse by a judge who opposes such relief regardless of its necessity. During the late 1970s for example, although the Second Circuit had repeatedly upheld the legality of numerical remedies, Judges Hays[115] and Feinberg[116] made clear that they disagreed with that holding and took part in a series of decisions reversing or vacating most of the numerical orders that came before the court.[117] Similarly, Judge Dortch Warriner of the Eastern District of Virginia has distin-

Tullio, 493 F.2d at 374-75; Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

114. *See* note 91 *supra*.

115. Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 634-39 (2d Cir. 1974) (Hays, J., dissenting).

116. Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 775-76 (2d Cir. 1975) (Feinberg, J., concurring), *cert. denied*, 427 U.S. 911 (1976).

117. United States v. City of Buffalo, 633 F.2d 643 (2d Cir. 1980) (Feinberg, J., participating); Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 310-11 (2d Cir. 1979) (Feinberg, J.); EEOC v. Sheet Metal Workers' Int'l Ass'n Local 638, 532 F.2d 821 (2d Cir. 1976) (Feinberg, J., concurring), *aff'd sub nom.* Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427-30 (2d Cir. 1975) (Hays, J., participating), *cert. denied*, 429 U.S. 823 (1976).

guished himself by adamantly refusing to approve any consent decree that contained a numerical remedy. After his first such decision, holding numerical remedies illegal per se, was reversed by the Fourth Circuit,[118] Judge Warriner found all subsequent numerical provisions impermissible in their particulars.[119]

Fifteen years ago, when many Title VII defendants had virtually no minority employees, the lack of a coherent account of the purpose of numerical remedies was of little moment. If numerical remedies were permissible at all, as every appellate court held that they were, that remedy was surely permissible in such extreme circumstances; in such cases the result was likely to be essentially the same regardless of what rationale or standards were adopted. But as the cases in which numerical orders were sought came to involve less egregious violations of the law, the lack of an agreed-upon rationale and set of standards made judicial dissension inevitable.[120] That emerging problem is starkly illustrated by the history of numerical remedies in the Fifth Circuit. That circuit was in 1969 the very first court of appeals to approve court ordered numerical relief in an employment case,[121] and its 1974 en banc decision in *Morrow v. Crisler*[122] is perhaps the strongest illustration of the practical need for such remedies. Between 1969 and 1981 the circuit rejected every appellate challenge to such a remedy.[123] In 1984, however, this veneer of consensus collapsed when the court was confronted with a district court decision disapproving a numerical provision in a consent decree that had been proposed to settle an employment discrimination suit against the New Orleans police department.[124] Unlike the all-white Mississippi and Alabama highway patrols of a decade earlier, the New Orleans police department was already over 20 percent black.[125] There was little evidence in the record of recent intentional discrimination,[126] and the city's mayor was black. The

118. Carson v. American Brands, 654 F.2d 300 (4th Cir. 1981), *rev'g* 446 F. Supp. 780 (E.D. Va. 1977).

119. United States v. Sheriff of Lancaster, 561 F. Supp. 1005 (E.D. Va. 1983); United States v. Virginia, 554 F. Supp. 268 (E.D. Va. 1983).

120. The first instance in which appellate judges disagreed about the propriety of a particular numerical order was Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc), affirming a numerical hiring order. The city police force that was the subject of that action was 18% black. Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1087 (E.D. Pa. 1972).

121. Int'l Ass'n of Heat & Frost Insulators Local 53, v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

122. 491 F.2d 1053 (5th Cir. 1974) (en banc), *cert. denied,* 419 U.S. 895 (1975).

123. Phillips v. Joint Legislative Comm., 637 F.2d 1014 (5th Cir. Unit A 1981), *cert. denied,* 456 U.S. 960 (1982); United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Baker v. Columbus Mun. Separate School Dist., 462 F.2d 1112, (5th Cir. 1972); *see also* notes 121-122 *supra.*

124. Williams v. City of New Orleans, 543 F. Supp. 662, *rev'd,* 694 F.2d 987 (5th Cir.), *rev'd on rehearing,* 729 F.2d 1554 (5th Cir. 1984) (en banc), *appeal dismissed,* 763 F.2d 667 (5th Cir. 1985).

125. *Williams,* 543 F. Supp. at 673.

126. *Id.* at 673-74.

trial judge approved almost all portions of the proposed 33-page decree, including a number of race-conscious provisions, and rejected the disputed numerical promotion order only after an evidentiary hearing.[127] In the resulting appeal no majority could be found in the Fifth Circuit for any single view of the purpose of numerical remedies or the propriety of the proposed decree. Six judges, including two of the original *Morrow* majority, thought numerical relief proper in a wide variety of circumstances, including those of the New Orleans case.[128] Four other judges, including one of the *Morrow* dissenters, concluded that, while numerical remedies might be permissible under some narrow circumstances as a "last resort," the New Orleans promotion order was unlawful. Their view, like the opinions of Judges Hays and Feinberg in the Second Circuit, was openly based on a candidly expressed opposition to all numerical remedies.[129] The deciding votes in the New Orleans case were cast by three judges who, after recounting a number of the more frequently announced standards for deciding whether to order numerical relief, announced that the issue was a matter for the discretion of the trial judge.[130] Faced with a complex case that is doubtless typical of the litigation of the years ahead, the circuit that had been the first, most frequent, and most consistent defender of numerical remedies was unable to reach any conclusion as to when and how they should be used in the future.

II. The Six Types of Remedial Numerical Remedies

With one notable exception,[131] the courts of appeals have endeavored to articulate a single standard governing when, and in what form, numerical remedies should be ordered. Were all numerical remedies designed to resolve a single remedial problem, this endeavor would long ago have achieved a reasonable degree of success. Repeatedly addressing the same situation, trial and appellate courts would have produced standards that steadily converged, and appellate disagreements and reversals would have become increasingly uncommon.

In fact, however, no such convergence or agreement has emerged. On the contrary, the more the appellate courts address this issue, the more confused the law becomes. This has occurred, in large measure, because trial courts are using numerical remedies for a number of very distinct purposes to deal with quite different types of problems. A dec-

127. *Id.* at 681-84.

128. *Williams,* 729 F.2d at 1570-84 (Wisdom, J., concurring and dissenting).

129. *Id.* at 1565 (Gee, J., concurring); *id.*, at 1565-70 (Higginbotham, J., concurring).

130. *Id.* at 1555-65 (plurality opinion).

131. Berkman v. City of New York, 705 F.2d 584, 595-96 (2d Cir. 1983). *Berkman* distinguished two types of numerical remedies, those intended to eliminate the discriminatory impact of a non-job related selection procedure, and those intended to provide "affirmative relief." The first type of order, which this article characterizes as a test-neutralization numerical remedy, is described at text accompanying notes 197-198 *infra*. *Berkman's* second category encompasses what are in fact a variety of different types of numerical remedies.

ade ago, when the discriminatory practices under attack were particularly extreme, several of those problems would frequently be present in the same case. Where that was true the practical necessity for a numerical remedy seemed particularly compelling, and a variety of possible remedial theories all yielded the same result.[132] In more recent years, however, Title VII cases have often presented only one or two of those remedial problems. Under these circumstances, a numerical order that might seem justified by the circumstances of one case would not fit the standard articulated in a separate case to deal with another quite different problem, and the standards announced by appellate panels to address the particular situations before them understandably varied from case to case.

In *Sheet Metal Workers'* the Supreme Court also attempted to announce general principles that could be used in all cases to evaluate the appropriateness of numerical relief. The plurality opinion suggested that numerical remedies were warranted where they were necessary, temporary, flexible, and did not unnecessarily trammel the interests of whites.[133] The shortcomings of this approach were illustrated by the fact that among the three other Justices apparently adhering to such broad standards, Justices O'Connor and White concluded that the order at issue was improper,[134] and Justice Powell upheld the order in that case only on an analysis rather different from the plurality's.[135] In the absence of a clear understanding of the purpose of a numerical order, there is simply no way to evaluate whether a particular order is necessary, whether the adverse impact on whites is unavoidable, or whether the order is insufficiently or excessively flexible. Another portion of the *Sheet Metal Workers'* plurality opinion,[136] however, one with which Justice White "generally agree[d],"[137] recognized the existence of several quite distinct purposes which a numerical remedy might serve.[138] To fashion a coherent body of standards for analyzing proposed numerical remedies, the courts must carefully distinguish among the very different remedial problems which numerical orders may be framed to solve.

A review of the experience of the lower courts reveals that numerical orders have been used to address six quite distinct remedial problems. The analysis which follows attempts to articulate the ration-

132. In Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 112-14 (D. Conn. 1979), *aff'd in part and vacated in part,* 647 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982), the district court surveyed the wide variety of standards and rationales for numerical remedies and found them all applicable to the circumstances of that case.

133. *Sheet Metal Workers' Int'l Ass'n Local 28,* 106 S. Ct. at 3051-52.

134. *Id.* at 3057-62, (O'Connor, J., dissenting); *id.* at 3062-63 (White, J., dissenting).

135. *Id.* at 3054-57.

136. *Id.* at 3036-37.

137. *Id.* at 3062.

138. *Id.* at 3036-37.

ale for using the different numerical remedies in each of these six separate situations, and to delineate the factors relevant to determining the need for and appropriate scope and duration of each type of numerical order. In some instances, such as test neutralization orders, the lower courts have been fairly articulate in explaining the purpose and parameters of the remedies. In other cases, such as victim identification orders, the nature of the underlying problem can be gleaned from reported opinions, but there are few if any decisions which clearly recognize the distinct rationale of the particular type of decree at issue.

A. *Compliance Orders*

The earliest remedial problem to emerge in Title VII litigation was the need to frame a decree that would effectively end intentional discrimination by a recalcitrant employer or union. The first reported numerical remedy in a Title VII case was issued in 1967 against a Louisiana local of the Heat and Frost Insulators and Asbestos Workers Union.[139] Two years after the adoption of Title VII, that union still had an avowed policy of refusing to admit blacks as members of the union; although the union referred large numbers of nonmembers to vacancies in the asbestos and insulating trade, it openly refused to refer any blacks.[140] The district court directed the union to establish objective, racially neutral standards for admission to membership and, until that was done, to give 50 percent of all referrals to black craftsmen.[141]

On appeal the union acknowledged both the illegality of its practices and the propriety of injunctive relief, but insisted that the injunction be limited to "an order prohibiting in forceful terms discrimination on the basis of race."[142] In rejecting that contention, the Fifth Circuit emphasized its concern that such a generalized injunction, merely reiterating the requirements of Title VII, simply would not be obeyed:

> If Local 53 wishes to read a forceful prohibition against discrimination, it need look no further than the Civil Rights Act itself.
>
> . . . . [T]he District Court did no more than ensure that the injunction against further racial discrimination would be fairly administered. Absent objective criteria regarding admissions . . . , covert subversion of the purpose of the injunction could occur. The same administrative reasons support alternating white and negro referrals, particularly in view of the union business agent's testimony that "every now and then" referral application forms tend to "run out." [143]

A number of subsequent decisions expressly grounded the granting of

139. Vogler v. McCarty, Inc., 294 F. Supp. 368 (E.D. La. 1968), *aff'd sub. nom.* International Ass'n Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

140. *Id.* at 370-71.

141. *Heat & Frost Insulators*, 407 F.2d at 1051.

142. *Id.* at 1051.

143. *Id.* at 1051, 1055.

numerical relief on the need to assure that an injunction against continued discrimination is "not subverted by hostile administration."[144]

The Supreme Court expressly recognized in *Sheet Metal Workers'* that this was one of the possible bases for a numerical remedy. The plurality opinion reasoned:

> In some instances . . . it may be necessary to require the employer or union to take affirmative steps to end discrimination [in order] effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force[145] may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.[146]

Justice White indicated general agreement with this portion of the plurality opinion,[147] and Justice Powell expressed the similar view that "in cases involving particularly egregious conduct a District Court may fairly conclude that an injunction alone is insufficient to remedy a proven violation of Title VII."[148]

The practical reasons why numerical orders are at times necessary to assure compliance with Title VII are readily apparent. In many areas of the law it is relatively easy to determine whether a defendant is obeying an injunction, and the issues raised by such a determination are ordinarily far narrower than those raised in the original litigation. Thus in an action to quiet title, an order that Smith convey a deed to Blackacre is relatively easy to police and enforce. But where a court orders an employee or union to refrain from engaging in racial discrimination, a plaintiff can only prove that the decree has been violated if he or she demonstrates that the defendant has continued to engage in unlawful discrimination after the entry of the decree. Thus a general in-

144. United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (4th Cir. 1971) (quoting *Heat & Frost Insulators,* 407 F.2d at 1055); United States v. Local 3, Int'l Union of Operating Eng'rs, 4 Fair Empl. Prac. Cas. (BNA) 1088, 1095 (N.D. Cal. 1972) (quoting *Heat & Frost Insulators,* 407 F.2d at 1055); NAACP v. Allen, 340 F. Supp 703, 705-06, (M.D. Ala. 1972) (relief necessary to end discrimination that permeated defendants' policies), *aff'd,* 493 F.2d 614 (5th Cir. 1974).

145. It is unclear whether this passage means that minorities should constitute such a proportion of new hires, or that new hires should be made at a rate that would quickly bring the employer's workforce or the union's membership up to the overall proportion of minorities in the workforce. The order in *Sheet Metal Workers' Int'l Ass'n* was something of a hybrid.

146. 106 S. Ct. at 3036. The plurality cited as examples of such compliance orders six specific cases: Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982); Chisholm v. United States Postal Serv., 665 F.2d 482, 498-99 (4th Cir. 1981); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-45 (10th Cir. 1979); United States v. City of Chicago, 549 F.2d 415, 436-37 (7th Cir. 1977); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974), *Allen,* 340 F. Supp at 706.

147. 106 S. Ct. at 3062 (White, J., dissenting).

148. *Id.* at 3054 (Powell, J., concurring in the judgment).

junction against discrimination confers upon a nominally successful plaintiff no remedy other than the option of returning to court and proving the occurrence of a fresh act of discrimination, a right the plaintiff would have enjoyed even had the original action never been brought or won.[149] A general injunction against discrimination thus provides a defendant with little additional incentive to obey the anti-discrimination statute or statutes that it has already violated.[150] Recalcitrant employers and unions have proven equally adept at continuing to discriminate in the face of decrees that forbade specific discriminatory practices and established new racially neutral procedures, but stopped short of ordering a numerical remedy. Judicial experience demonstrated that the complexities of employment practices afforded a racist employer or union more opportunities for continued discrimination than a court could often anticipate and forbid, and that adjudicated decrees, consent decrees, and voluntarily adopted affirmative action plans were all vulnerable to such evasive tactics.

The lower courts understandably came to regard numerical orders as a useful and at times essential method for ending such willful violations of the law. The litigation leading to a finding of past discrimination ordinarily provided a court with sufficient information to predict the level of minority hiring or promotions that would occur in the absence of renewed discrimination. Rather than attempt to imagine and forbid every conceivable discriminatory tactic that might be adopted, and to monitor compliance by every personnel official, the courts simply ordered the defendants to hire or promote the number of minorities that those courts believed would be hired or promoted if there were no further discrimination. Thus where the evidence demonstrated that an employer would, but for unlawful discrimination, hire approximately 10 percent blacks, the court would require the employer to hire that proportion of blacks.

Such a compliance order offers three decided advantages over the other often unsuccessful types of injunctions. First, a compliance order can deter a wide range of discriminatory practices, not by attempting to enumerate them all, but by forbidding an effect—the hiring or promotion of fewer than expected minorities—that would result from any type of systematic discrimination. Second, a compliance order shifts from the court and the plaintiff to the defendant the burden of identifying

149. *Cf. Lee Way Motor Freight, Inc.*, 625 F.2d at 944-45 (numerical remedy "a practical measure which would prevent possible repetition of the long and arduous lawsuit with which we are now involved and which continues.")

150. A personnel official who violated an injunction against discrimination might technically be subject to criminal prosecution for contempt. 18 U.S.C. § 401 (1982). This method of enforcing injunctions against racial discrimination by election officials proved unavailing, since juries simply refused to convict the responsible officials. The author has been unable to identify a single instance in the twenty year history of Title VII in which criminal contempt charges were brought against a defendant for violating an injunction.

and correcting discriminatory practices or officials.[151] Third, a violation of a compliance order is far easier to detect and prove than a violation of, for example, a general injunction against discrimination. Compliance orders do not preclude a defendant from seeking to justify non-compliance, or from obtaining a modification, if, for example, sufficient numbers of qualified minorities cannot be found.

A compliance order provides a remedy similar to that established by Congress in section 5 of the 1965 Voting Rights Act.[152] The Voting Rights Act was adopted after Congress concluded that both general and detailed injunctions had proved insufficient to end intentional discrimination against minority voters. Section 5 placed on the covered jurisdictions the burden of demonstrating that any proposed alteration in election law would be non-discriminatory, thus "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims."[153] Just as section 5 does not absolutely forbid all deviations from state election law as it stood in 1965, so too a compliance order does not absolutely forbid any departure from the mandated percentage. In both instances, rather, any such deviation is declared presumptively impermissible unless the responsible party can demonstrate an appropriate justification.

The most renowned example of a compliance order is the Philadelphia Plan, adopted by the Labor Department in 1969 for federal construction projects in the Philadelphia area, and subsequently used in other areas of the country. Although minority groups constituted 30 percent of the construction workers in the Philadelphia region, they were less than 1 percent of the members of six specific trades. After a detailed investigation and public hearings, the Department determined that this underrepresentation resulted from racial discrimination in those trades.[154] Such employment discrimination at federally-funded construction projects had been forbidden by Executive Order since

151. The threat of back pay liability serves a similar purpose. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

152. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973(c) (1982)).

153. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). The Court's account of the circumstances leading to the adoption of section 5 is similar to the reasons underlying use of compliance orders:

> [W]hen favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

383 U.S. at 314 (footnotes omitted).

The Court went on to conclude that "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Id.* at 335.

154. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 163 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

1943.[155] The Department concluded that this long-standing violation required "special measures" to end discrimination, and ordered federal contractors to establish employment goals ranging from approximately 7 percent in 1970 to about 22 percent in 1973.[156] Because construction work involved generally short term, often seasonal employment, with a new crew hired for each project, these were essentially hiring goals for each year. The detailed regulations governing this program spelled out what seems implicit in any compliance order, namely that the obligation involved was not absolute, and that a contractor who failed to meet a goal would be given "an opportunity to demonstrate that he made every good faith effort" to do so.[157] The Philadelphia Plan and its progeny were upheld by the courts as necessary to end intentional discrimination.[158]

The central purpose of a compliance order is to protect individuals who, but for that relief, would in the future be actual victims of unlawful discrimination. Rather than waiting until further discrimination has occurred and then awarding back pay and corrective injunctive relief, a court, by issuing a compliance order, prevents that discrimination from occurring at all. This preemptive approach is clearly to be preferred under Title VII, which was adopted to end discrimination, not to permit discrimination to continue subject to occasional litigation and redress. As a practical matter, this preemptive approach often serves the interests of whites as well, since further discrimination will often lead to corrective seniority relief that necessarily has an adverse effect on the seniority rights of whites.[159]

The specific purpose of compliance orders dictates the type of circumstance in which they should be used. Compliance orders are appropriate where a court or agency determines that an employer or union is likely to continue to engage in discrimination despite the issuance of either a general or a detailed injunction against such discrimination. The existence of a pattern of egregious or long-standing discrimination, pursued in the teeth of federal and state laws forbidding employment discrimination, is relevant because, and to the extent that, it indicates that the employer or union is unlikely to mend its ways merely because the statutory prohibitions are supplemented by an injunction. Ordinarily, this rationale means that compliance orders should be limited to cases of intentional discrimination, or to instances

155. *See* Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943).

156. *See Contractors Ass'n,* 311 F. Supp. at 1005.

157. *Id.* at 1006.

158. *See* Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); *cf.* Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied,* 396 U.S. 1004 (1970); United States v. United Bhd. of Carpenters, Local 169, 457 F.2d 210 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972).

159. *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. 747, 774-77 (1976).

in which an employer persistently disregarded the Title VII prohibition against practices with a discriminatory effect.[160] Conversely, if an employer or union takes voluntary steps both to end its past discrimination and affirmatively to increase opportunities for minorities, that effort would ordinarily indicate that the employer or union would obey an injunction against discrimination. Where an employer or union has already demonstrated its inclination to continue to engage in discrimination despite the applicable statutory prohibitions, the employer or union involved ought ordinarily to bear the burden of establishing that a remedy short of a compliance order will suffice to end those illegal practices. Where a request for a compliance order is denied, that denial should not be the end of the matter; the subsequent actions of the employer or union should be closely monitored to assure that the nonnumerical decree indeed proves sufficient.

The proportion of minorities to be hired or promoted under a compliance order must be based on a factual determination of the level of minority hiring or promotions likely to occur in the absence of continued discrimination. Under various circumstances that figure might be the proportion of minorities in the area workforce,[161] the proportion of minorities applying for the positions at issue,[162] or the proportion resulting from a more complex calculation based on interest, qualifications and possible deterrent effects of past discrimination.[163] If, for example, minorities constitute a higher proportion of an employer's job applicants than of the area workforce, then the applicant propor-

160. *See* Guardians Ass'n of the N.Y. Police Dep't, Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 109 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981).

161. The cases cited in this note and notes 162-165 *infra* involve efforts, in connection with a variety of different types of numerical orders, to ascertain the level of promotions, hirings or employment that would occur but for discrimination. Cases using area workforce data include Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 286 (2d Cir. 1981) (citing Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 632-633 (2d Cir. 1974)), *cert. denied,* 455 U.S. 988 (1982).

162. *See* Louisville Black Police Officers Org. v. City of Louisville, 511 F. Supp. 825, 831-32 (W.D. Ky. 1979), *aff'd,* 700 F.2d 268 (6th Cir. 1983).

163. *See* Berkman v. City of New York, 705 F.2d 584, 594-96 (2d Cir. 1983) (adjustment for deterrence of candidates due to sex-discriminatory test); Thompson v. Sawyer, 678 F.2d 257, 295 (D.C. Cir. 1982) (adjustment required for probable degree of interest in position); Taylor v. Jones, 495 F. Supp. 1285, 1296 (D. Ark. 1980), *aff'd in relevant part,* 653 F.2d 1193 (8th Cir. 1981) (long term goal adjusted in light of skills required); Morgan v. Kerrigan, 530 F.2d 431, 433 (1st Cir. 1976) (no adjustment for skills since defendant did not prove adjustment warranted); Drayton v. City of St. Petersburg, 477 F. Supp. 846, 857-58, (M.D. Fla. 1979) (adjustment for high school degree requirement); EEOC v. Local 14 Int'l Union of Operating Eng'rs, 415 F. Supp. 1155, 1170-71 (S.D.N.Y. 1976) (adjustment to exclude workers with more than a high school education); *Rios,* 400 F. Supp. at 986-87 (adjustments for census undercount of minorities; weighted adjustment based on proportion of actual steam fitters with various levels of education); EEOC v. Enterprise Ass'n Steamfitters Local 638, 401 F. Supp. 467, 488-89 & 489 n.27 (S.D.N.Y. 1975) (weighted adjustment based on proportion of actual apprentices with various levels of education); Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585, 593 (S.D.N.Y. 1974) (adjustment to exclude labor force with more than high school education), *aff'd,* 514 F.2d 767 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976).

tion should be used.[164] Defining the relevant geographical area has frequently been a source of controversy, since the cities in which many employers are located typically have a far higher proportion of minority residents than do the surrounding suburbs.[165]

A number of factors, although possibly relevant to other forms of numerical orders, have little bearing on a compliance order. Since a compliance order serves merely to prevent future discrimination, such an order has no more impact on whites than simple compliance with the law. Thus it is not necessary that the order be of a short or even specific duration, or that the proportions it establishes be kept at a low level. An employer or union is always at liberty to seek to prove that a change in its attitude and record has eliminated the need for a compliance order; a decree that sets no specific date for ending or reconsidering a compliance order simply leaves the defendant with the responsibility for seeking reconsideration whenever it believes it can make the requisite evidentiary showing.

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164. The importance of this distinction is starkly illustrated by the error of the Fourth Circuit in Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The court of appeals concluded that no numerical relief was required since blacks were 50% of the defendant's 1972-1975 hires in an area whose workforce was 41% black. *Id.* at 648. The detailed findings of the district court showed, however, that blacks were 67% of the applicants in 1972, and that the disparity between the hiring rates among black and white applicants had gotten worse, not better. In 1969 the company hired 86% of white male applicants and 61% of black male applicants; in 1972 the hiring rates were 60% for white males and 30% for black males. *See* Sledge v. J.P. Stevens & Co., 16 Fair Empl. Prac. Cas. (BNA) 1652, 1662-63 (E.D.N.C. 1976).

165. *See* Bolden v. Pennsylvania State Police, 578 F.2d 912, 921 (3d Cir. 1978) (problem noted); *Drayton*, 477 F. Supp. at 857-58 (suburbs included); *Louisville Black Police Officers Org.*, 511 F. Supp. at 830-31 (weighted average of city and suburbs); EEOC v. Local 14 Int'l Union of Operating Eng'rs, 415 F. Supp. at 1170-71 (city figure only used since only 12% of union members worked outside city); EEOC v. Int'l Union of Elevator Constructors Local 5, 398 F. Supp. 1237, 1246-47, 1252-53 (E.D. Pa. 1975) (problem noted), *aff'd*, 538 F.2d 1012 (3d Cir. 1976); Stamps v. Detroit Edison Co., 365 F. Supp. 87, 122 n.4 (E.D. Mich. 1973) (compromise figure used), *rev'd sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated*, 431 U.S. (1977).

In such a case the court should attempt to determine what proportion minorities would be, in the absence of discrimination, of the actual pool of applicants; the proportion of previous hires from the suburbs will have been tainted by past hiring discrimination, and the number of past minority applicants from the city may well have been depressed by past discriminatory practices. Where an employer hires workers from both the city and the suburbs, a court should use neither city-only nor combined city and suburban figures. Instead the Court ought to use a weighted combination of both based on the likely proportion of applicants from each area in the absence of discrimination. These sometimes complex calculations are not an attempt to delineate a number of jobs to which minorities are in any sense entitled, but to ascertain the level of minority hiring or promotions to be expected in the absence of discrimination. That calculation is essentially the same as the type of statistical analyses used to determine whether an employer or union has engaged in unlawful discrimination. *See, e.g.*, Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1026 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 960 (1982). The same percentage figure was used both to ascertain the presence of discrimination and to establish the appropriate long term goal in a number of cases. *See Drayton*, 477 F. Supp. at 858, 861; *Louisville Black Police Officers Org.*, 511 F. Supp. at 831, 840.

B. *Procedure Neutralization Quotas*

The plurality in *Sheet Metal Workers'* recognized that numerical orders are at times required to neutralize the effects of "informal mechanisms [that] may obstruct equal employment opportunities."[166] In the course of finding that an employer or union has engaged in unlawful discrimination, the courts invariably identify specific practices or procedures that have caused that discrimination. In a variety of rather different circumstances, lower courts have concluded that discrimination has occurred because certain key positions in a company or union were held by individuals of only one race, and that the prompt and certain eradication of continuing discrimination required an alteration in the racial composition of the group of officials or employees who play such a critical role in the employment process. Race conscious orders in such cases are used to eliminate the discriminatory impact of a particular employment practice or procedure by increasing the number of minorities involved in that practice or procedure. In some instances courts have directed the immediate assignment or appointment of a specified number of minorities, including a one-time 100 percent order. In other instances, particularly where larger numbers of minority members are involved, the courts have used lower numerical orders of longer duration intended to reach, albeit more gradually, the number of minority members deemed necessary in the critical positions to finally bring discrimination to an end.

Under the earliest use of such a procedure neutralization order, a court was to require that a specified number of minorities be placed on boards or committees that made critical personnel decisions. Courts in Title VII cases had repeatedly found that discrimination was particularly likely when such decisions were relegated to an all-white group of officials.[167] By including in the decision-making process minority individuals unlikely to engage in or tolerate continued discrimination, the courts sharply reduced the danger that new violations would occur. In some instances the courts merely added minorities to existing boards or committees; in other cases the courts created new panels on which minorities were to be included. Courts issued procedure neutralization decrees directing that specified numbers of minorities be included among officials responsible for recruiting new applicants,[168] considering appeals by rejected applicants,[169] training newly hired workers,[170]

166. 106 S. Ct. at 3036.

167. *See* Paxton v. Union Nat'l Bank, 688 F.2d 552, 563-64 n.15 (8th Cir. 1982) (citing cases), *cert. denied,* 460 U.S. 1083 (1983); Rowe v. General Motors Co., 457 F.2d 348, 359 (5th Cir. 1972).

168. *See, e.g.,* Pennsylvania v. Rizzo, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1483 (E.D. Pa. 1975) (existing recruiting program including six minorities), *appeal dismissed,* 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976).

169. *See, e.g., id.* at 1482 (new panel, one of three members to be chosen by plaintiff).

170. *See, e.g.,* Williams v. City of New Orleans, 543 F. Supp. 662, 668, 682 (E.D. La. 1982) (four additional black instructors, new "Academy Review Panel" to be half black), *rev'd,*

or, more broadly, evaluating all hiring and promotions.[171] Such orders were upheld as "an effective method to prevent future discrimination."[172]

The lower courts have also concluded that numerical orders, particularly with regard to hiring, are at times necessary to overcome deterrent effects of past discrimination. The *Sheet Metal Workers'* plurality expressly noted the need to neutralize the deterrent effect of such earlier discrimination.[173] The fact that an employer or union had for years excluded all or virtually all minorities, the Supreme Court noted in 1977, could discourage minority applications as surely as "a sign reading 'Whites Only' on the hiring office door."[174] The Court's holding was amply confirmed by the experience of the lower courts, which repeatedly concluded that in particular cases minorities had been deterred from applying for jobs or union memberships because the employer or union's employment record was so bad that it indicated that such applications would be pointless.[175] Other discriminatory

694 F.2d 987 (5th Cir. 1982), *rev'd on rehearing,* 729 F.2d 1554 (5th Cir. 1984) (en banc), *appeal dismissed,* 763 F.2d 667 (5th Cir. 1985); United States v. Local 3, Int'l Union of Operating Eng'rs, 4 Fair Empl. Prac. Cas. (BNA) 1088, 1097 (N.D. Cal. 1972) (minority persons should be represented on the board of any new program designed for minority training).

171. *See, e.g.,* Ostapowicz v. Johnson Bronze Co., 12 Fair Empl. Prac. Cas. (BNA) 1230, 1232 (W.D. Pa. 1974) (one female member to be on new panel "to supervise and evaluate affirmative action programs, hiring and promotion, and to insure that there is no sex discrimination in the future operations of the defendant"), *aff'd in part and rev'd in part on other grounds,* 541 F.2d 394 (3d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977).

172. *Ostapowicz,* 541 F.2d at 402; *see also Williams,* 543 F. Supp. at 682 (order will "ensure the appearance of fairness in police academy decision making"); *Local 3, Int'l Union of Operating Eng'rs,* 4 Fair Empl. Prac. Cas. (BNA) at 1097 (minority representative on board of new program will "insure that such a program will be administered in a manner sympathetic to the particular needs of [minority] trainees.").

173. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986).

174. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977).

175. Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974); United States v. N.L. Indus., 479 F.2d 354, 369 (8th Cir. 1973) ("[A] black employee with knowledge of the nominal number of black foremen . . . could hardly be expected to make a meaningless request indicating his willingness to be promoted."); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) ("Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community . . . , minority persons will still be reluctant to apply for employment absent some positive assurance that if qualified they will be in fact hired on a more than token basis."), *cert. denied,* 406 U.S. 950 (1972); Arnold v. Ray, 21 Fair Empl. Prac. Cas. (BNA) 793, 795 (N.D. Ohio 1979); Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 105 (D. Conn. 1979), *aff'd in part and vacated in part,* 641 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); Arnold v. Ballard, 390 F. Supp. 723, 735 (N.D. Ohio 1975); Hogue v. Bach, 5 Fair Empl. Prac. Cas. (BNA) 754, 757 (D. Colo. 1972). *Carter* was cited with approval by the plurality in *Sheet Metal Workers'* 106 S. Ct. at 3036.

The potential impact of an employer's hiring record was graphically illustrated by events in Chicago in the early 1970s. Following the use in 1971 of a test with a severe discriminatory effect, minority applications to the city police department dropped sharply; subsequent litigation resulted in the elimination of that test, and the proportion of minority applications then rose to well over 1971 levels. Blacks were 33% of the 1971 applicants, 28.6% of the 1975 applicants, and 45% of the 1981 applicants. United States v. City of Chicago, 663 F.2d 1354, 1361 n.20, 1362 n.23 (7th Cir. 1981) (en banc). In 1971, 67% of whites, but only 33% of blacks, passed the test, and only 10% of those hired were black. United States v. City of

practices can have a similar enduring discriminatory effect. Blacks are unlikely to want to work as teachers in "an anti-black, segregated school system,"[176] or to work as police officers in a department with a well deserved reputation for discrimination against minority officers[177] or violence against minority citizens.[178]

The lower courts have recognized that an employer whose past practices depressed minority applications remains in violation of the law until that deterrent effect is eliminated.[179] In the absence of effective corrective measures, recruiting by an employer with a reputation for discrimination will as a practical matter be racially selective recruiting of whites. In a number of instances, employers were directed to engage in recruitment or publicity specifically designed to attract minority applicants. But practical experience demonstrated that potential minority applicants, often with good reason, were unlikely to believe promises of equal opportunity from an employer whose workforce still remained virtually all white. After a century of unfulfilled promises of fairness and equality, blacks and hispanics often perceive little reason to take seriously another such promise from an employer with a sordid record of bigotry. As one federal judge observed in 1972, "the best publicity programs will not fully convince all minority group members that they now have the opportunity to qualify" for previously all-white positions.[180] In *Morrow v. Crisler*[181] and *NAACP v. Allen*,[182] detailed injunctions requiring aggressive recruiting of minorities and public assurances of nondiscrimination proved entirely ineffective in inducing blacks to apply for positions in the then all-white Mississippi and Alabama state police forces, both of which then had well deserved reputations of bitter hostility towards blacks. In *Morrow* the Fifth Circuit concluded in that instance that no "benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi . . . ."[183]

To end the enduring effects of such discriminatory practices, courts in a number of instances have concluded that a numerical hiring order was necessary to promptly place enough minorities in positions from which they had been barred. This would demonstrate that minorities could indeed find work with a given employer, thus eliminating the

Chicago, 411 F. Supp. 218, 233-34 (N.D. Ill. 1976), *aff'd in part and rev'd in part*, 549 F.2d 415 (7th Cir. 1977).

176. *See* Morgan v. Kerrigan, 388 F. Supp. 581, 582 (D. Mass. 1975).

177. *See Ballard*, 390 F. Supp. at 735.

178. *See City of Chicago*, 411 F. Supp. at 233 & n.16.

179. *See, e.g., Morrow*, 491 F.2d at 1057.

180. Sims v. Sheet Metal Workers Int'l Ass'n, 353 F. Supp. 22, 32 (N.D. Ohio 1972), *aff'd in part*, 489 F.2d 1023 (6th Cir. 1973).

181. 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974). *Morrow* was cited with approval by the plurality in *Sheet Metal Workers'*, 106 S. Ct. at 3036.

182. 493 F.2d 614 (5th Cir. 1974).

183. *Morrow*, 491 F.2d at 1056.

often fatal deterrent effect of past discrimination. The Second Circuit noted that such orders might be necessary at times "to assure prospective minority candidates that applying is no longer futile."[184] The Fifth Circuit sustained such an injunction as a method "to change the outward and visible signs of yesterday's racial distinctions" and thus overcome an employer's "reputation as an all-white organization,"[185] and the Eighth Circuit agreed that a decree of this sort was in some instances essential to give minorities "some positive assurance that if qualified they will in fact be hired on a more than token basis."[186]

A procedure neutralization order was issued for rather different reasons in *Taylor v. Jones*,[187] an Eighth Circuit case involving a racial discrimination by a single black civilian employee of the Arkansas National Guard. The trial court found that the plaintiff had been constructively discharged from her position, having been forced to resign "by the racial atmosphere" in her office after having "stayed as long as any self-respecting black person could have been expected to stay . . . ."[188] That atmosphere included recurrent racial epithets and slurs, harrassment of and physical threats against blacks, and discrimination in determining the work duties and salary of the "traditionally 'black job' " held by the plaintiff.[189] The Eighth Circuit concluded, as had other courts, that the very existence of such a racially discriminatory work atmosphere violated Title VII.[190] The trial and appellate courts in *Taylor* recognized that the plaintiff was entitled to more than merely an order permitting her to resume a position "in a work atmosphere only somewhat improved from the appalling conditions" that had earlier driven her from the job.[191]

The district court concluded as well that only an order requiring the hiring of additional minority co-workers could be relied on to eliminate the conditions which prompted the plaintiff's complaint. Although

184. Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 311 n.13 (2d Cir. 1979). On remand the district court found that a numerical remedy was needed to provide such an assurance. 479 F. Supp. 101, 113 (D. Conn. 1979), *aff'd in part and vacated in part*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). A similar factual finding was made in Bridgeport Guardians, Inc. v. Civil Serv. Comm'n, 354 F. Supp. 778, 797-98 (D. Conn.), *aff'd in part and rev'd in part*, 482 F.2d 1333 (2d Cir. 1973), although the district court read an earlier Second Circuit decision in that case to preclude a numerical remedy however necessary it might be.

185. *Allen*, 493 F.2d at 621.

186. Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

187. 489 F. Supp. 498 (E.D. Ark.), *partial reh'g*, 495 F. Supp. 1285 (E.D. Ark. 1980), *aff'd in part and rev'd in part*, 653 F.2d 1193 (8th Cir. 1981). The Eighth Circuit opinion was quoted with approval by the plurality in *Sheet Metal Workers'*, 106 S. Ct. at 3036.

188. 489 F. Supp. at 501.

189. 653 F.2d at 1198-99.

190. *Id.* at 1199; *see also* Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); Rogers v. EEOC, 454 F.2d 234, 238-39 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

191. 495 F. Supp. at 1294.

blacks were 16 percent of the state population and 23 percent of the members of the Guard, only 2 percent of the Guard's civilian workers were black. In light of the testimony of Guard officials, the trial judge found that:

> [A]s the environment approaches a fairer racial representation, the degree of racism tends to diminish . . . .
>
> [Plaintiff] has standing not only to seek reinstatement, but to seek to be reinstated in a work place where all people are treated with decency and respect. The Court finds that this goal will be materially impeded unless the Arkansas National Guard is required to step up its employment of qualified black persons . . . . Racial quotas are philosophically abhorrent to the Court, but the proof here leaves no choice. There is simply no other way to ensure that the law will be complied with in the future.[192]

The court of appeals sustained this factual finding that a numerical hiring order was necessary to end discrimination against the named plaintiff.[193] The defendants objected that such orders were not proper in an individual action, and could be issued only in a class action, but the Eighth Circuit held that such relief was justified as a measure to protect the plaintiff from further discrimination.[194]

The circumstances warranting use of a procedure neutralization order are quite distinct from those relevant to a compliance order. As the deterrence problem in *Morrow* illustrates, a procedure neutralization order does not require a showing that a defendant is likely to engage in continued intentional discrimination. The use of a procedure neutralization order, rather, requires a court to identify a specific discrimination practice, including a practice with only a discriminatory effect, that is likely to recur and that can most effectively be prevented by requiring that a particular number of minority individuals be placed in specific positions. The criteria of egregiousness and long-standing discrimination, although critical to demonstrating the need for a compliance order, are not necessarily relevant to establishing the existence of a practice requiring a procedure neutralization order. In some instances of intentional discrimination, such as *Taylor v. Jones*, a compliance order

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192. 495 F. Supp. at 1294, 1296.

193. 653 F.2d at 1204 ("There is no indication that significant improvement will be made in the work atmosphere to which Taylor must return absent the relief afforded. In fact, the evidence is to the contrary.").

194. *Id.* The appellate court stated, "[The remedy's] sole design is to ensure the relief to which Taylor is entitled—reinstatement into a work place that is not infected with virulent racism. It is a remedy carefully tailored to fit the circumstances." *Id.* The trial court had earlier rejected that same objection:

> it is customary for courts, even in individual actions, to award broad injunctive relief forbidding future discrimination. So here, where the aggravated character of the evidence justifies affirmative relief, and where that relief is necessary to create a work place in which black people can maintain their self-respect, it is no bar to the granting of such relief that plaintiff has never been certified as a class representative.

495 F. Supp. at 1295.

is of no relevance because the underlying claim of discrimination does not concern hiring or promotion.

The appropriate structure of a procedure neutralization order is entirely different from that of a compliance order. A court establishing a procedure neutralization order must make two determinations, neither of which is necessarily related to the proportion of minorities who would be hired absent continued discrimination. The first determination is the number of minorities in the position at issue that, once attained, will neutralize the discriminatory practice at issue. This figure may be smaller or larger than the number of minorities who would have occupied that position in the absence of past discrimination. The second necessary determination is how fast that level of representation is to be achieved. A court might order that it occur at once, that only minorities be given future vacancies until the desired level is reached, or that a particular portion of all positions be filled with minorities until that point is achieved. Immediate compliance is the ideal method of assuring that the practice at issue will cause no further discrimination, but in some instances that method would require an employer to hire or promote unneeded employees; where elevation to a better paid position is involved, a preference for minorities, whether to be applied at once or as vacancies occur, will adversely affect whites. A court must give some consideration to these competing interests in deciding how to frame a procedure neutralization order, bearing in mind that anything less than immediate and complete neutralization entails a substantial risk of permitting continued discrimination against minorities. Under a compliance order, the employer is left with discretion to select the minority individuals to be included. In the case of procedure neutralization order, this discretion may well be inappropriate if the intended role of those minority employees is to resist and obstruct further acts of discrimination by their superiors. In such situations the courts have correctly given the plaintiff a role in making the selection.[195]

Procedure neutralization orders, like compliance orders, are used to prevent future acts of discrimination against actual victims. But while those potential victims are the very individuals hired or promoted under compliance orders, procedure neutralization orders safeguard potential victims by selecting third parties for particular jobs or assignments. The fact that these third parties—blacks hired as a result of the *Taylor* order, for example—may receive benefits from the injunction, although they may be neither past nor potential future victims of discrimination, is neither objectionable nor remarkable. This result is, as a practical matter, unavoidable if the courts are to address effectively the problems discussed above. Both judicial and administrative remedies frequently provide such incidental benefits to third parties.

195. *See* note 169 *supra*.

C. *Test Neutralization Orders*

A need for numerical remedies unrelated to any problem of intentional discrimination has emerged as a result of the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*[196] *Griggs* held that Title VII forbids the use of employment practices, such as criteria for hiring or promotion, that have an adverse effect on minorities, unless those practices are demonstrably job related. Subsequent decisions made clear that a selection standard has such an adverse impact if it excludes a disproportionately large number of minority applicants.[197] When an employer cannot prove that such a standard is a valid predictor of actual job performance, the employer cannot continue to hire or promote employees on that basis. The vast majority of lower court decisions applying *Griggs* have involved attacks on written examinations used for hiring or promotion.

In a case where a court has declared an employer's test unlawful, the fashioning of a new test that will be job related is often a difficult and time consuming undertaking.[198] While such an examination is being developed, an employer may well need to hire or promote additional employees. In the case of public agencies, particularly police and fire departments, continuation of such personnel actions is often vital to the safety of the community.[199] As a consequence, employers whose tests have been held unlawful frequently press the courts to fashion or approve some form of interim hiring or promotion procedure that may be used until a new test can be devised and approved.[200] Whites who scored well on the invalid test understandably prefer a remedy that permits continued use of those results even in a modified form.[201]

A variety of techniques have been devised by employers and the

196. 401 U.S. 424 (1971).

197. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (minimum weight requirement disproportionately excludes women); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (company use of Beta examination and Wonderlic Test disproportionately excludes blacks).

198. *See, e.g.*, NAACP v. Allen, 340 F. Supp. 703, 706 (M.D. Ala. 1972) (creation of new test could take four to five years), *aff'd*, 493 F.2d 614 (5th Cir. 1974); Luevano v. Campbell, 93 F.R.D. 68, 79 (D.D.C. 1981) (developing new tests will require "a substantial period of time").

199. *See* Berkman v. City of New York, 536 F. Supp. 177, 216 (E.D.N.Y. 1982) ("to freeze all appointments [to the Fire Department] may present a hazardous situation to the citizens of the community") (quoting Vulcan Soc'y v. Civil Serv. Comm'n, 360 F. Supp. 1265, 1278 (S.D.N.Y.), *aff'd in part*, 490 F.2d 387 (2d Cir. 1973)), *aff'd*, 705 F.2d 584 (2d Cir. 1983); Reed v. Lucas, 11 Fair Empl. Prac. Cas. (BNA) 153, 155 (E.D. Mich. 1975) ("Any injunction which caused continuing vacancies in the . . . [Sheriff's] Department would jeopardize . . . efficient operation").

200. There is one instance in which an employer and predominantly white union preferred to adopt a test neutralization order to retain permanently a disputed test. Vulcan Soc'y v. Fire Dep't of White Plains, 505 F. Supp. 955, 960-61 (S.D.N.Y. 1981).

201. *See* Castro v. Beecher, 459 F.2d 725, 736-37 (1st Cir. 1972) (district court order forbidding any use of old test scores unfair to whites who took that test; old list to be utilized together with test neutralization order); Vulcan Soc'y v. City of New York, 96 F.R.D. 626 (S.D.N.Y. 1983) (whites on list based on old test but displaced by test neutralization order to have priority over applicants who take any subsequent test).

courts to deal with this common problem. In several cases employers have added a sufficient number of points to the scores of blacks to eliminate the adverse effect of selection on the basis of test scores.[202] Test scores once used to rank applicants have been used instead on a pass-fail basis,[203] or only to sort applicants into several large groups.[204] Tests have been changed by eliminating specific questions with an adverse impact,[205] or used in combination with criteria that have a countervailing, favorable impact on minorities. Some employers have even chosen employees by lot.[206]

The most common interim measure, however, is to permit the use of the disputed test, but to require an employer to hire or promote a sufficient number of minorities, regardless of test score, to eliminate the adverse impact of the test.[207] Thus where blacks comprised 20 percent of the job applicants, but only 5 percent of the applicants receiving high scores on an invalid test, an employer would be permitted to continue using the test, provided that the employer actually hired one black for every four whites. In virtually all of these cases the disputed test had earlier been used to give eligible applicants comparative rankings; thus the effect of such an order is to require an employer to make

202. *See* Kirkland v. New York State Dep't of Correctional Servs., 628 F.2d 796, 798 (2d Cir. 1980) (average black score 268 points below average white score; 250 points added to score of every black), *cert. denied,* 450 U.S. 980 (1981); *cf.* Dawson v. Pastrick, 600 F.2d 70, 73-74 (7th Cir. 1979) (all black and hispanic employees given 15.25 "seniority points"). The EEOC regulations expressly authorize such modifications of test scores. 29 C.F.R. § 1607.14(B)(8)(d) (1986).

203. *See* Vulcan Soc'y v. Fire Dep't of White Plains, 505 F. Supp. at 959.

204. *See* Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1123 (2d Cir. 1983), *cert. denied,* 465 U.S. 1005 (1984).

205. *See* Williams v. City of New Orleans, 543 F. Supp. 662, 682-83 (E.D. La.), *rev'd,* 694 F.2d 987 (5th Cir. 1982), *rev'd on rehearing,* 729 F.2d 1554 (5th Cir. 1984) (en banc), *appeal dismissed,* 763 F.2d 667 (5th Cir. 1985); Vulcan Soc'y v. Fire Dep't of White Plains, 505 F. Supp. at 959.

206. *See Kirkland,* 711 F.2d at 1123 (candidates to be "ranked within their zone [based on test scores] . . . by random selection"); Association Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 313 n.19 (2d Cir. 1979) (adverse effect "could be eliminated by random selection of appointees from the group of passing candidates, rather than use of ranking"); Sims v. Sheet Metal Workers Int'l Ass'n Local 65, 353 F. Supp. 22, 29 (N.D. Ohio, 1972) (apprentices to be selected "from the eligible pool by lottery"), *aff'd in part,* 489 F.2d 1023 (6th Cir. 1973); *see also* Luevano v. Campbell, 93 F.R.D. 68, 79 (D.D.C. 1981) (defendant to use "all practicable efforts" to eliminate adverse impact of test being phased out).

207. *See* Berkman v. City of New York, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd without op.,* 755 F.2d 913 (2d Cir. 1985); Guardians Ass'n of the N.Y. Police Dep't, Inc., v. Civil Serv. Comm'n, 630 F.2d 79, 108-09 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); Berkman v. City of New York, 536 F. Supp. 177, 216 (E.D.N.Y. 1982), *aff'd,* 705 F.2d 584 (2d Cir. 1983); Oburn v. Shapp, 393 F. Supp. 561, 574 (E.D. Pa.), *aff'd,* 521 F.2d 142 (3d Cir. 1975); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1103-04 (E.D. Pa. 1972), *aff'd in part and vacated in part,* 473 F.2d 1029 (3d Cir. 1973) (en banc) (per curiam) (proportional hiring provision affirmed by equally divided court); Vulcan Soc'y v. City of New York, 96 F.R.D. 626, 628-29 (S.D.N.Y. 1983); Reed v. Lucas, 11 Fair Empl. Prac. Cas. (BNA) 153, 155-56 (E.D. Mich. 1975); NAACP v. Seibels, 14 Fair Empl. Prac. Cas. (BNA) 670, 686-87 (N.D. Ala. 1977), *aff'd in part and rev'd in part,* 616 F.2d 812 (5th Cir. 1980); Pennsylvania v. Rizzo, 13 Fair Empl. Prac. Cas. (BNA) 1468, 1474 (E.D. Pa. 1974), *appeal dismissed,* 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976).

different selections from among applicants whom the employer has already concluded are qualified.[208] The remedial orders either contemplate that the necessary number of minority employees will be selected or promoted on the basis of the disputed test,[209] or leave the choice of which minorities to hire or promote to the discretion of the employer.[210]

The courts have consistently regarded test neutralization orders as an essential device for ending the unlawful discriminatory impact of disputed tests. The *Sheet Metal Workers'* plurality expressly approved the use of numerical remedies for this purpose: "[P]ending the development of nondiscriminatory hiring or promotion procedures . . . the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure."[211]

This particular form of numerical remedy has occasioned little objection by defendants or whites, in part, no doubt, because in the absence of test neutralization orders there could often be no hiring or promotions at all for a considerable period of time. Such remedies, one court explained, "only mean that . . . defendants could not add to the discrimination already caused by its [sic] illegal practices. The current [court-ordered] procedure only prevents *additional* discrimination, against minority applicants, during the temporary period while defendants develop constitutional selection procedures."[212] The minorities who benefit from such an order are the individuals who would be actual victims of the illegal test if that test were used without a numerical modification. A modification in a ranking that was originally based on an invalid test does not, by definition, discriminate against better qualified whites.[213] In the absence of a valid test such rankings have no more

208. In those cases in which plaintiffs successfully attacked a test used to reject minorities or women as ineligible, rather than merely to give them low rankings, the courts have limited participation in test neutralization orders to minorities or women who could actually pass a new test that assured they were in fact competent to do the work at issue. *See Berkman,* 536 F. Supp. at 218 ("[q]ualification shall be determined pursuant to procedures agreed upon by the parties"); Castro v. Beecher, 459 F.2d 725, 737 (1st Cir. 1972) (new test).

209. *E.g., Oburn,* 393 F. Supp. at 569-70; *Reed,* 11 Fair Empl. Prac. Cas. (BNA) at 156.

210. *E.g.,* Pennsylvania v. Flaherty, 477 F. Supp. 1263, 1267 (W.D. Pa. 1979); *Seibels,* 14 Fair Empl. Prac. Cas. (BNA) at 686.

211. 106 S.Ct. at 3037.

212. *Oburn,* 393 F. Supp. at 575 (emphasis in original); *see also Berkman,* 705 F.2d at 595 ("[s]uch an order does not go beyond the simple elimination of the disparate impact of the practice found to be discriminatory and is properly regarded as compliance relief"); United States v. City of Chicago, 663 F.2d 1354, 1361 (7th Cir. 1981) (en banc) (order "corrects for the disparate impact of the . . . examination"); Guardians Ass'n of N.Y. Police Dep't, Inc., v. Civil Serv. Comm'n, 630 F.2d 79, 113 (2d Cir. 1980) (order "designed to make sure that the City complies with the requirements of Title VII in making appointments to the police force"), *cert. denied,* 452 U.S. 940 (1981).

213. NAACP v. Allen, 493 F.2d 614, 618 (5th Cir. 1974) (a white applicant for public employment cannot "base any claim . . . upon an eligibility ranking which results from unvalidated selection procedures. . . . This is so because by definition . . . there is no reliable way to know that any . . . applicant is truly better qualified than others . . . ."). In upholding the

significance than numbers drawn by lot, and a test neutralization order merely eliminates a bias built into the original lottery.

Test neutralization orders are appropriate only in the specific category of cases in which an employer seeks to use, on an interim basis, an invalid test with a racially discriminatory impact. Where such use is permitted, a test neutralization order, or a modification with a similar impact, is virtually mandatory, since the denial of relief would result in additional violations of the law. Ordinarily the level of the order will be equal to the proportion of minorities among the group actually taking the test. Where a test has itself deterred minority individuals from seeking the position involved or from completing the application process, a different figure is required, since such a test excludes minorities in two distinct ways: by deterrence and by outright rejection.[214] Here a court must attempt to calculate what proportion of minorities would actually have taken the test had it been a valid examination which they had a far better chance of passing. Once an invalid test has been replaced, further numerical relief may be appropriate, but it would have to be based on a rationale other than test neutralization.

The principle of test neutralization will at times warrant a second type of numerical order. The adverse impact of a test is measured not by its effect on the applicants hired or promoted in a single day, but on the group of applicants as a whole. Where a court determines that an unlawful test was used to make past employment decisions, a requirement that future hirings or promotions have no adverse impact will not be sufficient to eliminate the overall adverse impact of the illegal test, since it will not lead to the hiring or promotion of sufficient minorities to neutralize the effect of earlier disproportionately white hiring or promotions. An order which fails to take into consideration those earlier hirings or promotions will have the effect of ensuring that in future employment decisions a number of whites will be better off, and an equal number of blacks worse off, than if the test had been neutralized from the outset.[215] The only method that will prevent an invalid test

addition of points to the scores of all minority applicants, the Second Circuit emphasized that the unadjusted scores simply were not a reliable "predictor of on-the-job performance" and that the program does not "bump white candidates because of their race but rather re-ranks their predicted performance." Kirkland v. New York State Dep't of Correctional Servs., 628 F.2d 796, 797-98 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

214. *See Berkman*, 536 F. Supp. at 177 (applicant rate adjusted due to deterrent effect). *But see Guardians Ass'n*, 630 F.2d at 111-13 (trial court to decide whether to use applicant rate or proportion of minorities in workforce).

215. This problem is illustrated by a hypothetical case in which blacks are 20% of all applicants. A racially neutral test for hiring 100 applicants would result in the hiring of blacks numbered 1-20 and whites numbered 1-80. If a test that no black could pass were used to hire the first 50 workers, a neutralized version of that same test, giving one position in five to blacks, would mean that the second group of 50 would consist of blacks 1-10 and whites 51-90. Thus blacks 11-20, who would have been in the second group of 50 in the absence of any discrimination, would still not be hired under a 20% prospective order. A 40% order for the second 50 hires is necessary to assure that the test does not have a future discriminatory effect.

from continuing to injure still more victims in this way is to require, as several courts have, that an employer who wishes to continue to use an invalid test must first give an absolute preference to a sufficient number of minorities to neutralize the net impact of past hiring or promotions under that test,[216] and then hire or promote a sufficient proportion of minorities to neutralize future applications of the test.

D. *Victim Identification Orders*

One of the central concerns of Title VII, and of a court in framing a decree in light of a violation of that statute, is to provide redress that will, so far as is practicable, correct and compensate for the impact of any such violation. Most Title VII cases involve discrimination in hiring or promotions; a remedy for that type of discrimination will ordinarily involve not only back pay, but also an injunction to assure that those who were unlawfully denied a job or promotion are given the position improperly denied them.

By the time a court has established the presence of a violation and is ready to frame a remedial decree, however, the position originally at issue will already have been filled, usually by a white employee with no direct responsibility for the proven act of discrimination. In such cases most courts have balked at suggestions that they order the demotion or dismissal of the white beneficiary of that discrimination.[217] Rather, the general practice has been to direct that the next vacancy or vacancies be offered to the victim or victims of that discrimination, and that any person discriminated against be awarded "front pay" until he or she reaches his or her rightful place, the position he or she would have occupied but for the past discrimination. Such an injunction has the effect of giving the victims an absolute preference over whites, or other minorities, who may subsequently seek the position.[218] Until the pool

216. *See, e.g., Kirkland,* 711 F.2d at 1123 (promotion preference); *Berkman,* 705 F.2d at 594-97 (absolute numerical hiring preference). In NAACP v. Seibels, 14 Fair Empl. Prac. Cas. (BNA) 670, 686 (N.D. Ala. 1977), *aff'd in part and rev'd in part,* 616 F.2d 812 (5th Cir. 1980), the court issued a 33% order to remain in effect until sufficient blacks had been hired to neutralize the effect of past discrimination. The effect of such a limited order, rather than an absolute preference, was to permit the unlawful test to continue to have an additional discriminatory impact, because the more limited type of order further delayed the date on which blacks would be hired at the same point in time as would have occurred had no discriminatory test ever been used. *See* note 215 *supra.*

217. *See, e.g.,* Patterson v. American Tobacco Co., 535 F.2d 257, 267-68 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976); United Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

218. Ivey v. Western Elec. Co., 23 Fair Empl. Prac. Cas. (BNA) 1028, 1033-34 (N.D. Ga. 1978) (victims identified under claims procedure to be placed on "Priority Promotion List" and be given "the first vacancies available in the affected job categories"); Hill v. Western Elec. Co., 13 Fair Empl. Prac. Cas. (BNA) 1157, 1162-63 (E.D. Va. 1976) (victims identified by special master to be given "priority offers of promotion, transfer, and hiring"), *aff'd in part and rev'd in part,* 596 F.2d 99 (4th Cir. 1979); Stamps v. Detroit Edison Co., 365 F. Supp. 87, 121 (E.D. Mich. 1973) (victims to receive "first opportunity to apply for vacancies"; procedure for identifying victims unclear), *rev'd sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated,* 431 U.S. 951 (1977); Vogler v. McCarty, 2 Fair Empl. Prac. Cas. (BNA) 491,

of victims has been exhausted, there is a 100 percent hiring or promotion order in effect. Neither the Reagan administration nor those judges openly hostile to numerical remedies have questioned the propriety of such preferences for victims of past discrimination.

Although the principle that a victim of discrimination ought to be restored to his or her rightful place seems simple in theory, the implementation of that rule often presents complex practical problems. Most Title VII cases involve not two individuals applying for the same position, but thousands of individuals seeking hundreds of jobs or promotions. Employers that engage in racial discrimination do not maintain lists of the specific victims of their illegal conduct; such a practice would be legally suicidal. Employers have every reason not to seek to identify victims of their own unlawful conduct, or to retain information that might make such identification possible.

Some types of discrimination, moreover, will by their very nature make particularly difficult the task of identifying the victims. One of the most effective discriminatory techniques is to prevent blacks from ever applying for a position. This tactic assures that it will not be necessary to actually reject an arguably qualified minority applicant, and increases the likelihood the minority victims will not complain because they will not know about the existence of the relevant vacancy or of the act of discrimination itself. More seriously, from a remedial point of view, it is especially difficult to construct a list of the individuals who would have applied had the application process been open to them.

The most common example of this type of discrimination is racially discriminatory recruiting. Assistant Attorney General Reynolds has suggested that discrimination in recruiting occurs in virtually all hiring discrimination cases.[219] A supervisor who knows the identity of both white and black workmen may, for example, choose to contact only whites when a vacancy arises.[220] In the absence of such knowledge, an employer may simply direct its recruiting at sources likely to have only white applicants.[221] Frequently an employer with an all-white work force publicizes vacancies by word-of-mouth among its own employees, who in turn pass along the information to largely white circles of

494, 497 (E.D. La. 1970) (44 named blacks to be admitted to union and "given priority as to initial referral as employees"), *aff'd*, 451 F.2d 1236 (5th Cir. 1971); United States v. Medical Soc'y, 298 F. Supp. 145-56 (D.S.C. 1969) (four named blacks to be "given preference . . . over all other applicants for the next four vacancies").

219. "[I]n virtually every instance of unlawful employment discrimination, the employer's search for new employees has been confined—geographically and otherwise—in a manner that reaches few minority and female applicants." W. Reynolds, Statement Before the National Foundation for the Study of Equal Employment Policy 7-8 (Nov. 11, 1984).

220. *See, e.g.*, Furnco Constr. Co. v. Waters, 438 U.S. 567, 580 n.9 (1978).

221. *E.g.*, United States v. Sheet Metal Workers Local 10, 6 Fair Empl. Prac. Cas. (BNA) 1036, 1041 (D.N.J. 1973); United States v. Bricklayers Local 1, 5 Fair Empl. Prac. Cas. (BNA) 863, 876 (W.D. Tenn. 1973); United States v. International Bhd. of Elec. Workers Local 357, 356 F. Supp. 104 (D. Nev. 1972).

friends and relatives.[222] Where blacks do approach an employer seeking work, they can be discouraged from making a formal application,[223] or be falsely told that no vacancies exist.[224] An employer's well deserved reputation for discrimination may be extremely effective in deterring minorities; as the Supreme Court noted in *Ford Motor Co. v. EEOC*, individuals in need of work "want jobs, not lawsuits."[225]

Even where the identity of the actual or potential applicants is known, it will still be difficult to construct distinct lists of victims and nonvictims, separating blacks rejected because of their race from blacks rejected for legitimate reasons. No employer is likely to maintain records making any such distinction, and the defense to a Title VII case will ordinarily include an insistence that all blacks were rejected for nonracial reasons. A judicial finding that an employer engaged in deliberate discrimination frequently will not entail or include any particular conclusions as to the identity of the victims. If 100 blacks and 100 whites apply for 50 vacancies, and the employer hires 50 whites, a court might properly find that blacks were rejected on account of race, but it may well be far from clear precisely which blacks were rejected for that unlawful reason.

For over a decade the federal courts have struggled with the task of framing specific remedies in a world fraught with such unavoidable uncertainties. The lower courts have repeatedly acknowledged the difficulty of reconstructing precisely who would have been placed in what job in the absence of unlawful discrimination.[226] The remedies that have evolved are based on a frank recognition of those problems, not on any pretense that it is possible to ascertain exactly who would have applied for and received which spot many years in the past. Until now, it has rarely if ever been suggested that the courts should refuse to redress violations of the law unless this could be done with surgical precision.[227] On the contrary, the Supreme Court has frankly acknowl-

222. EEOC v. Local 2P Lithographers, 412 F. Supp. 530, 534 (D. Md. 1976) (due to word-of-mouth recruiting, relatives of union members placed on apprenticeship waiting list as young as age 2); EEOC v. International Union of Elevator Constructors Local 5, 398 F. Supp. 1237, 1256 (E.D. Pa.) (due to word-of-mouth recruiting 75% of applicants were friends or relatives of union members), *aff'd sub. nom.* United States v. International Union of Elevator Constructors, 538 F.2d 1012 (3d Cir. 1976); United States v. Lee Way Motor Freight, Inc., 7 Fair Empl. Prac. Cas. (BNA) 710, 748 (W.D. Okla. 1973), *aff'd in part,* 625 F.2d 918 (10th Cir. 1979); United States v. Georgia Power Co., 474 F.2d 906, 925-26 (5th Cir. 1973).

223. *See, e.g., Lee Way Motor Freight, Inc.,* 7 Fair Empl. Prac. Cas. (BNA) at 719-722.

224. *See, e.g., id.* at 722, 746.

225. 458 U.S. 219, 230 (1982).

226. Segar v. Smith, 738 F.2d 1249, 1289 n.36, 1290 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985); McKenzie v. Sawyer, 684 F.2d 62, 76 (D.C. Cir. 1982); EEOC v. AT&T, 556 F.2d 167, 180 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); Kirkland v. New York State Dep't of Correctional Services, 531 F.2d 5, 9 (2d Cir. 1975) (en banc) (Mansfield, J., dissenting); EEOC v. Detroit Edison Co., 515 F.2d 301, 315 (6th Cir. 1975), *vacated,* 431 U.S. 951 (1977); Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 114-15 (D. Conn. 1979), *aff'd in part and vacated in part,* 641 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982).

227. *But see* Mitchell v. Mid-Continent Spring Co., 587 F.2d 841 (6th Cir. 1978).

edged that the "process of recreating the past will necessarily involve a degree of approximation and imprecision."[228]

The Supreme Court has dealt with this unavoidable imprecision by expressly and repeatedly holding that the plaintiff in a Title VII case is not required to establish with certainty the identity of every actual victim.[229] The burden on a plaintiff is merely to establish the identity of the group of individuals at which the discriminatory practice was directed. That group may well include some nonvictims, but the plaintiff does not bear the often impossible burden of further refining this list of probable victims into certain victims and certain nonvictims. Rather, the employer is afforded an opportunity to adduce evidence justifying a further narrowing of that list of likely victims, and the employer bears the burden of establishing which person or persons among the group of probable victims were nonvictims.[230] In a case in which blacks actually apply for positions from which they are excluded, every black applicant is treated as a probable victim, and is entitled to relief unless the employer can establish that he or she is a nonvictim.[231] Where the method of discrimination involved preventing or deterring blacks from applying, the plaintiffs' burden is merely to identify blacks who met the relevant minimum qualifications and who, but for that discrimination would have applied for the positions involved. The latter requirement can be met by identifying those blacks whose actual jobs were so abundantly less desirable than the vacancy being filled that they would obviously have preferred to fill that vacancy "if given a free choice."[232] While such a showing may be difficult with regard to blacks already em-

228. International Bhd. of Teamsters v. United States, 431 U.S. 324, 372 (1977). Judge Wisdom recently noted that a 50% quota for members of a likely victim pool has a less harsh impact on whites than the absolute preference that would follow from litigation of the identity of each victim. Williams v. City of New Orleans, 729 F.2d 1554, 1584 (5th Cir. 1984) (concurring and dissenting opinion) (en banc), *appeal dismissed,* 763 F.2d 667 (5th Cir. 1985).

229. *International Bhd. of Teamsters,* 431 U.S. at 371-72; Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976).

230. In tort cases in which the existence of wrongdoing is clear, but the precise matching of wrongdoer and victim appears impossible, the wrongdoer has the burden of proof to establish that she is not responsible for any particular injury. W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 41, at 271-72 (1984); F. HARPER & F. JAMES, JR., THE LAW OF TORTS, § 2.03 at 1131 (1956). This problem arises most frequently in tort cases in which it is impossible to ascertain which of two wrongdoers caused a particular injury, and thus to determine the identity of an alleged tortfeasor's actual victim. *See, e.g.,* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (two defendants negligently fire guns at same time, only one of which hits plaintiff); Murphy v. Taxicabs of Louisville, 330 S.W.2d 395 (Ky. 1959) (plaintiff injured by one of several negligently driven cars); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (plaintiff unable to identify which manufacturer produced drug which caused injuries), *cert. denied,* 449 U.S. 912 (1980). Section 443b(3) of the Restatement of Torts, Second adopts this rule, explaining that such a shift in the burden of proof is necessary to avoid "the injustice of permitting proven wrongdoers . . . to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." RESTATEMENT (SECOND) OF TORTS § 443B comment on subsection 3 (1965).

231. Franks v. Bowman Transp. Co., 424 U.S. at 772.

232. International Bhd. of Teamsters v. United States, 431 U.S. at 369.

ployed in positions in some ways preferable to that being filled,[233] that showing can be readily made by adducing evidence that a particular qualified black was unemployed and looking for work.

If this allocation of the burden of proof were mechanically applied in every case, assuring inclusion of all actual victims by providing relief to a sometimes larger group of probable victims, that would eliminate one major reason for numerical remedies. But such a mechanical application, while perhaps guaranteeing that no actual victims were omitted, would at times have extreme results. The pool of likely victims of a discriminatory practice is in some cases enormous; racially selective recruiting among out-of-work New York bricklayers, for example, would exclude thousands of blacks, all of whom could easily establish that they were well qualified, and that they would have applied for the positions at issue had the vacancies not been kept secret. As the employer's burden and the task of separating actual from probable victims becomes more difficult, the group of probable victims obtaining relief grows larger, and the percentage of probable victims who were in fact actual victims becomes smaller. In the example discussed earlier, in which 100 blacks and 100 whites applied for 50 positions, all of which were given to whites, it might be possible for an employer to prove that 95 of the 100 rejected black applicants were nonvictims, having been turned down for nonracial reasons, but it is equally conceivable that the employer could establish only that 50 or 5 of the blacks were nonvictims. In the latter situations the number of blacks technically entitled to relief would be 50 or 95, even though there were originally only 50 vacancies.[234] It is unlikely that, but for the proven discrimination, all of the vacancies would have been filled by blacks, and it is of course im-

233. *Id.* at 369 n.55.

234. The lower courts have correctly insisted that, where the victim identification process sanctioned by *Teamsters* is applied, all victims so identified must receive full relief, regardless of the number of such identified victims. In United States v. Lee Way Motor Freight, 625 F.2d 918, 935-36 (10th Cir. 1979), the employer had promoted eight apprentices, all white, to journeymen in the years between 1965 and 1972 that it engaged in racial discrimination. Applying the *Teamsters* procedure, the trial court held that Lee Way was obligated to award vacancies to six identified victims. Lee Way objected on appeal that since only 8.5% of the area population was black, only one black would have been hired in the absence of discrimination, so only one black should have been given a hiring preference. The Tenth Circuit rejected this argument, insisting that *Teamsters* required full relief for all identified victims. 625 F.2d at 935-36. In *Mims v. Wilson* the trial court held that the defendant had unlawfully rejected seven black applicants because of their race. 10 Fair Empl. Prac. Cas. (BNA) 1357, 1358 (N.D. Fla. 1973), *vacated,* 514 F.2d 106 (5th Cir. 1975). Since the area population was only 7.2% black, and the defendant employed fewer than 20 workers, the trial court held that only two class members were entitled to back pay and hiring preference. 10 Fair Empl. Prac. Cas. (BNA) at 1358, 1359. The Fifth Circuit reversed, explaining:

> The district court may have been influenced in limiting relief to two members of the class by the consideration that the racial composition of employees in the sheriff's office would then mirror the racial composition in the community. This bears no legal relevance to the relief the discriminatees are entitled to assuming each had qualifications superior to those of the white hired in his stead. It stops short of returning the black discriminatee to his 'rightful place' . . . .

514 F.2d 106, 109 n.5 (5th Cir. 1975).

possible that 95 black applicants would have been hired. Second, an actual victim of hiring discrimination would ordinarily be entitled, at the least, to the next available vacancy, enjoying priority over all more recent pending applicants. But as the degree of uncertainty and thus the size of the probable victim group grows, the delay faced by new applicants would increase.

These interrelated problems can be dealt with in a sensible pragmatic manner by means of a numerical order. Several lower courts have used that approach, although none of the reported opinions contains a direct explanation of why those courts are doing so. In those cases in which the potential size of the probable victim group exceeds the number of likely actual victims, or even the number of relevant vacancies, the courts have at times simply ordered the hiring or promotion of a specified number of members of that group.[235] Typically that number is the difference between the number of blacks actually hired or promoted and the number which, under all the circumstances, it seems likely that the employer would have hired or promoted in the absence of discrimination. Thus where 100 blacks and 100 whites applied for 50 vacancies, all of which went to whites, the number of blacks permitted to obtain relief might be limited to 25. An injunction of this sort places a ceiling on the number of individuals who receive hiring or promotion preference, and dispenses with the individualized identification process.

Such a ceiling, of course, unavoidably entails a risk that a number of actual victims will be denied make-whole relief, either because the ceiling is too low, or because the wrong probable victims will be afforded that relief. The lower courts, however, seem to have concluded that such a ceiling strikes a reasonable balance between the goal of restoring victims to their rightful places and the interests of subsequent white applicants who will necessarily be adversely affected by any rightful

235. For decisions issuing numerical hiring or promotion orders of this sort, see note 234 *supra*. The clearest account of this type of order is in Association Against Discrimination in Employment v. City of Bridgeport. The district court, ordering the hiring of 102 minorities, explained:

> The hiring of an additional 102 minority persons would create a situation in which the percentage of minority firefighters hired since January 1, 1971 roughly would equal the percentage of minority persons in the population of the City. In theory, these 102 positions should go to those minority individuals who would have been hired had there been no discrimination. Recognizing that, at this point in time, it is impossible to identify these individuals with any certainty, the Court must exercise its discretion to fashion an equitable means of selecting the individuals to be hired.

479 F. Supp. 101, 115 (D. Conn. 1979), *aff'd in part and rev'd in part*, 641 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). The court ordered that the list be composed of rejected applicants who could pass certain medical and physical tests. If there were fewer than 102 such rejected applicants, a procedure was to be used for identifying and adding to the list individuals who were deterred from applying because of the defendants' reputation for discrimination. *Id.* The Second Circuit upheld the order as a reasonable method of providing compensatory relief, noting that the inherent risk that the order might be over or underinclusive was simply unavoidable. 647 F.2d at 281-87.

place relief for apparent victims. What looks at first blush like a quota hiring or promotion order is in fact a quota ceiling designed to protect whites from the potentially extreme effect of a mechanical application of the normal evidentiary rules for identifying the victims of past discrimination.

Where such a ceiling is imposed, the courts often accord an employer considerable discretion in filling the positions at issue from the pool of likely victims. This is ordinarily a sensible approach, since an employer is likely for economic reasons to select the best qualified individuals from that group, and the best qualified individuals are particularly likely to be the blacks whose earlier rejections were due, not to any lack of qualification, but to race. White workers or applicants have no particular interest in the unavoidable imprecision involved in selecting the appropriate minorities out of the likely victim pool.

The lower courts that have chosen to authorize such ceilings have refused to go further and permit an employer or others to seek to prove that the number of actual victims is lower than the ceiling. This practice, although used without judicial explanation, is clearly appropriate if an employer chooses to contest on a case-by-case basis the identity of every victim. The employer must run the risk that that litigation tactic will fail—specifically the risk that, unable to establish the presence of a greater number of nonvictims, it will have to provide make-whole relief to a group substantially larger in number than the ceiling a court might have set. Assuming arguendo that these ceiling orders do not violate the rights of blacks, a court clearly should not both accord an employer the benefits of such ceiling and also permit the employer to pursue victim-by-victim litigation. Frequently the primary beneficiaries of such a ceiling will be, not the employer, but innocent white employees or applicants, and an employer who insists on waiving the ceiling and pursuing individualized litigation may be gambling away the jobs of those whites. A federal court charged with responsibility for considering the interests of such whites[236] clearly need not permit an employer to undertake such a course of action.

The number of minorities to be hired under such a victim identification order is the number of minorities who would have been hired but for the proven discrimination, less the number in fact hired. That figure will have to reflect both the actual impact of the employer's discrimination and any related deterrence of minority applications, as well as the likely interest and qualifications of potential minority candidates.[237] A victim identification order is not to be used for the selection of minorities from the public at large, but should be limited to a pool or list of likely victims that has been constructed in such a way as to maximize, to the degree feasible, the probability that any participant was in fact a

236. International Bhd. of Teamsters v. United States, 431 U.S. at 372.
237. *See* text accompanying notes 173-177 *supra*.

victim.[238] While the calculation of the total number of workers to be so hired or promoted raises an essentially factual question, the rate at which those hirings or promotions should occur necessarily involves a degree of discretion. Where victims have been identified with certainty, a 100 percent hiring or promotion order is ordinarily used to get them to their rightful places as quickly as possible. But where a victim identification order is used, some of the courts have been reluctant to resort to so harsh a decree, and have been inclined to use a lower figure,[239] so long as the hiring or promotion of the victims identified in this unavoidably less certain method is still completed with reasonable dispatch.

Nothing in this use of numerical remedies is inconsistent with the Reagan administration's insistence that compensatory relief be limited to "known" or "identifiable" victims.[240] Rather, this approach is simply a sensible method of identifying those victims. It is not, in the administration's terms, "victim blind,"[241] for the pool of blacks from whom participants are drawn is limited to likely victims of discrimination, and the order identifies the victims with as much precision as an imperfect world allows. To require more would be largely to nullify Title VII. A requirement of absolute certainty would simply channel discrimination into those techniques, such as racial recruiting, which make any such precision impossible, and would give employers an irresistible incentive to avoid making or keeping the sorts of records that would facilitate the identification of victims. If this is what the Administration has in mind, then the legal standard that it characterizes as a call for relief for all victims would in reality be a prohibition against relief for almost any victim, an insistence on a degree of certainty which a discriminatory employer would always be at liberty to make impossible.

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238. *See, e.g.*, Pennsylvania v. Flaherty, 477 F. Supp. 1263, 1265-66 (W.D. Pa. 1979) (minorities ranked low due to non-job-related test); United States v. San Diego County, 21 Fair Empl. Prac. Cas. (BNA) 402, 411 (S.D. Cal. 1979) (minorities now in position from which defendant promoted only whites); *Association Against Discrimination in Employment*, 479 F. Supp. at 115 (rejected applicants and persons deterred from applying).

239. Both absolute preferences and lower partial preferences are common. Only a handful of decisions explain the basis upon which that choice was made. *See* United States v. N.L. Indus., 479 F.2d 354, 377 (8th Cir. 1973) (50% until 15 blacks hold front-line foreman positions); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (33% until 20 members of minority groups are hired), *cert. denied*, 406 U.S. 950 (1972); *Association Against Discrimination in Employment*, 479 F. Supp. at 114 n.16 (100%); EEOC v. AT&T, 13 Fair Empl. Prac. Cas. (BNA) 390, 420-21 (E.D. Pa. 1975) (100%).

240. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, STATEMENT CONCERNING THE DETROIT POLICE DEPARTMENT'S RACIAL PROMOTION QUOTA, 2-3 (Jan. 17, 1984).

241. To complain that remedies for probable victims are "victim blind" is to mischaracterize both the nature and reason for such relief. The metaphor suggests that the identities of actual victims and nonvictims can readily be perceived, if only the courts are willing to look. In reality that is an identification which is frequently impossible to make with absolute certainty, and the difficulty in doing so stems, not from any indifference on the part of federal judges, but from the action of the employer itself in engaging in a form of discrimination calculated to prevent a court from making that very distinction.

E. *Indirect Victim Orders*

For two decades the Supreme Court has insisted, in a variety of contexts, that federal courts have a duty "to render a decree which will so far as possible eliminate the discriminatory effects of the past."[242] The purposes of that command are preventative as well as compensatory. An earlier act of discrimination may set into motion events which will cause injuries long into the future; the eradication of the effects of past discrimination requires not only redress for past injuries, but affirmative measures to break any ongoing chain of injuries. A decree which lacks such breadth may well permit the original act of discrimination to cause still further harm, rendering permanent, albeit partially successful, the original unlawful discrimination, and giving hope to potential wrongdoers that similar conduct will also succeed even where detected by the courts.

A substantial number of federal employment discrimination cases present precisely this problem. In a wide variety of contexts discriminatory employment practices injure not only the individuals who are the immediate objects of those practices, but also harm, over an extended period of time, indirect victims as well. The lower courts have correctly sought to provide redress for those indirect victims, and in some instances the remedies involved have been numerical.

If judicial redress were available immediately after every act of discrimination, the fashioning of remedies, problems of identifiability aside, would be relatively easy. Were a discriminatory denial of a job on a Monday the subject of a trial on Tuesday, and a final order on Wednesday, such nearly instantaneous judicial relief would be virtually the equivalent of preventing the violation in the first place. The applicant who unsuccessfully sought work on Monday will ordinarily stand ready to accept that same position if it is offered a few days later. When the period between violation and relief is merely a matter of hours or days, that violation will ordinarily cause only a small and readily calculable injury to the rejected applicant, and is not likely to affect anyone else. Because the position of the actual victim will rarely if ever change during such a brief period, that victim will, of course, welcome a judicially compelled job offer equivalent to the offer he or she sought only days earlier.

But such instantaneous justice simply is not available in the federal courts for the victims of racial discrimination. In Title VII actions, as in all other types of civil rights cases, lengthy delays in litigation are now commonplace.[243] Title VII itself requires administrative proceedings

242. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

243. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982).

which can consume close to a year,[244] and the processing of such complaints by the EEOC often takes considerably longer.[245] The pre-trial proceedings are ordinarily lengthy even in an individual case, and discovery in a complex class action can itself require years. Appeals of interlocutory orders, or of orders dismissing claims prior to trial, are also common.[246] Even after a final decision at the trial court level, another year or two can be consumed in appeals, which may in turn be followed by further proceedings on remand. Total delays of as much as a decade are not unheard of.[247]

It is during this often lengthy delay that the discriminatory effects which a court must correct will occur. The impact of a discriminatory act, like the effect of any other action, will inexorably become greater and more complex with the passage of time, affecting an increasing number of individuals in any number of possible ways. The passage of time will alter the position of those immediately affected by the act of discrimination as well—the black denied the job or other benefit, the white beneficiary of that action, and the employer or other perpetrator. Because of the combined effects of these changes, a court called upon to fashion a remedy several years after an unlawful act confronts consequences of that discrimination often radically different from those which existed immediately after that act initially occurred.

In an ideal world in which the federal courts could dispense instant justice, the effects of past discrimination could be eliminated by directing an employer to hire the particular individuals whom it earlier had rejected on the basis of race. Where discrimination in promotions is concerned, such an order may indeed be effective even years later, since the original victims will frequently be in the same positions, still seeking the same vacancies. But in a hiring discrimination case that will only rarely if ever be the situation.[248] Jobless black applicants rejected because of their race by one employer simply cannot afford to remain

244. 42 U.S.C. § 2000e-5 (prior to suit, charge must have been pending for 180 days before EEOC, and 60 to 120 days before relevant state agency).

245. *See, e.g.*, Johnson v. Railway Express Agency, 421 U.S. 454, 455-56 (1975) (four year delay between filing of charge and issuance of right to sue letter); 5 U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, at 529-33 (1974) (median delay of 32 months); U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 88 (1973) (backlog of 53,410 charges).

246. *See, e.g.*, Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

247. *See, e.g.*, Pullman-Standard Co. v. Swint, 456 U.S. 273, 279 (1982) (11 years); *Ford Motor Co.*, 458 U.S. at 222 (10 years); *Albemarle Paper Co.*, 422 U.S. at 408 (9 years).

248. The value of admission to an educational institution, like a job offer, is inherently transitory. A black rejected for racial reasons by one school will ordinarily pursue his or her education elsewhere. The education which he or she actually receives may not be as good as that which would have been obtained at the discriminatory institution. But the passage of time after the discriminatory rejection of an application will necessarily render a subsequent offer less valuable and ultimately useless. Admission to a white college as a freshman in 1984 is very different than admission as a sophomore in 1985, or as a junior in 1986. With each passing year a transfer involves more educational and personal disruption. By 1988, when the rejected applicant is attending graduate or professional school or working for a living, a court

unemployed for years, hoping that a court will someday direct reconsideration of their applications. Indeed, a rejected applicant cannot choose to remain jobless during the pendency of a Title VII case, even if financially able to do so, without fatally compromising his or her claim, since he or she has a legal duty to seek other work and mitigate the damages suffered.[249] Thus the direct victim of discrimination in hiring, an individual who by definition was sufficiently qualified that his or her rejection had to be based on race, will almost invariably find other employment during the pendency of a Title VII action.

The more blatant the original discriminatory act, and the more substantial the qualifications of the rejected black, the greater the odds that the victim will readily and quickly[250] find other employment. By the time a federal court finally fashions a remedial decree, that original direct victim will have acquired extensive seniority and experience in another job with a different employer; few sensible employees are likely to choose to abandon such a comparatively secure position for a job with an employer which is known to be hostile[251] and which is only offering employment because forced to do so by a court order. The number of civil rights plaintiffs who have been dismissed after receiving court ordered jobs or promotions makes apparent the risks involved in accepting such relief.[252] Even a rejected employee who might otherwise be willing to run these risks is not going to do so if he or she has moved to another city or state in search of work.

The circumstances of the Title VII cases in the Supreme Court illustrate how readily such delays remove the immediate victims of discrimination from the ranks of interested applicants. In *Franks v. Bowman Transportation Co.*,[253] a total of 166 qualified blacks had unsuccessfully sought truck driver jobs during the relevant limitations period.[254] In July 1972, a federal judge finally ordered the defendant to give these identifiable direct victims priority in consideration for such jobs, but

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order directing his or her admission to a white college as an undergraduate would simply be a joke.

249. *See Ford Motor Co.*, 458 U.S. at 232-33.

250. Although the prospect of a back pay award will at times operate to deter discrimination, in hiring discrimination cases the subsequent employment which ends a direct victim's interest in a job offer will also cut off or sharply reduce back pay liability. The more blatant the discrimination, and the greater the skills of the rejected black, the quicker that victim will find other employment. Thus the worst cases of discrimination in hiring will ordinarily give rise to the smallest back pay awards and the smallest monetary incentive to obey the law.

251. *See, e.g., Ford Motor Co.*, 458 U.S. at 246 n.3 (Blackmun, J., dissenting) ("Whenever I had worked at Ford before, I had been badgered . . . I had a fear to go back. I didn't know what I would be facing. . . ."); *id.*, at 247 ("Neither woman . . . wanted to be the only woman employed in the Ford warehouse.") (quoting trial court).

252. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 752 n.4 (1976) (named plaintiff, hired after filing charge with EEOC, fired six months later); *see also* Memorandum Suggesting Mootness at 2, *Franks* (No. 74-728).

253. 424 U.S. 747 (1976).

254. *Id.* at 776 n.36.

only five or six of those individuals actually took the position.[255] In *Ford Motor Co. v. EEOC*,[256] two rejected female job applicants were the plaintiffs in a successful Title VII action, but the court of appeals did not finally sustain the finding of discrimination until 1981,[257] more than seven years after both individuals had taken a similar position with General Motors.[258] The history of Title VII cases in the lower courts reflects a similar pattern.[259]

The impact of this unavoidable delay in obtaining any judicial relief might be of little concern if discrimination in employment never injured anyone except the individual personally rejected for a job or promotion. But practical experience teaches that an unlawful action may injure not only the original direct victim, but other subsequent and indirect victims. Where a tortfeasor acts in a negligent manner, his or her liability extends, not only to the immediate victim, but to any other individuals whose injuries were reasonably foreseeable. Thus, if *A* negligently ignites a fire in *B*'s home, the fire spreads to *C*'s home, and firefighters are compelled to hose down *D*'s home to save it, thus causing water damage to *D*'s property, *A* is liable to *B*, *C*, and *D*.[260] The identity of the indirect victim need not be foreseeable so long as an injury to a person in that position was reasonably foreseeable at the time of the original misconduct.

The Supreme Court has recognized on several occasions the diverse ways in which acts of racial discrimination can harm such indirect victims. In *Rogers v. Paul* the Court held that black students had standing to challenge racial discrimination in the assignment of faculty, noting that such assignments inherently denied black students equality of educational opportunity.[261] Manifestly, a policy of racial discrimination in the hiring of faculty would affect black students in a similar way. In *Trafficante v. Metropolitan Life Insurance Co.* the Court noted that the discriminatory exclusion of blacks from a residential apartment building could injure white residents by denying them the social benefits of liv-

255. *Id.*

256. 458 U.S. 219 (1982).

257. 645 F.2d 183 (4th Cir. 1981).

258. 458 U.S. at 222.

259. *See* AT&T v. EEOC, 556 F.2d 167, 180 (3d Cir. 1977) (numerical remedies at times required "to counteract the effects of discriminatory practices because some victims no longer seek the job benefits which they were discriminatorily denied"), *cert. denied sub nom.* Communications Workers v. EEOC, 438 U.S. 915 (1978); White v. Carolina Paperboard Corp., 564 F.2d 1073, 1090 (4th Cir. 1977) (most of class members no longer interested in disputed position); Bledsoe v. Wilker Brothers, 33 Fair Empl. Prac. Cas. (BNA) 127, 131 (W.D. Ky. 1980) (successful plaintiff, now working as a supervisor for another firm, too disgusted with defendant to return to work there).

260. *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS, 43 (1984).

261. 382 U.S. 198, 200 (1965); *see also* Bradley v. School Bd. of Richmond, 382 U.S. 103 (1965) (injury to students caused by faculty segregation not entirely speculative); *cf.* Bridgeport Guardians v. Civil Serv. Comm'n, 354 F. Supp. 788, 797 (D.Conn.) (public has "a right to the enforcement of law by a police department staffed on a non-discriminatory basis"), *aff'd in part and rev'd in part*, 482 F.2d 1333 (2d Cir. 1973).

ing in an integrated community and by cutting residents off from the business and professional advantages which might arise if they lived with members of minority groups.[262] *Gladstone Realtors v. Bellwood* held that certain portions of the 1968 Civil Rights Act extended to "*all* victims—both direct and indirect—of housing discrimination."[263] The Court noted that a practice by realtors of steering only black buyers to an integrated but changing neighborhood could injure existing residents, as well as the city itself, by driving down the value of homes, reducing the tax base, or provoking a flight of white residents that would result in a segregated city and school system.[264]

Neither the indirect injuries with which these cases were concerned, nor any redress that might have been attained, depended on the particular identity of the specific black teachers, apartment hunters, or home buyers initially harmed by the original act of discrimination. In *Rogers* the students sought not the assignment to their school of the specific black and white teachers whose "rightful place" that school might be, but simply an integrated faculty. If the original black faculty victims in *Rogers*, for example, had been fired, or had left for an integrated school system, the students' injuries would not have been remedied simply by offering assignments to black former teachers who no longer wanted them. The constitutional interests of the student indirect victims required, if the direct faculty victims were understandably no longer interested in working for the defendant school system, that other black teachers, in numbers comparable to the number of original direct victims, be hired.[265] Similarly, in *Trafficante* the black apartment hunters rejected earlier because of their race were in all likelihood living elsewhere and not interested in moving; a pointless offer of apartments to those direct victims clearly could not have ended the white tenants' injuries. Only by renting to a number of black tenants comparable in number to, although not necessarily the same individuals as, the original direct victims could the landlord bring an end to the injuries of which Mr. Trafficante and the other plaintiffs complained.

Whether a Title VII case involves indirect victims whose interests must be separately considered will depend on the particular circumstances of each case. Of course, if all of the original direct victims will accept the jobs or promotions that were earlier denied unlawfully, further injury to indirect victims will ordinarily end. Even where some or all direct victims no longer want rightful place relief, the nature of the proven discriminatory practice may not entail injury, or at least ongoing injury, to any third parties. But where the exclusion of blacks from

262. 409 U.S. 205, 208-12 (1972).

263. 441 U.S. 91, 100-02 (1979).

264. *Id.* at 110, 111, 115.

265. In school desegregation cases in which school authorities had illegally dismissed minority teachers, the courts commonly required the hiring of a sufficient number of black teachers to restore the level that existed prior to those illegal terminations. *See* note 266 *infra*.

a job or workforce causes such ongoing injuries, steps must be taken to integrate that job or workforce, and thus end those continuing injuries to indirect victims, even if the original direct victims are no longer interested in the positions at issue.

Federal courts have identified a number of distinct circumstances in which employment discrimination causes indirect injuries. The most frequent example is racial discrimination in the selection of public employees, particularly teachers,[266] firefighters,[267] and police officers.[268] When Title VII was amended in 1972 to prohibit discrimination in public employment, the Senate Report explained:

> This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies . . . . Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.[269]

The Civil Rights Commission studies that contributed to Congress' decision to apply Title VII to state and local agencies concluded that racial discrimination in the selection of police, teachers or other government officials was a major cause of racial discrimination by the agen-

266. Kromnick v. School Dist., 739 F.2d 894 (3d Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985); Morgan v. O'Bryant, 671 F.2d 23, 27 (1st Cir.), *cert. denied,* 459 U.S. 881 (1982); Arthur v. Nyquist, 520 F. Supp. 961, 966 (W.D.N.Y. 1981), *aff'd in part and rev'd in part,* 712 F.2d 816, 817 (2d Cir. 1983); Morgan v. Kerrigan, 530 F.2d 431, 432 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976); Morgan v. Kerrigan, 509 F.2d 599, 600 n.3 (1st Cir. 1975).

267. NAACP v. Beecher, 679 F.2d 965, 977-78 (1st Cir. 1982); Association Against Discrimination v. City of Bridgeport, 479 F. Supp. 101 (D.Conn. 1979), *aff'd in part and vacated in part,* 647 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); Pennsylvania v. Rizzo, 13 Fair Empl. Prac. Cas. (BNA) 1468, 1473 (E.D. Pa. 1974), *appeal dismissed,* 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976).

268. Williams v. City of New Orleans, 729 F.2d 1554, 1575 (5th Cir. 1984) (en banc) (Wisdom, J., concurring and dissenting); Williams v. Vukovich, 720 F.2d 909, 923-24 (6th Cir. 1983); *Beecher,* 679 F.2d at 977-78; United States v. City of Chicago, 663 F.2d 1354, 1364 (7th Cir. 1981); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371, 375 (3d Cir. 1974); United States v. City of Buffalo, 22 Fair Empl. Prac. Cas. (BNA) 577, 580 (W.D.N.Y. 1978); Officers for Justice v. Civil Serv. Comm'n, 20 Fair Empl. Prac. Cas. (BNA) 1304, 1309 (N.D. Cal. 1977); United States v. City of Chicago, 411 F. Supp. 218, 240 (N.D. Ill. 1976), *aff'd in part and rev'd in part,* 549 F.2d 415 (7th Cir. 1977); Pennsylvania v. Flaherty, 404 F. Supp. 1022, 1030 (W.D. Pa. 1975); Officers for Justice v. Civil Serv. Comm'n, 371 F. Supp. 1328, 1341-42 (N.D. Cal. 1973); Bridgeport Guardians, Inc. v. Civil Serv. Comm'n, 354 F. Supp. 788, 797 (D. Conn.), *aff'd in part and rev'd in part,* 482 F.2d 1333 (2d Cir. 1973).

269. S. REP. No. 415, 92d Cong., 1st Sess. 10 (1971). *See also* H.R. REP. No. 238, 92d Cong., 1st Sess. 17 (1971): "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated."

cies involved.[270] The Koerner Commission had also urged that the eradication of discrimination by government employees required the elimination of discrimination in the hiring and promotion of those very employees.[271] The 1972 amendments to Title VII were adopted at a time when the problems arising out of discrimination in public employment had reached a crisis level in many cities. All-white police units in black communities were often regarded by those communities and by the police themselves as an occupying military force, with police-community relations hostile at best and frequently violent.

Courts adopted remedies for such public employment discrimination in light of the severe and continuing harms that followed from the creation of virtually all white public agencies. An agency tainted by discrimination in staffing, particularly a police department, was likely to experience severe difficulty in winning the public confidence and assistance necessary for the work of that agency.[272] White employees in a virtually all-white agency were more likely to engage in conduct that was discriminatory, or thoughtlessly offensive or harmful to blacks, either because they followed the example of discrimination set by the agency's employment policies, or because those employees were not exposed to the leavening effects of working with black colleagues. Members of the public who suffer the indirect effects of such public employment discrimination may be injured even more seriously than the original direct victims of that discrimination. Blacks denied jobs in an all-white police force will ordinarily lose only income, but blacks who must deal with such a force on the streets may well lose their lives. And while the harm to a direct victim may sooner or later end if he or she finds another job, the recurring injuries inflicted on the black community by the resulting all-white agency may well continue indefinitely.

The grave though indirect injuries suffered by the community, particularly the black community, as a result of public employment dis-

270. *See* U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970); U.S. COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE, 71-82 (1969).

271. U.S. NAT'L ADVISORY COMM. ON CIVIL DISORDERS, REPORT 165-67 (1968); *see also* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695 (6th Cir. 1979) (citing authorities), *cert. denied,* 452 U.S. 938 (1981).

272. Williams v. City of New Orleans, 729 F.2d at 1575 & n.14 (Wisdom, J., concurring and dissenting); Williams v. Vukovich, 720 F.2d at 923-24 (6th Cir. 1983); *Beecher,* 679 F.2d 965 (1st Cir. 1982); United States v. City of Chicago, 663 F.2d at 1364; Talbert v. City of Richmond, 648 F.2d 925, 929 (4th Cir. 1981), *cert. denied,* 454 U.S. 1145 (1982); *Young,* 608 F.2d at 695; NAACP v. Allen, 493 F.2d at 621; *Tullio,* 493 F.2d at 375; *Bridgeport Guardians,* 482 F.2d at 1341; *Officers for Justice,* 20 Fair Empl. Prac. Cas. (BNA) at 1309; United States v. City of Chicago, 411 F. Supp. 218, *Flaherty,* 404 F. Supp. at 1029-30; Pennsylvania v. Glickman, 370 F. Supp. 724, 734-36 (W.D. Pa. 1974); *Bridgeport Guardians,* 8 Fair Empl. Prac. Cas. (BNA) 59, 60-61 (D. Conn. 1983); *Officers for Justice,* 371 F. Supp. at 1341-42; Castro v. Beecher, 365 F. Supp. 655, 659, (D. Mass. 1973); *see also* League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 896-97 (C.D. Cal. 1976) (minority citizens have standing to litigate police and fire department hiring discrimination because of adverse effects of such discrimination on police and fire services).

crimination will continue so long as the government agency staffed in that discriminatory manner remains disproportionately white. The racial composition of that workforce, and the consequent harms, are the direct effect, often the intended effect, of past discrimination—an effect that must be ended to correct the original violation. Because discrimination in public employment causes such broad and ongoing injuries, the original violation would not be fully redressed, for example, by an order providing rejected minority job applicants with back pay and prospective front pay, but no jobs, or by offering jobs to rejected minority applicants who no longer wanted the positions. The only way to end the ongoing injuries set into motion by the past discrimination is to place minority employees in the discrimination-tainted agencies. Regardless of whether those minority employees were themselves actual direct victims, their appointment is necessary to end continuing harms to actual indirect victims.

In the case of private as well as public employers, racial discrimination in hiring and firing under certain circumstances will also injure those minority employees who are not themselves direct victims of that practice. A present employee has a vital personal stake in preventing future discrimination in promotions, discipline and assignments, and in redressing any past forms of discrimination of which he or she may have been a victim. As a practical matter, any one employee's ability to protect and advance that interest is directly affected by the presence or absence in the workforce of employees with similar interests and concerns. When an employee undertakes to press an employer or union to correct or prevent discrimination, it will often be vital that that undertaking be made in concert with a substantial number of other workers. An employer is likely to respond very differently to a complaint from 20 percent of its workforce than one from 2 percent of that workforce. Within a labor union, the likelihood that the union will deal aggressively with a problem of discrimination is clearly greater if more members want that action taken. Although it is technically possible for a single employee to bring suit to end discriminatory practices, in a large number of cases organizations of minority employees, rather than individuals, have brought this type of litigation.[273] Such a group effort,

273. Firefighters Inst. for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 390 (2d Cir. 1973); Louisville Black Police Officers Org. v. City of Louisville, 511 F. Supp. 825 (W.D. Ky. 1979), *aff'd,* 700 F.2d 268 (6th Cir. 1983); United States v. City of Chicago, 411 F. Supp. at 225, 241 (Afro American Patrolman's League); Pennsylvania v. Rizzo, 66 F.R.D. 598 (E.D. Pa. 1975) (Club Valiants), *aff'd,* 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976); Reed v. Lucas, 11 Fair Empl. Prac. Cas. (BNA) 153 (E.D. Mich. 1975) (Guardians of Michigan, Inc.); Firebird Soc'y v. New Haven Bd. of Fire Comm'rs, 66 F.R.D. 457 (D. Conn.), *aff'd,* 515 F.2d 504 (2d Cir.), *cert. denied,* 423 U.S. 867 (1975); Afro Am. Patrolmen's League v. Duck, 366 F. Supp 1095, (N.D. Ohio 1973), *aff'd in part,* 503 F.2d 294 (6th Cir. 1974); *Officers for Justice,* 371 F. Supp 1328; *Bridgeport Guardians,* 354 F. Supp. at 783; Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1972); Hull v. Cason, 14 Cal. App. 3d 344, 171 Cal. Rptr. 14 (1978) (Oakland Black Fire Fighters Association).

which requires the presence of a significant number of minority employees, is likely to provide the litigation with financial and other support that no single plaintiff could.[274]

When an employer systematically rejects minority applicants or purges minority employees from its workforce, it severely impairs the ability of the remaining minority employees to make common cause with like minded and similarly situated fellow workers. Within a union, where elections and decisions are made on a one-member-one-vote basis, such discrimination harms blacks in precisely the same way that disenfranchising half the blacks in a city would injure those who were still able to vote. The lack of such allies is of similar importance for blacks who want to engage in concerted activity to change an employer's practices by persuasion or litigation. A rule that forbade half the black workers in a plant from engaging in such joint activities, or voting in a union, would clearly injure those blacks not subject to that prohibition. A discriminatory employment decision to fire half of those workers, or not to hire a similar number, causes precisely the same injury.

Here, as with public employees, correcting the continuing effects of illegal past hiring or dismissal practices requires that blacks be added to the workforce, regardless of whether the original victims can be found or any longer want the jobs. Two circumstances must be present to justify a remedy aimed at indirect injury of this sort. First, the number of blacks fired, or not hired, for discriminatory reasons must be large enough to adversely effect the ability of black employees to engage in effective concerted activity on issues of particular concern to blacks. Clearly the dismissal or rejection of a single black would not have such an impact. Second, employment and other conditions at the workplace must be such that minority workers regard themselves as having the kind of special common interests that make the ability to engage in concerted activity important.[275] Although assessing those concerns may at times pose subtle problems, it will almost invariably be the case that such concerted activity is a matter of concern among minority employees at a plant or office where the union or employer has engaged relatively recently in racial discrimination. A judge's confidence that all racial abuses have ended is irrelevant if black workers themselves still perceive a danger that those or similar problems will recur.

In fashioning a remedy for discrimination injuring third parties, the critical issue is time.[276] Once an employer ceases discriminating, the

274. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

275. *Cf.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986) (importance of no dilution of minority group strength in voting context).

276. Most numerical orders merely recite that the defendant must hire or promote at a given rate until a particular workforce level is reached. A number of opinions, however, recognize that the critical consideration in framing a hiring or promotion order is the amount of time that will be necessary to reach the desired level. *See, e.g.*, United States v. New York, 475 F. Supp. 1103, 1108 (N.D.N.Y. 1979) (40% order will reach desired level in 5 years); Associa-

effect of past discrimination on the composition of its workforce will slowly dissipate, and by the date when the direct victims would have retired, perhaps thirty or forty years after the original violation, there may well no longer be any new injuries to third parties. The question before a court attempting to end such indirect injuries is how much affirmative action to use to reduce the length of the period of that continuing third party injury. In some cases those injuries could be ended in a reasonably short period of time without resort to numerical remedies; in other instances only a numerical order will suffice to avoid intolerable delay. The preferable procedure would be for a court, bearing in mind an employer's normal hiring rate, to set a date by which the employer's workforce must be purged of the effects of past unlawful discrimination, thus ending any continuing third party injuries, and then invite the parties to propose a method for achieving that goal. If no numerical remedy appears necessary to meet the deadline set by the court, no such remedy should be used; a court should, however, monitor progress under whatever order it adopts in order to ascertain whether stronger measures are required, or lesser measures will suffice, to eliminate by the target date all effects of the proven violation.

F. *Deterrence Orders*

There are, as noted above, a number of situations in which it is not possible to restore the actual victims to the positions they would have occupied but for past discrimination. In some instances, particularly involving discrimination in hiring or dismissals, the direct victim will often no longer want the job that, for racial reasons, was given to a white, because the delay between violation and remedy made another position more secure or attractive. Some forms of discrimination may so effectively obscure the identities of the original victims that it would be impossible to delineate a class of likely victims. Where this is the case, and no third parties are being injured by a past violation, there may be cases in which no remedial purpose would be served by taking affirmative steps to alter the racially tainted composition of an employer's workforce.

Where, however, an employer has engaged in systematic intentional discrimination, be it in hiring, promotions or dismissals, affirmative

tion Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 117 n.16 (D. Conn. 1979) (50% ratio rejected as too slow, 100% ratio for first 102 hires ordered), *aff'd in part and vacated in part,* 641 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); *Louisville Black Police Officers Org.,* 511 F. Supp. at 840 (33% ratio needed to reach desired level in five years); Haynie v. Chupka, 17 Fair Empl. Prac. Cas. (BNA) 267, 270 (S.D. Ohio 1976) (45% ratio required to reach desired level in five years); Crockett v. Green, 388 F. Supp. 912, 921 n.4 (E.D. Wis. 1975) (50% numerical remedy needed to reach desired level in six years, defendants proposed 25% ratio unacceptable because it would require 12 years), *aff'd,* 534 F.2d 715 (7th Cir. 1976); Arnold v. Ballard, 6 Fair Empl. Prac. Cas. (BNA) 287, 289-90 (N.D. Ohio 1973) (50% ratio needed to reach desired level within 3 years; without order 22 years would be required).

measures are essential regardless of whether likely victims can be found or want the positions in dispute. The purpose of systematic intentional racial discrimination is by definition racial, not personal: to deny to all blacks, not just to one individual who happened to be black, access to particular positions or promotions. The ultimate goal of such discrimination is to assure that an entire workforce, or the workforce in certain jobs, is either all white or as close to all white as possible. At the least, in the face of laws such as Title VII, racist employers seek to postpone as long as possible the day when there will be a substantial number of blacks in their plants or offices.

Whatever compensatory relief may be appropriate in a particular case, a court faced with a practice of systematic intentional discrimination must adopt a decree that not only condemns that scheme, but assures, insofar as is possible, that the scheme will not succeed. If the courts, in the face of such systematic intentional discrimination, were merely to forbid discrimination, employers would as a practical matter be at liberty to postpone the effective date of Title VII from July 1, 1965 to whatever date the courts finally caught up with them. If, in the face of such discrimination, the courts were merely to enjoin further such discrimination and direct back pay awards for applicants who, due to changed circumstances, no longer wanted the jobs at issue, Title VII would no longer constitute a prohibition against racial discrimination, but would be little more than a somewhat unpredictable system for licensing, at a fee, the practice of racial discrimination. Either of these limited remedies leaves an employer or union with precisely the result that it sought when it violated Title VII, an all-white workforce.

Such a consequence is intolerable because it rewards with success the most vicious and systematic type of Title VII violation. Equally seriously, were it the practice of courts to leave untouched the all-white units created in this way, that promise of success would encourage employers and unions to engage in intentional discrimination. As a practical matter, ordinary rightful place relief is unworkable or meaningless as a method of undoing the effects of certain types of Title VII violations. Thus an inevitable consequence of limiting redress to rightful place relief would be to encourage employers to engage in those particular forms of intentional discrimination that tend to make rightful place relief impracticable. An employer that wanted an all white supervisory force, for example, would have good reason not to hire blacks at all, rather than to refuse to promote blacks to supervisor, since victims of promotion discrimination are likely to be all too ready to seek and use rightful place relief, while victims of hiring discrimination often are not.

The purpose of Title VII is to end racial discrimination, not to create a world in which both discrimination and litigation thrive. If an employer who desires to create an all-white workforce is to be deterred from doing so, the courts must adhere to a remedial approach that assures that the intentional systematic exclusion of blacks will be not

merely expensive, but also unsuccessful. Where none of the other considerations discussed above, including rightful place relief, would warrant an order placing blacks in a particular job, such an order should nonetheless be issued if an employer has systematically and intentionally excluded blacks from the positions at issue. That order must ensure that an employer who engages in such systematic discrimination does not in fact succeed in ending up, after obeying that decree, with substantially fewer blacks than an employer who chose from the outset to obey the commands of Title VII itself. Adherence to this rule is essential to deterring future intentional discrimination and to protecting the individuals who would otherwise be the victims of such illegal practices.

Judges have frequently observed that court ordered numerical remedies are often offensive to an employer and its white employees. In the case of intentional discrimination, however, any such offensiveness actually augments the deterrent value of a numerical order. Numerical orders are likely to be particularly distasteful to racist employers and personnel officials; individuals who would like to give preferences to white applicants will be particularly galled at having to give such preferences to blacks. The greater the prospect that systematic intentional discrimination will ultimately provoke a court ordered hiring or promotion remedy, the more likely that employers will think twice before engaging in such discrimination.

III. Fashioning Numerical Remedies

To assert that there are a number of entirely legitimate and important reasons why a court might order a numerical remedy is not to claim that such remedies should be ordered in all cases, or that they were necessarily warranted in every case in which they have been awarded in the past. What this article proposes, rather, is a framework for deciding whether a numerical remedy is appropriate in a particular case, and a method of analysis under which that decision, and the parameters of any order that is approved, will turn on largely factual issues. The essentially practical considerations which bear on the appropriateness of these remedies are equally applicable whether a court is enforcing Title VII, the fourteenth amendment, or some other prohibition against racial discrimination.

The various types of numerical remedies which the courts have used in Title VII cases are all entirely consistent with the principle that compensatory relief be directed at the actual victims of discrimination. In most instances the courts have used numerical remedies to prevent future injuries to new actual victims, rather than merely to try to redress those injuries after they have already occurred. In those instances where numerical orders are included in a compensatory remedy, they are used as part of a scheme whose very purpose is to identify actual

victims of discrimination, and the sometimes unavoidable imprecision in such remedial schemes is the result of the unlawful discrimination that, often intentionally, tended to obscure the identities of those victims.

Although there are a number of quite distinct circumstances in which numerical remedies may and should be ordered in employment discrimination litigation, in most cases the federal courts issuing such decrees have failed to explain which particular legal principle they were applying, or to make the specific factual findings which that rationale required. Orders denying numerical remedies are generally equally opaque. It may well be that many or even most of these decisions are sound, but there is ordinarily no way a reader, or an appellate court, can be certain that that is true.

Any court considering the issuance of a numerical remedy ought to make clear precisely what remedial principles it is applying. Once a court identifies the particular type of numerical remedy at issue, the decision to grant or deny such an order will often turn largely on factual issues. An understanding of the distinctions among the various rationales for court ordered numerical remedies will ordinarily suggest in any particular case what facts are relevant in that case, and why. This fact-intensive analysis will eliminate much of the apparently standardless and at times misused judicial discretion in fashioning remedial decrees. In light of the factual decision underlying a particular decree, the court and parties will understand what future developments, if any, might warrant a modification of that order.

If trial court decisions to grant or deny numerical remedies are structured in this way, the role of the appellate courts will be both simpler and narrower. Where a trial judge correctly understands the applicable legal principles governing the circumstances and reasons for granting or denying numerical remedies, the only question on appeal will ordinarily be whether the lower court's factual findings were clearly erroneous.[277] Supreme Court decisions make clear that the courts of appeals have only limited authority to overturn such trial court findings of fact.[278]

The present confused state of the law has left the courts with virtually no meaningful standards for deciding whether to approve proposed consent decrees containing some form of numerical remedy. In the absence of any clear idea of why a court should order such a remedy in a litigated case, judges understandably have been even more uncertain about when in a settlement, a necessarily far more limited record, such orders should be approved. In considering such a proposed order in a consent decree, a court should ascertain the specific rationale on

277. *See* FED. R. CIV. P. 52(a).

278. *See, e.g.*, Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint Co., 456 U.S. 273 (1982).

which the remedy was sought by the plaintiffs. Once that rationale is known, the settlement will represent a compromise of the particular factual issues that would be relevant if the remedy were being sought in a litigated case. A decision as to the reasonableness of such factual compromise will be far easier to make, and review, than an exercise of the sort of amorphous discretion that courts now use in considering consent decrees.

Much of the theoretical opposition to numerical remedies has been directed at "rigid" and "inflexible" "quotas" that must be met regardless of future developments and regardless of whether there are sufficient numbers of qualified black applicants. In practice, however, many court-ordered numerical remedies are expressly limited to qualified blacks,[279] contemplate alteration under specific circumstances,[280] or simply contain an open ended invitation to the parties to seek subsequent modifications.[281] More importantly, the district courts have frequently altered numerical orders at the request of a party even though the original decree did not expressly authorize such an alteration.[282] That practice reflects the readiness of federal judges to use their inherent authority to modify any outstanding injunction, and the particular willingness of those judges to consider such changes where a sensitive problem like race conscious remedies is involved. Any numerical order must be understood as authorizing, at least tacitly, future requests for

279. Justice Powell correctly regarded such a limitation as implicit in the order at issue in *Sheet Metal Workers'*, 106 S. Ct. at 3056-57; *see also* League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 911 n.32 (C.D. Cal. 1976); Bridgeport Guardians v. Civil Serv. Comm'n, 354 F. Supp. 778, 799 (D.Conn.), *aff'd in part and rev'd in part,* 482 F.2d 1333 (2d Cir. 1973).

280. EEOC v. International Union of Elevator Constructors Local 5, 20 Fair Empl. Prac. Cas. (BNA) 506, 508 (E.D. Pa. 1979) (order will be reconsidered if there are "undue difficulties"); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 488 F. Supp. 988 (E.D. Pa. 1979) (modification may be sought in light of 1980 census), *aff'd,* 648 F.2d 922 (3d Cir. 1981); *League of United Latin Am. Citizens,* 410 F. Supp. at 911 n.32 (defendants can seek modification "if insufficient qualified individuals apply").

281. United States v. New York, 475 F. Supp. 1103, 1109, (N.D.N.Y. 1979) (order will be reconsidered in two years); Pennsylvania v. Rizzo, 13 Fair Empl. Prac. Cas. (BNA) 1468, 1484 (E.D. Pa. 1974) (either party may move for modification of order after six months), *appeal dismissed,* 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976); Jones v. Milwaukee County, 13 Fair Empl. Prac. Cas. (BNA) 307, 312 (E.D. Wis. 1976) (court will consider motion by either party for corrective order); Arnold v. Ballard, 390 F. Supp. 723, 736 (N.D. Ohio 1975) (need for order will be reevaluated in three years); United States v. Lathers Local 46, 341 F. Supp. 694, 697 (S.D.N.Y. 1972) (order subject to modification in light of "later experience"), *aff'd,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

282. United States v. City of Chicago, 663 F.2d 1354, 1361 (7th Cir. 1981) (en banc) (required promotion level reduced from 40% to 25% in light of substantial progress under earlier order); Copeland v. Donovan, 29 Fair Empl. Prac. Cas. (BNA) 119, 119-20 (D.D.C. 1981) ("goals" modified due to drastic drop in available vacancies and in light of defendant's good faith efforts); EEOC v. Bartenders Int'l Union Local 41, 28 Fair Empl. Prac. Cas. (BNA) 1575, 1577 (N.D. Cal. 1979) (mandated level of minority union members raised in light of defendant's unexplained failure to achieve lesser goals); United States v. City of Philadelphia, 17 Fair Empl. Prac. Cas. (BNA) 167, 168 (E.D. Pa. 1978) (25% female hiring order suspended due to lack of eligible women).

modification.[283] Because the granting of an order necessarily depends on factual findings, findings which frequently involve predictions about future events, there is a clear and principled factual basis on which requests for modification may be based and resolved.

Much of the heated debate about "quotas" has consisted of essentially factual disputes masquerading as arguments about grand principles of morality. Federal courts may have no particular expertise regarding social policy, but they are uniquely well-equipped to resolve factual contentions. To assert that federal judges should not order numerical remedies in employment cases is either to insist that Congress never intended to permit full enforcement of Title VII, an argument definitively rejected by *Sheet Metal Workers'*, or to claim that every federal judge over the last twenty years who concluded that the use of a numerical remedy was a practical necessity must have simply misunderstood the facts of the particular case he or she was deciding. The decision to order a numerical remedy in any specific case will be, and ought to be, a troubling one, to be made with a degree of deliberation commensurate with the sensitivity of the problem, but it is a decision to be made by inquiring with care into the particular facts of that case, not by relying on a priori asumptions that such remedies are never, or always, necessary.

283. United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 234-35 (1969); Morgan v. Kerrigan, 530 F.2d 431, 434 (1st Cir. 1976) ("should experience demonstrate over time that even the most diligent efforts fail to make demonstrable progress toward that [hiring] goal, there will be adequate opportunity to request minority relief. Conversely, time may indicate the goal to be too modest."); Arnold v. Ray, 21 Fair Empl. Prac. Cas. (BNA) 793, 797 (N.D. Ohio 1979) ("the Court's door is always open").