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FROM ILLUSION TO REALITY— RELIEF IN CIVIL RIGHTS CASES

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I. Introduction

For more than two centuries the black man in America was regarded, by lawyers and laymen alike, as a being of an inferior order, with no rights whatsoever which a white man was bound to respect.[1] After a bloody civil war, fought in part to end his servitude, the thirteenth, fourteenth and fifteenth amendments made the Negro, in theory at least, the white man's equal before the law. Reality, however, was different. For almost a century after the Civil War, slavery was replaced by its stepchild, segregation, as a way of life for many black Americans, and few encountered in their daily lives the equality of opportunity which the liberating amendments were designed to assure.

There was a short period after the Civil War when it appeared that black men might in fact enjoy their rights. When the old Confederate States contrived, by so-called Black Codes and other devices, to deny the Negro the basic rights of citizenship,[2] Congress responded with the program known as Radical Reconstruction. The South was placed under military occupation. Many whites in the rebellious states were disfranchised and their governments were placed in the hands of carpetbaggers, scalawags, and local blacks. During this period, and even for some years thereafter, blacks obtained the right to vote and achieved some desegregation of public accommodations in many areas of the South.[3]

In 1876, however, Republican Rutherford Hayes won the presidential election by securing white southern support in exchange for a policy of ending military occupation of the South. Gradually, the entire region was returned to the rule of local whites. By the turn of the century, all of the former Confederate States had adopted new constitutions which effectively disfranchised the Negro and accomplished white political and social supremacy.[4] In the Deep South, these constitutions remained in effect, in spirit as well as in letter, for three quarters of a century.

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1 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

2 Under the Black Codes, blacks were barred from owning property or voting. According to one historian:

> [The] Black Codes gave the Negro population very little freedom. The colored man was free in name only in many cases. The apprentice, vagrancy, and other provisions of these statutes forced the Negro into situations where he would be under the uncontrolled supervision of his former master or other white men who were willing to exploit his labor.

MANGUM, THE LEGAL STATUS OF THE NEGRO 27 (1940); *see* Jones v. Mayer Co., 392 U.S. 409 (1968).

3 VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 16 *et seq.* (1955).

4 For some decisions discussing these Constitutions, *see* Harman v. Forssenius, 380 U.S. 528, 543 (1965); Louisiana v. United States, 380 U.S. 145, 147-48 (1965); South Carolina v. Katzenbach, 383 U.S. 301, 310-11 (1966); United States v. Mississippi, 380 U.S. 128, 131-32 (1965); Gaston County v. United States, 288 F. Supp. 678, 684 (D.D.C. 1968), *aff'd*, 395 U.S. 285 (1969).

The black man's political impotence was accompanied by discrimination and degradation in practically every aspect of life. Mississippi was a striking example. Segregation was required by law in its schools,[5] hospitals, prisons, insane asylums, parks, waiting rooms, places of amusement, and other facilities. It was unlawful for an operator of a small motor vehicle for hire to carry Negro and white passengers at the same time, unless the Negro was a servant; for a white pupil to go to a school also attended by Negroes; and for a traveller to enter a waiting room or restroom designated for another race. While "colored" nurses were required to attend "colored" patients at all state hospitals, it was also mandatory that they work under the direction of white supervisors.[6]

The Mississippi legislature reacted with fury to the landmark decision of *Brown v. Board of Education.*[7] It became the sworn duty of every elected and appointed official of state, county, or local government to oppose or resist the implementation of what the state legislature called the "unconstitutional" desegregation decrees of the Court and of other federal agencies.[8] The legislature also made it a crime to advocate social equality between the races or intermarriage between whites and blacks.[9]

In 1962, it required the intervention of the U. S. Army to register James Meredith, the first black student at the University of Mississippi. The Governor and Lieutenant Governor of the State were later held in civil contempt of court for their attempts to frustrate the judicial process.[10] The taxes of citizens, black and white, financed state aid to the segregationist Citizen's Council.[11] The entire governmental structure of Mississippi was arrayed against fulfillment of the constitutional rights of Negroes.

II. The Civil War Amendments: Years of Failure

How could such deplorable conditions continue to exist almost a century after the Civil War? First, the Supreme Court, closely attuned to the political climate of the last quarter of the nineteenth century, had so construed the post-

5 The dissenting opinion of Judge John R. Brown in *United States* v. *State of Mississippi,* 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd,* 380 U.S. 128 (1965), discussed in some detail the historic disparities between black and white schools. The substantial differences over the years in the instructional cost per child in Mississippi schools for black and white children are illustrated by the following statistics:

	1900-01	1929-30	1939-40	1949-50	1956-57	1960-61
White	$ 8.20	40.42	31.23	78.70	128.50	173.42
Negro	$ 2.67	7.45	6.69	28.83	78.70	117.10

United States v. State of Mississippi, 229 F. Supp. 925, 990 n. 63 (S.D. Miss. 1964).

6 The Government's brief in United States v. State of Mississippi, C. A. No. 3791 J (S.D. Miss. 1965) a case challenging the legality of the Mississippi poll tax as a prerequisite for voting, contains a compendium of the state's segregation requirements. *See also* Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962).

7 347 U.S. 483 (1954).

8 Law of 1956, ch. 254, §§ 1, 2 [1956] Miss. Laws 41 (repealed 1970).

9 MISS. CODE ANN. § 2339 (1956).

10 For the history of this protracted litigation *see* United States v. Barnett, 330 F.2d 369 (5th Cir. 1963), *certified question answered in the negative,* 376 U.S. 681 (1964). Also, see the appellate court's extraordinary unilateral dismissal of criminal contempt charges against the Governor and Lieutenant Governor on the grounds that times had changed so much since their alleged acts of defiance. United States v. Barnett, 346 F.2d 99 (5th Cir. 1965).

11 *See* LORD, THE PAST THAT WOULD NOT DIE 78 (1965); SILVER, MISSISSIPPI, THE CLOSED SOCIETY 8 (1963).

war amendments as to give the least possible offense to the white South. The fourteenth amendment appeared to guarantee equality of treatment under the law, but in *Plessy v. Ferguson*[12] the Court ruled that separate railroad cars for Negroes and, by implication, separate schools for the two races, did not violate that amendment provided that they were substantially equal. Moreover, although both the thirteenth and fourteenth amendments contained clauses authorizing Congress to enforce their provisions by "appropriate legislation," the Court had held that Congress had no power to prohibit racial discrimination by privately owned inns, hotels, restaurants, and other establishments which purportedly served the general public, but which actually refused service to blacks.[13] The Supreme Court's treatment of the fifteenth amendment also failed to make the Negro's right to vote a reality.[14]

Restrictive interpretations by the courts were but one impediment to the enjoyment by Negroes of the rights secured to them by the post-Civil War amendments. Even accepting the narrowest interpretation possible of the fourteenth amendment, the separate schools for Negroes were at least required to be equal. In fact, they were manifestly inferior.[15] Furthermore, while the discriminatory practices of election officials were often flagrant,[16] there was, as a practical matter, very little that could be done about it. Not many victims of discrimination had realistic access to the courts, and the few who did were seriously inhibited from taking advantage of their rights because the threat of reprisal was very real.

Mississippi is the southern state with the largest percentage of blacks, and, possibly for that reason, it was always in the forefront of resistance to proposals for progress in civil rights. In the early 1960's, when major civil rights litigation first came to Mississippi, there were only three black men in the state engaged in the active practice of law, and one of those was held to have been subjected to harassment not only by county authorities but also by a federal district judge.[17] White lawyers did not, and, as a practical matter, could not, take on civil rights cases. One who tried to do so had to leave the state.[18] Most Negroes who were denied the right to vote could not obtain a lawyer. Moreover, in the few cases in which a Negro did get legal representation, the resources at the lawyer's disposal were generally insufficient to defray the costs of a lawsuit in which volu-

12 163 U.S. 537, 560 (1896).

13 Civil Rights Cases, 109 U.S. 3 (1883).

14 *See* Williams v. Mississippi, 170 U.S. 213 (1898); Giles v. Harris, 189 U.S. 475 (1903). In *Giles,* no less a figure than Mr. Justice Holmes held for the majority that a federal court was without jurisdiction to require Alabama registrars to register a Negro alleged to have been a victim of pervasive discrimination against his race, largely because "equity cannot undertake . . . to enforce political rights." *Id.* at 487. With this approach in vogue, the courts did not become an effective avenue by which disfranchised Negroes could secure the right to vote.

15 *See* note 5, *supra;* Gaston County v. United States, 395 U.S. 285, 289-90 (1969).

16 For some of the more remarkable discriminatory practices by registrars of voters, *see* United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. State of Mississippi, 339 F.2d 679 (5th Cir. 1964); United States v. Holmes County, Miss., 385 F.2d 145 (5th Cir. 1967); United States v. State of Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965).

17 In re Brown, 346 F.2d 903 (5th Cir. 1965).

18 *See* SILVER, *supra* note 11, at 96-98 for an account of the forced departure from Mississippi of William Higgs, a white classmate of the author at Harvard Law School. For a description of the difficulties encountered by lawyers who took on civil rights cases, see Sobol v. Perez, 289 F. Supp. 392 (E.D.La. 1968) (three judge court).

minous records had to be photocopied and studied to prove the requisite pattern of discrimination.[19] In Forrest County, Mississippi, the federal courts ultimately found intractable discrimination in voting,[20] but a suit by black plaintiffs which went all the way to the Supreme Court failed to correct the situation.[21]

Some states took resourceful advantage of the restrictions which poverty imposed on Negroes who attempted to enforce their civil rights. In the 1950's, Mississippi enacted legislation to inhibit suits against discrimination in voting by requiring an applicant who claimed that he had been wrongfully denied registration to exhaust burdensome administrative remedies before seeking judicial relief. The statute, which provided for a hearing, the subpoena of witnesses, and a stenographic transcript, also required that the losing party pay the cost of the entire proceeding.[22] The stenographic costs alone might easily have equaled a black tenant farmer's annual income.[23]

Another effective barrier to the exercise by Negroes of their constitutional rights was the fear of reprisal. During the 1950's, several blacks were murdered practically on the courthouse steps while apparently attempting to obtain the right to vote.[24] Three civil rights workers, who were in the South to encourage blacks to register, were lynched a few days prior to the enactment of the U. S. Civil Rights Act of 1964.[25] Reported judicial decisions describe how the registrar of Walthall County, where no blacks were registered, pistol-whipped a civil rights worker who had brought two elderly Negroes to register, and then had the *victim* arrested for breach of the peace;[26] how the Sheriff of Rankin County and his deputies brutalized young blacks while they were attempting to register;[27] how a black schoolteacher was dismissed from her teaching position in Greene County immediately after school authorities learned that she had complained about voting discrimination in neighboring George County;[28] and how a Negro, who had led registration efforts in Holmes County, was charged with the crime of fire bombing

19 For some of the cases in which black plaintiffs tried vainly to resort to the federal courts to secure their right to vote without discrimination, *see* Giles v. Harris, 189 U.S. 475 (1903); Peay v. Cox, 190 F.2d 123 (5th Cir.), *cert. denied,* 342 U.S. 896 (1951); Darby v. Daniel, 168 F. Supp. 170 (S.D. Miss. 1958) (three judge court).

20 *See* United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963). *See also* CHAZE, TIGER IN THE HONEYSUCKLE (1965).

21 Peay v. Cox, 190 F.2d 123 (5th Cir.), *cert. denied,* 342 U.S. 896 (1951).

22 Miss. Code § 3224 *et seq.* (1942). The name of every applicant for registration also had to be published in the local newspaper—a very frightening requirement for rural blacks.

23 According to expert testimony in *United States* v. *State of Mississippi,* C.A. No. 3791 (j.) (S.D. Miss. 1965) 63% of the black families in Mississippi in 1965 earned less than $2,000 per year. Court costs in many cases run far above that figure.

24 *See* COOK, THE SEGREGATIONISTS 54-55 (1962); LORD, *supra* note 11, at 67.

25 *See* Posey v. United States, 416 F.2d 545 (5th Cir. 1969), *cert. denied,* 397 U.S. 946 (1970), for the story of the murders. *See also* WHITEHEAD, ATTACK ON TERROR; THE FBI AGAINST THE KU KLUX KLAN IN MISSISSIPPI (1970); HUIE, THREE LIVES FOR MISSISSIPPI (1965).

26 United States v. Wood, 295 F.2d 772 (5th Cir. 1961).

27 United States v. Edwards, 333 F.2d 575 (5th Cir. 1964). By the time this case was on appeal, the sheriff was out of office, and for that and other reasons no injunction was issued.

28 United States v. Board of Education of Greene County, Miss., 332 F.2d 40 (5th Cir. 1964). The Court did not, however, draw the necessary inference that the teacher's voting activity was the cause of her dismissal, so no relief was secured for her. Compare *Greene County* with Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966).

his own home by a sheriff who had previously proclaimed that no black would vote in the county during his tenure in office.[29]

In addition to the Meredith case, a Negro who tried to register at an all-white university in Mississippi was sentenced to seven years in the penitentiary after having been found guilty by an all-white jury of being an accessory to the theft of a chicken, while the "principal" to the crime, who had testified against the defendant, went free.[30] Another black who had attempted to attend a segregated university was promptly packed off to an insane asylum.[31]

Since most serious white crimes against Negroes went unpunished,[32] a black did not have to be especially timid to forego the assertion of his rights. Discretion was not only the better part of valor, but practically a necessity of life.

III. The Creation of Corrective Machinery

Black veterans who had served in the armed forces during World War II and in Korea were understandably bitter when the democracy for which they had risked their lives in foreign lands was still not available to them at home. Pressure for equal rights from both Negroes and sympathetic whites increased. It had become obvious that "separate but equal" was a myth. It was thus a reflection of the change that had come to the world, as well as to the Nation, when the Supreme Court held in the landmark *Brown* decision[33] that state-enforced racial segregation in public schools was unconstitutional. *Brown* was followed by a series of decisions which invalidated compulsory segregation in virtually every aspect of American life.[34]

For many decades, civil rights legislation had been talked to death through filibusters by southern senators. In 1957, however, Congress enacted the first civil rights act since the Reconstruction period. While civil rights advocates had favored a more comprehensive act which would deal not only with voting rights but also with school desegregation and discrimination in employment, the final version dealt primarily with the right to vote. The statute was designed to circumvent the obstacles which had previously hampered Negro efforts—intimidation and lack of access to adequate representation—by putting the Justice Department in the enforcement business. This introduced federal resources into what had previously been a private quarrel between Negroes and southern local officials.

29 United States v. Holmes County, Miss., 385 F.2d 145 (5th Cir. 1967).

30 LORD, *supra* note 11, at 76.

31 *Id.*

32 In 1958, a young Negro named Mack Charles Parker, was charged with the rape of a white woman in Poplarville, Mississippi. He was taken from the courthouse by a gang of whites and lynched. The FBI investigated and reportedly identified the killers, but the all-white local jury declined even to look at their report. No one was indicted.

33 Brown v. Board of Education, 347 U.S. 483 (1954).

34 *See, e.g.*, Watson v. Memphis, 373 U.S. 526 (1963) (public parks); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (transportation); Loving v. Virginia, 388 U.S. 1 (1967) (laws prohibiting intermarriage between whites and non-whites held unconstitutional).

Ultimately, the Court held that the Civil Rights Act of 1866, 42 U.S.C. § 1982 prohibits racial discrimination by private entrepreneurs in contractual relations and transactions affecting property constituted a badge of slavery, notwithstanding past assumptions to the contrary. Jones v. Mayer Co., 392 U.S. 409 (1968).

The Civil Rights Act of 1957 authorized the Attorney General to initiate suit in a federal district court for an injunction and other relief against discrimination or intimidation in the electoral process.[35] The need to secure state "administrative remedies" was eliminated in such federal suits. Registrars who engaged in discriminatory practices would now have to cope with whatever resources the Nation chose to invest in this activity, rather than with the theretofore futile efforts of the impoverished Negro. Moreover, the federal government could not be run out of town or lynched by those intent on perpetuating a discriminatory *status quo*.

Some states resisted. Traditionally, when someone claimed the denial of his rights, it was up to him and not the Government to seek redress in the courts. Previously, the Attorney General had only been authorized to prosecute the offending official for wilful deprivation of constitutional rights. Even if this had resulted in a registrar's conviction,[36] the prosecution could not enfranchise the Negro. It was contended on behalf of a Georgia registrar in the landmark *Raines* case[37] that the new Act was unconstitutional because, among other things, the United States was not the "real party in interest." The dispute, it was contended, was between the black man alleging discrimination and the state official alleged to be denying him his rights, and the victim should have to fight his own battle. It would be unfair, so it was argued, to put the resources of the federal government on the side of a private litigant. The Supreme Court rejected this claim, holding that the United States had a clear interest, distinct from that of individual Negro applicants, in preventing the widespread denial of voting rights to its citizens. This interest was sufficient, the Court found, to empower Congress to give the Attorney General standing to sue.[38]

The provision of the Civil Rights Act of 1957 which authorized civil suits by the Attorney General was copied in the civil rights legislation of the next eleven years. In 1964 Congress prohibited racial segregation and discrimination in employment,[39] in hotels, restaurants, theaters and other places of public accommodation,[40] and in public facilities, such as courthouses, prisons, and public parks.[41] It also strengthened the Supreme Court's school desegregation ruling by providing that recipients of federal financial assistance had to desegregate to remain eligible for federal money.[42] Later in 1968, Congress refined the coverage of the civil rights laws by prohibiting discrimination on account of race, color, religion, and national origin in most privately owned housing.[43] Each of these new laws contained a provision which authorized the Attorney General to initiate

35 42 U.S.C. § 1971(c).
36 *See* 18 U.S.C. §§ 241, 242, and 594. There is no record of a criminal conviction in recent times of any election official for discriminating against Negroes.
37 362 U.S. 17 (1960).
38 For cases on the Attorney General's standing to sue without explicit congressional authority, *see* In re Debs, 158 U.S. 564 (1895); United States v. City of Jackson, Miss., 318 F.2d (5th Cir. 1963); United States v. Brand Jewellers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970); United States v. Madison County Board of Education, 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964); United States v. Brittain, 319 F. Supp. 1058 (N.D. Ala. 1970).
39 42 U.S.C. § 2000e *et seq.* This law also prohibits discrimination based on sex.
40 *Id.* § 2000a *et seq.*
41 *Id.* § 2000b *et seq.*
42 *Id.* § 2000d *et seq.*
43 *Id.* § 3601 *et seq.*

civil suits to restrain violations, at least in those cases where the discrimination was alleged to have been pursuant to a "pattern or practice." A decade after the passage of the Civil Rights Act of 1957, Congress had not only extended the scope of these laws from state action to discriminatory private conduct,[44] but had also counterbalanced the individual victim's lack of resources to assert his rights by providing him with a powerful friend in court.

To enforce the Civil Rights Act of 1957 and subsequent civil rights legislation, Congress created a Civil Rights Division in the U.S. Department of Justice. As new civil rights laws have been enacted, this Division has been entrusted with much of the enforcement responsibility. Because of the Division's limited staff,[45] it has had to select priorities so that its manpower may be devoted to those cases which will do the most good. In particular, the Division's responsibility has been to give life to the laws which it enforces by securing effective and comprehensive relief. The basic remedy available to the government for civil rights violations is the injunction, and the civil rights laws have left the form and scope of the appropriate decree to the courts. If, after a time-consuming lawsuit, the government could secure no more relief than a court order prohibiting discrimination in the future, it might be questionable whether the result was worth the effort; discrimination was already unlawful when the suit began.[46] Since the Division has the responsibility for making civil rights legislation a vehicle for justice, it has had to devise more effective remedies.

IV. Devising a Remedy

A. *The Right to Vote*

The right to vote was at issue when the Department of Justice entered the battle for equal rights, the subject matter of the Civil Rights Division's early cases. The typical scenario of a lawsuit of this type was a rural county in Mississippi, Alabama, or Louisiana. In the Mississippi cases, in several of which the author was counsel for the government,[47] substantially all whites, but very few, if any, Negroes, were registered to vote.[48] In order to register, an applicant had to fill

44 Since the Supreme Court had held congressional enactments against private discrimination unconstitutional after the Civil War in the *Civil Rights Cases,* 109 U.S. 3 (1883), its treatment of the new enactments is interesting. The power of Congress to prohibit discrimination in places of public accommodation was sustained under its power to regulate commerce between the states, *Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964), so the holding of the *Civil Rights Cases* was not disturbed. The constitutionality of the fair housing laws was sustained pursuant to the power of Congress under the thirteenth amendment to eliminate "badges of slavery." Jones v. Mayer Co., 392 U.S. 409 (1968).

45 In 1957, the entire Division was less than twenty lawyers strong; today there are about 150. The Division's annual budget to enforce all of the civil rights laws nationwide has steadily grown, but it still amounts to less than a third of the cost of a single warplane.

46 A simple injunction can, of course, be enforced by contempt. *See, e.g.,* United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Barnett, 376 U.S. 681 (1964).

47 The author has served with the Civil Rights Division since 1962.

48 *See generally* United States v. Mississippi, 380 U.S. 128 (1965), *rev'g* 229 F. Supp. 925 (S.D. Miss. 1964). The Government's answer to interrogatories in this decision, summarized in Judge Brown's dissenting district court opinion, contains the most complete compilation of discriminatory statistics and incidents.

out a complicated application form and write a "reasonable interpretation," to the registrar's satisfaction, of any section of the Mississippi Constitution. The section could have been about eminent domain or *ex post facto* laws (for blacks it often was), or any easy one such as section 30: "There shall be no imprisonment for debt, which, predictably, was most often assigned to whites."

The registrar was seldom satisfied with an interpretation written by a black applicant. On the other hand, the answers given by whites were frequently identical, and the proof in many cases showed that the registrar simply allowed white applicants to copy someone else's completed form. Often, the copying was not very artistic. Twelve Lauderdale County, Mississippi, whites wrote that "no one can be placed in prison for death," as their interpretation of "there shall be no imprisonment for debt." A George County white man wrote: "I thank that a Neorger should have 2 years in college be fore voting be cause he dont onder stand" as his interpretation of the same provision. They were all registered despite their obvious lack of comprehension.[49]

To uproot such a deeply ingrained pattern of life by means of a civil rights suit is difficult. Although the cases were tried in a federal court, even that forum was not always favorable.[50] A few of the federal judges assigned to hear these cases appeared to be reluctant to grant relief, sometimes finding no "pattern or practice" of discrimination even though the facts were quite persuasive. When these judges did find that discrimination had occurred, they would often grant only a very limited remedy, usually in the form of an injunction prohibiting discrimination in the future.[51] While such a remedy might appear fair and adequate in the abstract, it was likely to be ineffective as a practical matter because the consequences of past discrimination would be left intact. Even if such an injunction was obeyed, it would only assure that the few unregistered whites, as well as the many unregistered blacks, would now have to pass a difficult test in order to register. This relief did nothing about the racial imbalance on the voting rolls, where whites overwhelmingly outnumbered Negroes because of prior discrimination. Most black citizens would still have to take the constitutional interpretation test, which had been effectively waived for the whites, and the effects of past discrimination were therefore perpetuated or "frozen" by such an order. For the Negro, the right to vote, either as an end in itself or as a means for securing other rights, remained only a remote dream.

Very few blacks applied for registration, and only a minuscule fraction of those succeeded in registering. The results in Mississippi of the initial enforcement of the Civil Rights Act of 1957 are reflected in the following table:[52]

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49 *See* the Government's exhibits and brief in United States v. Coleman, 9 Race Rel. L. Rep. 1354 (S.D. Miss. 1964) and in United States v. Ward, 345 F.2d 857 (5th Cir. 1965).

50 *See, e.g.,* United States v. Duke, 332 F.2d 759, 766 n. 1 (5th Cir. 1964) (acerbic remarks about "our colored gentry" by a federal district judge are recorded for posterity); United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965). For an interesting discussion of the recalcitrance of some United States district judges, see LUSKY, RACIAL DISCRIMINATION AND THE FEDERAL LAW: A PROBLEM IN NULLIFICATION, 63 COLUM. L. REV. 1163 (1963).

51 Even the generally progressive United States Court of Appeals for the Fifth Circuit originally approved such limited relief. United States v. Atkins, 323 F.2d 733 (5th Cir. 1963).

52 MARSHALL, FEDERALISM AND CIVIL RIGHTS 25-27 (1964). *See also* South Carolina v. Katzenbach, 383 U.S. 301, 313-15 (1966).

City or County	Date Suit Was Filed	Percentage of Negroes Registered on Filing Date	Percentage of Negroes Registered on 12/1/63
Clark Co.	7/6/61	0.00	1.50
Forrest Co.	7/6/61	0.20	1.20
Jefferson Davis Co.	8/3/61	2.00	3.60
Walthall Co.	8/5/61	0.00	0.12
Panola Co.	10/26/61	0.01	0.36
Tallahatchie Co.	11/17/61	0.01	0.08
George Co.	4/13/62	1.20	2.00
Jackson	8/28/62	4.30	4.50
Sunflower Co.	1/26/63	0.84	about same
Hinds Co.	7/13/63	13.00	about same

In spite of this discouraging rate of progress, the Civil Rights Division pressed forward, bringing lawsuits in the most recalcitrant counties of the Deep South. Typically, one, two, six, or ten Negroes might be registered in areas where none had voted in seventy years, but the remaining thousands remained disfranchised. In all of the cases, the Government asked—at first in vain—for comprehensive relief which would eliminate the effects of decades of unlawful discrimination and give the Negro a meaningful opportunity to vote.

In the spring of 1964, a breakthrough came. The improbable locale for this turning point in constitutional history was rural Panola County, Mississippi, where 70% of the whites, including dozens of illiterates, voted freely, but where only two black citizens had succeeded in registering during the preceding 75 years. In a suit against Panola's registrar,[53] the Government introduced evidence which showed that blacks had been given far more difficult registration tests than white applicants, that the registrar had assisted whites, but not blacks, with their applications, and that even those whites who could not read or write were allowed to register without difficulty. The trial judge, however, denied the Government relief on the ground that the Negro applicants had not correctly interpreted the abstruse sections of the Mississippi Constitution which had been assigned to them, notwithstanding that white applicants had never been required to interpret comparable sections.

The Court of Appeals for the Fifth Circuit unhesitatingly reversed the district court's decision. The most difficult question for the court concerned the form which the remedy should take. The Mississippi Attorney General, representing the registrar, argued that if any relief at all was appropriate, it would be simply an injunction prohibiting discrimination in the future and striking from the voting records all white voters who had been chosen to testify and who had thus been shown to be illiterate. However, in an eloquent opinion by Chief Judge Tuttle, the appellate court explained why such relief would be inadequate:

> [T]here is no possible way to know how many thousands of white citizens

53 United States v. Duke, 332 F.2d 759 (5th Cir. 1964).

> of Panola County were registered by "just signing the book." Many of them may well be thoroughly qualified even under the most stringent requirements as they appear in today's statute. On the other hand, relatively few of them will ever have to face this hurdle. As it now stands every Negro citizen in Panola County, except two, who wish to become registered voters must satisfy the stricter requirements of today's law.
>
> What, then, is the court's duty in such a situation? Ordinary principles of fairness and justice seem to indicate the correct answer. Would anyone doubt the utter unfairness of permitting the unrestricted application by the state of higher and stricter standards of eligibility to all of the Negroes of the county where 70% of the white voters of the county have qualified under simple standards or no standards at all, and where the Negro citizens were prevented from qualifying under the simpler standards by reason of a practice or pattern of discrimination?[54]

The court noted that the only adequate remedy was to allow Negroes to register if they possessed the qualifications previously required of white applicants.

Technically, the Government might have argued that since white illiterates had been allowed to register, black illiterates should be accorded the same right. However, for reasons of strategy, and perhaps because any remedy which ignored state law requirements (*e.g.*, that applicants interpret the Constitution in order to register) seemed drastic as well as unprecedented, the United States asked only that the registrar be required to register every Negro who could demonstrate a reasonable ability to read and write. The appellate court agreed and ordered the district judge to enter the requested decree. Negroes were not required to take the test required by state law, at least until the effects of past discrimination had been dissipated.[55] Instead, they were permitted to register, if they were able to fill out the simple informational parts of the application form with reasonable assistance from the registrar. A few months after the order, more than 1,200 Panola County Negroes had registered, putting the lie to the shibboleth that southern blacks do not want to vote.

In addition to suing dozens of local registrars, Civil Rights Division lawyers brought state-wide suits against Louisiana and Mississippi in an effort to have the constitutional interpretation test provisions such as in both states declared unconstitutional and permit the registration of all minimally literate Negroes. In *United States v. Mississippi*[56] the Division encountered a hostile trial court, which, incredibly, dismissed the action on the pleadings alone; the Supreme Court unanimously reinstated the complaint with some caustic comments for the recalcitrant jurists below.[57] The *Louisiana*[58] case, however, came to the Court on an appeal by the state from a decision in favor of the United States. The trial

54 *Id.* at 768.

55 Initially, the Court ordered that the relaxed standards for Negroes remain in effect only for one year, on the theory that the victims of discrimination would have an adequate opportunity to register during that period. As appears in the text below, however, events proceeded so fast that the constitutional interpretation test was never reinstituted in Panola County.

56 229 F. Supp. 925 (S.D. Miss. 1964).

57 United States v. Mississippi, 380 U.S. 128 (1965), *rev'g* 229 F. Supp. 925 (S.D. Miss. 1964).

58 United States v. State of Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965). The district court opinion is particularly instructive as to the historical setting of the problem.

court, after holding that the constitutional interpretation test in effect in particular parishes (counties) was discriminatory and unconstitutional, ordered Louisiana not to give Negroes any registration test in those parishes which was more difficult than that which had been given to whites during the period of discrimination (*i.e.*, practically no test at all). Louisiana appealed the decree, but the Supreme Court unanimously affirmed.[59] Mr. Justice Black, speaking for the Court, approved the order of the court below, observing that a court of equity not only has "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."[60] So far as relief in civil rights cases is concerned, that sentence says it all.

The Supreme Court's decision in *Louisiana* was announced within a few days of events in Selma, Alabama, which made voting discrimination a matter of the most urgent public concern. Four years of intensive Justice Department litigation in Dallas County, of which Selma is the county seat, had raised Negro registration only from 1% to 2.5% of the eligible black adults.[61] Negroes protesting the denial of the right to vote as well as some white supporters attempted to march from Selma to Montgomery, the state capital, to confront Governor George Wallace with their demands for justice. The marchers were clubbed down[62] by officers led by Jim Clark, the sheriff of Dallas County who wore a lapel button which said "Never," in obvious reference to his view of when Negroes should have equal rights. President Johnson, in a historic speech in which he embraced the slogan of the Negro revolution "we shall overcome," pressed for the immediate enactment of a comprehensive Voting Rights Act which would put an end to all discrimination in voting registration. In August of 1965, by an overwhelming majority, Congress enacted the law.[63] The principle of *Louisiana*—the comprehensive correction of past inequities—was the central theme of the legislation. Since the Civil Rights Division's lawsuits had shown that illiterate whites had been registered in large numbers, the Act suspended all literacy tests and similar devices for a five-year period in particular states and counties selected by a formula which covered all those states in which discriminatory application of literacy tests had been a factor.[64] The effect of this suspension was to allow even illiterate citizens to register, and thus potentially to enfranchise virtually every Negro. The Act also authorized the Attorney General to assign federal voting examiners to accomplish registration of voters in those areas where local officials were reluctant to comply with the new law.

The Supreme Court promptly sustained the constitutionality of the Voting Rights Act.[65] Black citizens enthusiastically responded to the new law. In Mississippi, for example, the percentage of Negroes registered to vote quickly climbed from about 5% to well over 50%. Black officials were elected in con-

59 Louisiana v. United States, 380 U.S. 145 (1965).
60 *Id.* at 154.
61 The Supreme Court cited the slow rate of progress in Dallas County as justification for the Voting Rights Act in South Carolina v. Katzenbach, 383 U.S. 301, 314-15 (1966).
62 See the vivid description of this event in Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).
63 42 U.S.C. § 1973 *et seq.*
64 *See id.* § 1973b *et seq.*
65 South Carolina v. Katzenbach, 383 U.S. 301 (1966).

siderable numbers all over the South, and white candidates, fearful of offending black voters, no longer yelled "Nigger!" in order to win an election. One of the first casualties of the Voting Rights Act was Sheriff Clark, whose excesses had done so much to bring about the Act. He lost his bid for re-election when his supporters failed in their attempt to disqualify the votes of federally registered blacks.[66]

In 1969, the Supreme Court went one step further and ruled in *Gaston County v. United States*[67] that a simple literacy test was impermissible where blacks had been accorded inferior educational opportunities for many years, because such a test placed a greater burden on the black community than on the white. In 1970, Congress extended the Voting Rights Act for five years, and recognized the implications of Gaston County by amending the Act to suspend literacy tests throughout the nation. The Supreme Court sustained the constitutionality of this nationwide suspension of literacy tests.[68] It now seems unlikely that significant numbers of prospective voters will be denied the right to vote because of discrimination against them on account of the color of their skin, either directly by prejudiced officials, or indirectly by reason of unequal educational opportunities.

* * *

The right to vote has been said to be of paramount importance because it is "preservative of all rights."[69] To some extent, this has proved to be true by the American experience. Those blacks who were denied the right to vote were denied other rights as well. There can be no doubt that, with the vote, the southern Negro can influence decisions affecting his well-being far more effectively than he could when he was disfranchised. One of the earliest and most visible consequences of the Voting Rights Act in Mississippi was the proper maintenance, for the first time, of roads and driveways in black communities. Nevertheless, there are limits.

Blacks have voted in the North without serious difficulty for many decades, but racial discrimination in housing and in employment has persisted until the teeming ghettoes of northern cities are regarded by many as more oppressive than the rural South. The Voting Rights Act has largely secured the right to vote for all Americans, but the Negro has not yet achieved equality of opportunity. The Civil Rights Division is striving to secure for Negroes (as well as for Mexican Americans, American Indians, and members of other minority groups) equal opportunity in education, employment, housing and other areas. Here, as in voting, the keystone to meaningful results has proved to be the proposition so aptly expressed in *Louisiana*—there exists a duty not only to discontinue discriminatory practices, but also to correct the effects of past discrimination.

66 United States v. Executive Comm. of Dem. Party of Dallas Co., Ala., 254 F. Supp. 537 (S.D. Ala. 1966).

67 395 U.S. 285 (1969). The decision involved an attempt by a county in North Carolina to free itself from the coverage of the Voting Rights Act on the ground that a literacy test had not been used in the five years preceding the suit to abridge the right to vote on account of race. The Court held that, in view of state imposed educational deprivations for Negroes, the literacy test could not be reinstated.

68 Oregon v. Mitchell, 400 U.S. 112 (1970).

69 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

B. *The Right to Equal Educational Opportunity*

For a decade after the Supreme Court's school desegration decision of 1954, most schools in the South remained completely segregated. The federal government had no statutory authority to bring school desegregation suits, and Negroes had few resources to initiate cases of their own. In 1955, the Supreme Court softened the impact of its epoch-making decision of the previous year by holding that the duty to disestablish dual school systems need not be carried out immediately, but must be accomplished "with all deliberate speed."[70] Granted the difficulty of changing established mores overnight, the holding that the denial of any constitutional right may continue even for a limited time was quite out of the ordinary and undoubtedly gave some encouragement to those who worked to resist.[71] Moreover, the prevailing view of the lower federal courts, to which the Supreme Court initially gave some limited comfort,[72] was that the Constitution did not require integration, but merely forbade enforced segregation.[73] Under this thesis, school boards had no affirmative obligation to do anything about segregated schools until sued by someone. If a Negro tried to attend an all-white school, he generally had to surmount complex and endless state administrative procedures before a federal court would listen to his case. At the end of this process, if he still was of school age, he might or might not be admitted, but no other changes would be made in the underlying segregated school system.[74] By 1964, the Supreme Court had become so irritated with the progress which had been made that it commented that "there has been altogether too much deliberation and not enough speed" in the desegregation of southern school systems.[75]

In the same year, Congress conditioned eligibility for federal financial assistance on compliance with desegregation requirements and, the Department of Health, Education and Welfare, which was charged with administering federal aid to education, issued guidelines with which school districts were supposed to comply in order to obtain federal funds.[76] These guidelines were accorded great weight by the courts;[77] however, they brought about little more than token

70 Brown v. Board of Education, 349 U.S. 294 (1955). This decision is generally known as *Brown II*. See Justice Black's criticism of *Brown II* in *Alexander* v. *Board of Education*, 396 U.S. 1218 (1969). *See also* Price v. Denison Independent School District Bd. of Ed., 348 F.2d 1010 (5th Cir. 1965).

71 *See, e.g.*, Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark.), *rev'd*, 257 F.2d 33 (8th Cir.), *aff'd*, 358 U.S. 1 (1958). Following violent white reaction to the admission of black pupils to a school in Little Rock, Arkansas, a federal district court ordered the postponement of desegregation. Both the court of appeals and the Supreme Court, however, emphatically reversed this accommodation to unlawful resistance to constitutional requirements.

72 *See e.g.*, Shuttlesworth v. Bd. of Education, 358 U.S. 101, *aff'g* 162 F. Supp. 372 (N.D. Ala. 1958).

73 Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).

74 *See, e.g.*, Shuttlesworth v. Bd. of Education, 358 U.S. 101 (1958), for the kinds of dilatory procedures which even the Supreme Court tolerated four years after the 1954 school desegregation cases. *See also* Evers v. Jackson Municipal Separate School District, 328 F.2d 408 (5th Cir. 1964).

75 Griffin v. County School Board, 377 U.S. 218, 233 (1964).

76 45 C.F.R. § 151.1 *et seq.* (1972).

77 *E.g.*, Singleton v. Jackson Municipal Separate School District, 348 F.2d 729 (5th Cir. 1965); United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

desegregation in most areas of the South. Under influence of the more restrictive interpretations of what *Brown* required, the guidelines permitted desegregation to proceed, at least for a transitional period, under a system known as "freedom of choice." Under the free choice plan, pupils in the various school districts were permitted the right to attend any school in the district selected by them or their parents, whether or not that school was previously maintained exclusively for members of their race.

While democratic in theory, the free choice plan worked out less effectively in practice. "[I]f choice influencing factors are not eliminated, freedom of choice is a fantasy."[78] In some school districts, economic pressures and acts of violence directed against Negroes by the Ku Klux Klan and other segregationist groups made freedom of choice illusory, and the courts eventually directed the school districts to desegregate by some other means, such as unitary attendance zones under which pupils of all races attended their neighborhood schools.[79] Even in the absence of overt intimidation, whites in areas where segregation had been a fact of life did not elect to attend previously all-black schools and that was undoubtedly why southern school boards elected freedom of choice plans. Under other methods of desegregation, such as unitary zoning, whites would have to go to the formerly all-black schools in their neighborhoods and could no longer be bused past such schools on their way to white schools in other parts of the county.[80] Such busing had been the only means by which segregation could be preserved. Moreover, the continued existence of segregated teaching staffs also encouraged pupils to remain in schools composed of their own race because, as one court so aptly observed,[81] a school with an all-black faculty is as plainly identified as a "black school" as if the word "colored" were emblazoned above the school's entrance. Because the school boards gave pupils and their parents what amounted to a choice between white and black schools, the results of the choice were preordained. There was usually token integration in the white schools and complete segregation in the black ones.

In 1968, the constitutionality of freedom of choice plans was argued before the United States Supreme Court. The Department of Justice, as *amicus curiae,* contended that the plans were unlawful unless they resulted in substantial desegregation. The principal case before the Court[82] involved New Kent County, a small rural county which had only two schools, one for white students and the other for Negroes. The all-black school was located in one part of the county, while the white school was in another part. There was little or no residential

78 Lee v. Macon County Board of Education, 267 F. Supp. 458, 479 (M.D. Ala.), *aff'd sub nom.,* Wallace v. United States, 389 U.S. 215 (1967).

79 Coppedge v. Franklin County Board of Education, 273 F. Supp. 289 (E.D.N.C. 1967), *aff'd,* 394 F.2d 410 (4th Cir.), *application for stay pending appeal denied,* 293 F. Supp. 356 (E.D.N.C.), *aff'd,* 404 F.2d 1177 (4th Cir. 1968); Singleton v. Anson County Board of Education, 283 F. Supp. 895 (W.D.N.C. 1968); United States v. Farrar, 414 F.2d 936 (5th Cir. 1969).

80 Lee v. Macon County Board of Education, 267 F. Supp. 458, 479, n. 27 (M.D. Ala.), *aff'd sub nom.,* Wallace v. United States, 389 U.S. 215 (1967); United States v. Jefferson County Board of Education, 372 F.2d 836, 888-89 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 340 (1967).

81 Kier v. County School Board of Augusta County, Va., 249 F. Supp. 239, 246-48 (W.D. Va. 1966).

82 Green v. County School Board, 391 U.S. 430 (1968).

segregation and, for the most part, whites and blacks lived adjacent to each other. After the freedom of choice plan had been in operation for three years, about 15% of the black pupils attended the white school—an unusually high percentage for a southern rural school district—but no whites attended the black school. Teaching staffs remained segregated. White pupils who lived near the black school were bused across the county to the white school, and most black pupils who lived near the white school continued to ride buses in the opposite direction. Both a zoning plan, based on "neighborhood schools," and a consolidation plan, based on the "pairing" of grades in the two schools, would have completely integrated the system. The Supreme Court determined that on the basis of the foregoing facts and the holding in *Louisiana*, New Kent County had an obligation not only to allow Negroes to attend formerly all-white schools, but also to take any affirmative action necessary to eliminate the dual school system.[83] The school district's freedom of choice plan was held constitutionally inadequate. The Court found it constitutionally insufficient to use a plan under which substantial segregation continued where there were educationally plausible ways to desegregate the schools. Accordingly, the county was ordered to adopt and implement an alternative plan, such as unitary zoning or pairing, in order to bring about a system in which there would be no schools designated for either white or black attendance.[84]

The Court expressly held in *Alexander v. Board of Education*[85] in 1969 that delays in desegregation of public schools were no longer tolerable. By the fall of 1970, the dual system of white and black schools had been largely eliminated in most of the southern rural counties, and virtually every school in such areas had become biracial.[86]

Still awaiting authoritative resolution is the complex and often emotionalized problem of urban school segregation, which generally results from racial residential patterns. Assignment of pupils to schools on the basis of the location of their homes appears on its face to be fair and nondiscriminatory. But what if the underlying residential segregation results from racial discrimination in the housing market? Is assignment of pupils to schools on the basis of their residence nondiscriminatory where state and local agencies have promoted residential segregation in their housing policies so that blacks will be forced to live in ghettoes?[87]

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83 *Id.*

84 *Id.* at 339, 442.

85 396 U.S. 19 (1969). For an eloquent opinion by Mr. Justice Black at an earlier stage of the case, see 396 U.S. 1218 (1969).

86 Mr. Elliott Richardson, Secretary of Health, Education and Welfare, announced on January 14, 1971, that there was, in effect, more actual school desegregation in the South than in the North. He stated that 38.1% of black pupils in 11 states of the old Confederacy were attending majority white schools, compared with 27.7% in 32 northern and western states. San Francisco Chronicle, Jan. 15, 1971, at 11, col. 3.

87 For a striking description of federal policies which have intentionally segregated neighborhoods (until the late 1940's, the FHA actively encouraged the use of racially restrictive covenants for federally assisted housing), *see* Bradley v. School Board of City of Richmond, Va., 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, —— F.2d —— (4th Cir., June 5, 1972). *See also* Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Shannon v. United States Dept. of Housing & Urban Dev., 436 F.2d 809 (3rd Cir. 1970).

The Supreme Court has determined that school boards may be required to eliminate the effects on school districts from past state-imposed racial segregation by taking any reasonable steps, including busing.[88] As this article goes to press the courts have yet to decide whether such relief is appropriate in districts where schools were never segregated by law, but which in fact may well be more rigidly segregated as a result of housing patterns.[89] It is surely quixotic to argue that blacks live in ghettoes and go to all-black schools in Charlotte, North Carolina, by compulsion, but live and learn together in the black districts and schools of Chicago by choice.[90] If the purpose of school desegregation decrees is to equalize and improve educational opportunities for schoolchildren, then the question whether large scale transportation of pupils should be required to eliminate segregation resulting from racial residential patterns should be resolved on the basis of whether such transportation helps the children, and resolved uniformly in the North, South, East, and West, without regard to whether segregation was formerly decreed by law.

C. *The Right to Equal Employment Opportunity*

When Congress enacted Title VII of the Civil Rights Act of 1964,[91] which prohibits racial discrimination in employment, it forbade practices which had been theretofore generally accepted as lawful,[92] at least in those states and municipalities which did not have local fair employment laws or ordinances. Obviously, some of the effects of pre-Act discrimination would continue after the effective date of the Act, and practices which appeared fair on their face could operate in a discriminatory fashion when superimposed on the pre-Act pattern. One of the principal issues to which courts had to address themselves in the early days of the Act was whether affirmative corrective action was required to eliminate the effects of pre-Act discrimination.

Before the Act, many companies tended to assign black employees to departments in which the work was harder and the pay was lower. Since these

88 Swann v. Board of Education, 402 U.S. 1 (1971). On August 18, 1972, after this article went to press, the U.S. House voted 282 to 102 to ban crosstown busing of school children.

89 Lower courts have not been unanimous on this question. *Compare* Bell v. School City of Gary, Ind., 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964) *with* Davis v. School District of City of Pontiac, Inc., 443 F.2d 573 (6th Cir. 1971), *aff'g,* 309 F. Supp. 734 (E.D. Mich. 1970) *and* Johnson v. San Francisco Unified School District, 339 F. Supp. 1315 (N.D. Cal. 1971).

90 The litigation over where public housing should be located in the Chicago area discloses the remarkable degree to which the ghetto is the result of state action. *See* Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967), *motion for summary judgment granted,* 296 F. Supp. 907 (N.D. Ill.), *judgment order,* 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd,* 436 F.2d 306 (7th Cir. 1970).

91 42 U.S.C. § 2000e *et seq.*

92 Some recent decisions, however, have found racial discrimination in employment to be a violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), as well as to Title VII. *See* Waters v. Wisconsin Steel Wks. of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970); Young v. Int'l Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972); United States v. Medical Soc'y of South Carolina, 298 F. Supp. 145 (D.S.C. 1969); Dobbins v. Local 212, Int'l Bro. of Elec. Wkrs., 292 F. Supp. 413 (S.D. Ohio 1968).

employees were not permitted to transfer to white departments, and most companies had separate white and black seniority lists, an employee's race had an effect on his job security and on his pay. After discrimination in employment was prohibited, many employers who recognized their obligation to end racial assignments to specific departments allowed blacks to transfer to formerly white jobs. Often, however, seniority continued to be determined by length of time in the department and not by the length of service with the company. In fact, this was a rather typical provision of collective bargaining agreements with labor unions. As a result, if a Negro with twenty years in a company transferred to a previously white job, his seniority would be lower than that of a white employee hired the previous week. Obviously, this practice inhibited transfers and tended to prolong and perpetuate racial segregation at the plant. On the other hand, the whites already in a white department had an expectation of a particular seniority which would be adversely affected through no fault of their own[93] if Negroes with greater plant seniority, but less time in the department, were permitted to move ahead of them on the seniority list. In times of low employment, displaced whites might be laid off under circumstances in which their existing seniority would have protected their jobs.

Despite the problem which this situation presented, the courts were unwilling to construe the Act restrictively so as to permit discrimination suffered by blacks before the Act to have the effect of confining them in segregated departments for a generation thereafter. Instead, they held that, at least as a general principle, Negroes transferring to jobs for which they were qualified, but from which they had previously been excluded because of race, were entitled to plant seniority at their new job.[94] The reasoning of the courts was akin to that of *Louisiana,* but went beyond it. In the voting cases, the defendants were required to correct the continuing discriminatory consequences of discrimination which was always unlawful. In employment cases, affirmative steps were ordered to undo discrimination which was thought lawful at the time of its occurrence. To put it another way, the companies were required to end not only practices which were openly discriminatory on their face, but also those which had discriminatory consequences because of the context in which they operated.

Labor unions are also subject to the prohibitions against discrimination in employment. Some craft unions, notably in the building and construction trades, have a long history of discriminatory policies and practices.[95] When the Act was passed, many local unions were all-white and some had restrictions which tended to perpetuate that situation.[96] In some unions, only the sons or other

93 For a rather poignant statement of this position by a white worker in a letter to the judge, see United States v. Wood, Wire & Metal Lathers Int'l U., L. U., 341 F. Supp. 694, 697 (S.D. N.Y. 1972).

94 United States v. Local 189, United Papermakers & Paperwork, 282 F. Supp. 39 (E.D. La. 1968), *aff'd,* 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

95 *See, e.g.,* Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971) (upholding numerical hiring "goals" in the construction industry because of past exclusion of blacks).

96 *See, e.g.,* United States v. Sheet Metal Wkrs. Int'l Ass'n, Local U. 36, 416 F.2d 123 (8th Cir. 1969); United States v. Int'l Bro. of Elec. Wkrs., L. No. 38, 428 F.2d 144 (6th Cir. 1970); United States v. United Ass'n of Journ. & App. of P. & P.F.I., 314 F. Supp. 160 (S.D. Ind. 1969).

relatives of current members would be taken on as apprentices or journeymen.[97] The constitutions of particular unions required that each new member be approved by a vote of the membership. While these unions generally conducted hiring halls which gave out work to persons in the trade whether or not they were union members, in many instances the rules gave preference to individuals with prior experience under union contracts.

All of the foregoing practices were racially neutral on their face and did not in and of themselves discriminate against Negroes. Given an all-white union, however, blacks were at an obvious disadvantage. Obviously, few blacks were eligible to join unions which practiced nepotism. Subjecting a black applicant to a vote of the membership was analogous to trying a Negro before an all-white jury from which blacks had been systematically excluded.[98] Moreover, giving a hiring hall preference to someone with experience under a union agreement is inherently discriminatory where blacks had not been allowed to join the union. While many whites may also be put at a disadvantage by these practices, they operate in the context of an all-white union, against virtually all Negroes. Holding that the Civil Rights Act deals with the continuing post-Act consequences of pre-Act discriminatory practices, the courts have set aside these ostensibly nondiscriminatory requirements.[99] The unions protested that all that was needed to end unlawful practices was to prohibit discrimination, but the courts have disagreed: "[For] a forceful prohibition against discrimination, [defendants] need look no further than the Civil Rights Act itself."[100]

Specific application in employment discrimination cases of the principle that affirmative steps must be taken to correct the effects of past discriminatory practices often poses difficult problems. Preferential treatment for any group to achieve racial balance in employment is specifically prohibited.[101] It has been held, however, that something in the nature of a quota may be appropriate relief in cases of deliberate exclusion. Where a union, for example, excluded blacks and Spanish Americans for many years, it has been held to be appropriate relief to require it to take on minority members and whites for a limited period on a one-to-one ratio to compensate for the past.[102] The Department of Labor has recently promulgated programs like the so-called Philadelphia Plan, which

97 *See, e.g.*, Local 53 Int'l Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

98 *See* Norris v. Alabama, 294 U.S. 587 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

99 *See, e.g.*, Local 53 of Int'l Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969), *aff'g sub nom.* 294 F. Supp. 368 (E.D. La. 1967); United States v. Sheet Metal Wkrs. Int'l Ass'n, Local U. 36, 416 F.2d 123 (8th Cir. 1969); United States v. Int'l Bro. of Elec. Wkrs., L. No. 38, 428 F.2d 144 (6th Cir. 1970); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); United States v. United Ass'n of Journ. & App. of P. & P.F.I., 314 F. Supp. 160 (S.D. Ind. 1969); United States v. Wood, Wire & Metal Lathers Int'l U., Loc. U. No. 46, 328 F. Supp. 429 (S.D.N.Y. 1971), *motion for stay pending appeal denied,* 341 F. Supp. 694 (S.D.N.Y. 1972).

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

101 42 U.S.C. § 2000e-2(j) (1970).

102 Local 53 of Int'l Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969), *aff'g sub nom.* 294 F. Supp. 368 (E.D. La. 1967); *accord,* United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 40 U.S.L.W. 3557 (U.S. May 23, 1972). United States v. Wood, Wire & Metal Lathers Int'l U., L. U. 46, 341 F. Supp. 694 (S.D.N.Y. 1972).

requires contractors on federal construction projects to take affirmative steps to meet specific minority employment goals loosely based on the percentage of blacks in the overall population. Obviously, such programs necessitate preferential recruitment in the non-white community to meet the goals. While some officials, including the Comptroller General of the United States, have contended that these goals amount to reverse discrimination by an unlawful quota, the Philadelphia Plan has survived its judicial test.[103]

In order to deal with indirect, almost intangible, discrimination as well as with overt exclusion, the courts have begun to address themselves to the problem of "image." When an employer or union can be shown to have operated in such a manner that the inevitable effect has been to deter Negroes or other non-whites from seeking employment or membership, it has been held that affirmative steps—generally systematic contacts with the non-white community—are necessary in order to correct the discriminatory image. Moreover, such steps have been required even when the membership practices which created the all-white image are of the pre-Act variety—their consequences linger on.[104]

As experience under the Act expands, the questions become even more difficult. The courts have been faced, for example, with the problem whether a test for prospective employees, which is more difficult for Negroes than for whites because the former have had inferior educational opportunities, is discriminatory if it is not reasonably related to the requirements of the job. Basically, the question is whether an employer must conduct his operation so as to correct rather than to capitalize on the effects of someone else's discriminatory acts.[105] One should not be required to employ incompetent non-white surgeons, architects, or pilots because their educational opportunities were inferior. Is it not unreasonable, on the other hand, to deny a black whose opportunities for decent schooling were negligible a job working with his hands because he cannot solve quadratic equations? The Supreme Court has, in effect, recently ruled that it is, holding in the landmark *Griggs*[106] case that such a test is unlawful if its use has the effect of placing blacks at a disadvantage in obtaining a job, unless the employer can show that the test is reasonably job related. The employer is thus obliged to take reasonable steps to correct the consequences of past discrimination in education against the Negro, even though he was not the discriminator and even though he did not intend to discriminate. Effect, not intent, is controlling, for, as Chief Justice Burger wrote for a unanimous Court, Title VII forbids discriminatory consequences as well as motivations.

How far does the *Griggs* principle go? A California employer refused to

103 Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

104 United States v. Sheet Metal Wkrs. Int'l Ass'n, Local U. 36, 416 F.2d 123 (8th Cir. 1969); United States v. Medical Soc'y of South Carolina, 298 F. Supp. 145 (D.S.C. 1969); United States v. United Ass'n of Journ. & App. of P. & P.F.I., 314 F. Supp. 160 (S.D. Ind. 1969); United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.D. 1971); *cf.* Rogers v. Equal Employment Opportunity Com'n, 454 F.2d 234 (5th Cir. 1971).

105 *Cf.* Gaston County v. United States, 395 U.S. 285 (1969) (literacy test discriminatory where Negroes were denied equal education opportunity); Brewer v. School Board of City of Norfolk, Va., 397 F.2d 37 (4th Cir. 1968) (neighborhood school plan may be unlawful where neighborhoods are segregated because of private discrimination in housing).

106 Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

hire individuals with arrest records, regardless of the color of their skin. The court held that this practice violated Title VII since arrest does not prove guilt, since blacks are unjustly arrested more frequently than whites, and since no business necessity was shown for this requirement.[107] Another employer refused to employ persons whose wages had been garnished, claiming that the burdensome administrative problems presented for its payroll personnel justified such exclusion. The court held the policy unlawful, citing its disproportionate impact on non-whites, and holding that the administrative difficulty complained of was not germane to the employee's ability to do the job. The court further suggested that the cycle of racial discrimination pervades all walks of life, and that Title VII requires the employer to contribute to its alleviation, even at some administrative disadvantage to himself.[108]

But the individual employer did not personally create all of the disadvantages which confront non-whites in the job market, and there must be limits to what he will be required to do about them. In general, an employer need not hire individuals convicted of crime, at least where there is a reasonable relationship between the crime and the capacity to satisfy the job requirements.[109] Where a practice perpetuates the effects of the employer's past discrimination, it may be justified only on the showing of a compelling business necessity.[110] When the vice of a challenged practice, however, lies in its disproportionate statistical impact on non-whites rather than in any conscious discrimination by the employer, the standard is apparently somewhat less exacting.[111] One of the primary tasks awaiting courts in the 1970's is to fashion reasonable rules, fair to all concerned, as to the scope of the employer's obligation to assure equal opportunity by compensating for discrimination practiced by someone else.

D. *The Right to Equal Housing Opportunity*

In 1968, Congress closed the last major gap in existing civil rights legislation by enacting the Fair Housing Act,[112] which prohibits discrimination on account of race, color, religion or national origin in the sale and rental of virtually all housing, private and public alike. This civil rights law is undoubtedly one of the most important ever enacted by Congress. The difficulties inherent in integrating schools, particularly in urban centers, stem largely from residential segregation. There is also a growing trend in the nation for employment to move from the increasingly black inner cities to traditionally white suburbs. Unless non-white citizens can live in these suburbs, equal job opportunities become illusory. In the wake of the wave of riots in the segregated ghettoes of American cities, the

107 Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970).
108 Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).
109 Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971).
110 United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).
111 Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), *rev'g* 334 F. Supp. 930 (D. Mass. 1971).
112 42 U.S.C. § 3601 *et seq.* (1970). While there are some minor exemptions from coverage of the Act, racial discrimination with respect to exempt dwellings is still prohibited by the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970). Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969).

Kerner Commission[113] found the nation drifting towards "two societies, one black, one white—separate and unequal." Unless equal opportunity in housing becomes a reality, it is difficult to see how this trend can be reversed.

Application of principles of affirmative relief from other areas of civil rights law is not simple. In voting cases, the doctrine of *Louisiana v. United States*[114] has assured that blacks must be permitted to register if they meet actual white standards. No serious practical problem is presented even if this doubles the number of persons on the voting rolls. Schools in many segregated school districts can be reorganized into a unitary system by the reassignment of pupils and teachers without causing unreasonable dislocation.[115] In employment discrimination cases, the affirmative relief principle can also be invoked to eliminate practices which build on and perpetuate past discrimination, and in most instances such remedies are compatible with the practical operation of the business. In those cases in which some continuing consequences of past discrimination in employment are necessary from a business standpoint, the courts reluctantly tolerate them.[116]

In some respects, it is even harder to counteract the effects of discriminatory housing practices than it is to eliminate other forms of discrimination. The voting analogy does not work in a full "white only" apartment house, for only a specified number of people can live there and, no matter how egregious the wrongs of yesterday, blacks cannot be moved into a full house today without incumbent tenants being put out on the street. The school analogy also has shortcomings; it is obviously completely impracticable to uproot people from their homes to promote residential integration, and the Fair Housing Act contemplates no such remedy. Accordingly it was earnestly contended in the early days of the Act that affirmative relief was inappropriate in housing discrimination cases and that courts should restrict themselves to prohibitory injunctions.[117] There was no established body of law supporting affirmative relief under state and local fair housing legislation, and, in general, the appellate courts had neither granted nor apparently considered such remedies in arguably analogous cases involving discrimination at places of public accommodation.[118] Nevertheless, discrimination in housing can often be self-perpetuating. Tenants in an all-white apartment

113 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).
114 380 U.S. 145 (1965).
115 Swann v. Board of Education, 402 U.S. 1 (1971).
116 Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).
117 *See, e.g.,* Brief for Appellee, United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971). No affirmative relief was granted in *United States* v. *Mintzes,* 304 F. Supp. 1305 (D. Md. 1969), the Government's first "blockbusting" case, although this may have been attributable to a peculiar set of facts. The continuing consequences of the proved unlawful conduct in that case were minimal.
118 *See, e.g.,* Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McClung, 379 U.S. 294 (1964). But see *United States ex rel. Clark* v. *Gramer,* 418 F.2d 692 (5th Cir. 1969), which cited with apparent approval consent decrees negotiated by the United States which granted some affirmative relief, such as the posting of "nondiscrimination signs" and the closing of kitchen facilities maintained for service to blacks during the period when they were excluded from dining room facilities. *See also* United States v. Beach Associates, Inc., 286 F. Supp. 801 (D. Md. 1968); United States v. Medical Soc'y of South Carolina, 298 F. Supp. 145 (D.S.C. 1969) (recognizing the obligation of operators of previously segregated public accommodations to inform the public and the non-white community of their opportunity to use the facilities, and ordering the posting of signs and other steps).

complex will tend to bring in white friends, and the process operates to exclude non-whites. Blacks are likely to be deterred from applying to an establishment with an all-white image. An injunction against a real estate company may have little practical effect if its potential beneficiaries know nothing about it, and a black man receives little benefit from opportunities which are not brought to his attention. Accordingly, it was the position of the Civil Rights Division from the first that affirmative relief is appropriate in fair housing cases to correct past discrimination and that its prime goal should be the communication to affected persons of their opportunities for housing.

Many of the Justice Department's suits are concluded by consent decree, without the need for a trial, and the early consent decrees shaped the character of the remedy in fair housing cases. The first cases which pioneered relief involved so-called land sales companies. The defendants[119] were developers of lakeside properties who solicited purchasers for lots on which they would build second homes. Their pitch was to city dwellers, and they offered frustrated residents opportunities to escape the ills of urban living. To some whites, those ills are not all nonracial. In suits alleging discriminatory practices by several such companies, the United States moved for preliminary relief, and filed supporting affidavits by the defendants' former telephone solicitors and salesmen. These affidavits disclosed that the employees were under orders not to solicit Negroes as purchasers, for it was feared that sales to blacks would imperil the white market. The affiants were directed to give black prospects misleading information to minimize the likelihood that they would try to purchase lots. Whites would be urged to attend sales dinners, but blacks were told that the dinners were cancelled. Bonuses were given to telephone solicitors for securing white prospects, but there was no reward for obtaining black ones. Records were coded to facilitate these practices. Double-X meant suspected black, and cards of confirmed blacks were to be thrown away so that they would not be urged to buy. Unsurprisingly, the discriminatory policy often extended to the defendants' employment practices. The policies were successful, and there were usually either no black purchasers or a really token number, like two of 1500.

The defendants in these suits usually denied any discriminatory policies, at least for the record, but in most instances they elected not to litigate. Eventually, consent decrees were negotiated which required compensatory steps to eliminate the effects of the past. Discrimination in housing and in employment was prohibited. Employees had to sign nondiscrimination pledges, and objective, nonracial sales criteria were ordered, so that blacks could not be turned down for subjective or capricious reasons. A reasonable proportion of the defendants' solicitation effort—thirty percent in the landmark case—was to be directed to the black community. All advertising was required to state defendants' nondiscriminatory policies. Full page ads were to be placed in black newspapers. If any advertisements depicted persons enjoying the property, both races were required to be represented. Also, contacts were to be made with the N.A.A.C.P.,

119 Since these companies negotiated the consent decrees in good faith, the author prefers not to identify them, notwithstanding that the facts described herein are a matter of public record.

Urban League, and other organizations representing the black community. Systematically, the defendants were obligated to assure that nonwhites who could afford their lots had an informed opportunity to purchase. In general, the decrees were governed by the principle that the more extreme the discrimination was before the suit, the more comprehensive the relief that was appropriate to correct it.

The affirmative marketing for which the consent decrees provided was, in most cases, remarkably successful. Lakesides became integrated. Most of the defendants had sold fewer than one percent of their lots to blacks before they came under court order, but their sales to blacks reached twenty percent or more after the initiation of a court ordered affirmative program. Soon, consent decrees based on similar affirmative marketing principles were negotiated with major defendants engaged in the ownership and management of apartments,[120] sale of homes,[121] and financing of housing.[122] Thus, even before there was any authoritative decisional law on the point, a series of consent decrees all over the United States had made affirmative relief of this kind the norm rather than the exception.

In *United States v. West Peachtree Tenth Corp.*,[123] the United States had sued the operators of a 96 unit apartment complex in Atlanta, Georgia charging exclusion of blacks. The District Judge dismissed the suit, but the Court of Appeals reversed, holding that a pattern and practice of racial discrimination had been established. Rejecting defendants' contention that only a prohibitory injunction was appropriate, the Court of Appeals took the comparatively unusual step of asking the parties to propose a specific decree. The United States suggested affirmative relief of the character discussed above, bringing its consent decrees to the Court's attention. Eventually, the appellate court ordered the District Judge to enter an order which it had prepared for him word for word. The order drew heavily on the prior consent decrees. In addition to enjoining discrimination in the future, it required instructions to defendants' employees, and to agencies which secured tenants for defendants, as to their duty not to discriminate. The operators of the apartment complex were directed to adopt and implement objective, reviewable, nondiscriminatory rental standards. Fair housing statements were to be included in all advertising and brochures. Defendants were ordered to offer to rent apartments to the specific blacks who had been discriminatorily excluded. The decree was obviously designed to be a model

120 *See, e.g.*, United States v. Weingart, Civil No. 70-530-CC (C.D. Cal., July 29, 1970). In this case the operators of more than 9,000 apartments in the Los Angeles area were ordered not only to invoke most of the steps required by the land sales companies, but also to give weekly notice to local fair housing councils of vacancies in predominantly white buildings. This measure greatly increased the opportunities of blacks and Chicanos to rent in white areas.

121 *See, e.g.*, United States v. Homestead Realty, Inc., Civil No. 71-C-205 (N.D. Ill., Feb. 25, 1971).

122 *See* United States v. Household Finance Corp., Civil No. 72-C-515 (N.D. Ill., Feb. 29, 1972). In this consent decree, HFC was required to include in its advertisements that it was an equal opportunity lender and to take steps to communicate its policies to the American Indian, Spanish-speaking, and black communities.

123 437 F.2d 221 (5th Cir. 1971). While there had been some prior intimations that the *Louisiana* principle applied to housing discrimination, see Kennedy Park Homes v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd* 436 F.2d 108 (2d Cir. 1970), *cert. den.* 401 U.S. 1010 (1971), the definitive decision was *West Peachtree*.

for district courts in similar cases,[124] and it established conclusively that prohibitory relief was insufficient.

Fair housing is a complex area, and adaptation of the *West Peachtree* principles to varying factual situations raises interesting questions. A common problem is the "steering" of blacks to certain areas and whites to others. In *United States v. Life Realty, Inc.*,[125] the Government sued one of New York's largest real estate operators in which it alleged that the defendants' rental office informed white applicants of vacancies only in all-white or predominantly white apartment complexes, while blacks and Puerto Ricans were channelled to buildings in black or racially transitional areas. Defendants denied the charges, and negotiated a consent decree without any adjudication of the merits. The decree prohibited discrimination, required some affirmative marketing, and provided for a system of posting vacancies and maintaining a log of applicants which was designed to prevent "steering."

Additionally, the United States sought relief which would put the victims of the alleged "steering" in their "rightful place" by allowing them to transfer from black to white buildings with defendants paying the moving expenses. The defendants resisted this proposal on the ground that it would imply an admission of wrongdoing on their part, but did agree to encourage desegregation by permitting up to fifty[126] persons who had rented at the Negro buildings to break their lease and to move to white buildings as vacancies occurred, with the landlord advancing them the equivalent of rent for one month. The decree resulted in a significant rise in the number of black applicants and about half of them moved into white buildings, compared with an insignificant percentage who had done so prior to the order.

The "steering" problem presented in *Life Realty,* which is even more common in relation to the sale of single rather than multiple family homes, is closely related to the iniquitous practice popularly known as "blockbusting." An important provision of the Fair Housing Act[127] makes it unlawful, for profit, to sell or rent a dwelling by representing that non-whites are moving into the neighborhood. The locale of this practice is usually a previously all-white neighborhood into which the first blacks have moved, and in which real estate agents see an opportunity for listings. The atmosphere in such areas has been colorfully described by United States District Judge Edenfield in one of the leading decisions:

> First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second,

124 It was followed almost verbatim by the court in *United States* v. *Reddoch,* Civil No. 6541-71 (S.D. Ala., Jan. 23, 1972), and termed a "model decree" in *United States* v. *Hunter,* 459 F.2d 205 (4th Cir. 1972).

125 Civil No. 70-C-964 (E.D.N.Y., Dec. 22, 1971).

126 Civil rights groups denounced the United States' agreement to the numerical limitation of 50 families as "pure tokenism." New York Times, Jan. 29, 1971, at 18, col. 3. Only one black family took advantage of the transfer provision, probably because it is less feasible to move to a new neighborhood once a pattern of life has been established in one's own community.

127 42 U.S.C. § 3604(e).

> there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are sorely tempted as their neighbors move away, and hence those who remain are peculiarly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction.
>
> In this maelstrom the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations as to race or as to what is going on. On the contrary both sides already know, all too well, what is going on. In short, for an agent to get a listing or make a sale *because* of racial tensions in such an area is relatively easy, whereas the direct *mention* of race in making the sale is superfluous and wholly unnecessary.[128]

Under circumstances such as those described by Judge Edenfield, it is unlikely that a simple prohibition against racial representations designed to induce sales will adequately correct the unlawful condition. To prevent desegregation from becoming no more than a short-lived way station between all-white and all-black, more comprehensive relief is necessary. Accordingly, the decisions concluding blockbusting cases have not only prohibited unlawful representations, but have also forbidden more intensive solicitation in transitional areas than in other neighborhoods, and have also prohibited discriminatory practices generally, with particular emphasis on prevention of "steering" of blacks into transitional areas.[129]

There are other housing practices which, although fair and reasonable on their face, operate in context to discriminate. The operators of an Alabama apartment complex required prospective tenants to be compatible with persons living in the complex, all of whom were white; the resident manager was admittedly concerned that rental to blacks would find disfavor among her white tenants. Under these circumstances, this otherwise reasonable criterion was held invalid.[130] In a case involving an all-white, and virtually all-gentile, cooperative apartment complex in the District of Columbia, prospective residents had to be approved by a vote of persons already owning the apartments; the United States attacked this provision as discriminatory in its context, and the defendants eventually agreed to a consent decree requiring objective standards and eliminating the "vote of the tenants" requirement. Subjectivity is inherently suspect, especially when non-whites are statistically underrepresented,[131] and requirements

128 United States v. Mitchell, 335 F. Supp. 1004, 1006 (N.D. Ga. 1971) (emphasis in original).

129 *Id.* Several consent decrees negotiated by the United States have gone even further and have prohibited all uninvited solicitation of listings for a stated period in the areas where the unlawful conduct occurred. *See, e.g.,* United States v. Stewart Realty Co., Civil No. 3-3589A (N.D. Tex., June 1, 1970); United States v. Arco, Civil No. C-70-29 (W.D. Tenn., Oct. 9, 1970).

130 United States v. Reddoch, Civil No. 6541-71 (S.D. Ala., Jan. 23, 1972).

131 *Id. See* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir. 1972).

which place a non-white applicant at the caprice of an all-white group seldom win favor in the courts.[132] A United States District Judge recently ruled that a discretionary requirement that applicants for rental at an all-white mobile home park secure recommendations from incumbent tenants constituted a pattern or practice of discrimination when applied to exclude two black families, irrespective of the defendant's motives.[133]

In housing, as in employment, a major area of controversy relates to practices which, while nondiscriminatory on their face, have a statistically disproportionate unfavorable impact on non-white citizens. The rights of persons on welfare illustrate this point. In *Life Reality,* previously discussed, after the consent decree was in effect, the Attorney General received a complaint that the landlord had practiced the blanket exclusion of welfare recipients from the apartments at the Lefrak buildings. The landlord acknowledged this, but denied that it was unlawful. Lefrak's attorneys argued that this rule had been in effect for many years and that a majority of welfare recipients in New York had been white at the time of its inception. In 1971, however, the overwhelming majority of New York inhabitants on public assistance were black or Puerto Rican. The United States thus challenged the blanket exclusion under the *Griggs* doctrine, contending that it had a discriminatory effect (or statistically disproportionate racial impact) and that no business necessity existed for it. The Government agreed that the landlord was entitled to have reasonable income requirements for prospective tenants, and the original consent decree provided that no tenant should spend more than 25% of his income on rent. The United States contended that persons on welfare must be accepted for available housing if either their welfare income complied with the standard or they were able to secure a rental payment guarantee from an appropriate person or agency. Despite the landlord's legal views, the consent decree was ultimately amended in accordance with the Government's position. Attorneys for a black welfare mother later sued the United States and the landlord, charging that the decree had not gone far enough and that the Attorney General had not enforced the law with sufficient vigor. The suit was dismissed against the Government, but is still pending against the landlord.[134]

The exclusion of integrated federally assisted housing complexes for families of low or moderate income from all-white communities has also raised interesting questions under the Fair Housing Act. The Supreme Court has held that a state constitutional mandate that such housing be approved by local referendum, while other forms of housing are not subjected to such approval, does not on its face contravene the fourteenth amendment.[135] Noting that the requirement was not aimed at any racial group and that provisions for referenda were common under California law, the Court ruled that, absent proof of racial discrimination, such procedural differentiation between the rich and poor was not constitutionally equivalent to discrimination founded on race.

132 *See, e.g.,* Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); *cf.* Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).
133 United States v. Grooms, Civil No. 71-94 (M.D. Fla., July 28, 1972).
134 Boyd v. United States, Civil No. 71-C-1433 (E.D.N.Y., June 7, 1972).
135 James v. Valtierra, 402 U.S. 137 (1971).

In many cases, however, the effect of exclusion of federally assisted housing may be racially discriminatory and while the purpose of a community's action is never easily ascertainable, "a man is held to intend the foreseeable consequences of his conduct."[136] Accordingly, there is now a substantial body of law holding that the exclusion of housing of this kind is unlawful if it tends unreasonably to impede desegregation,[137] regardless of the defendant's stated motives. As one court has stated: "most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro race. . . ."[138] Plaintiffs have not been required to prove that overt racially discriminatory statements have been made. On the contrary, the courts have talked in terms of the discriminatory consequences of defendants' conduct:

> For better or worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. . . . Among other things, this reflects the recognition that in the area of public housing local authorities can no more confine low-income blacks to a compacted and concentrated area than they can confine their children to segregated schools. Moreover, the court in *Lackawanna* held that even though the deprivation of plaintiffs' equal housing rights had been caused to some extent by the sheer neglect and thoughtlessness of local officials, there was, nevertheless, a violation of the Equal Protection Clause. . . .
>
> Only a showing of compelling governmental interest could overcome a finding of unconstitutionality in such thoughtlessness and inaction on the part of municipal officials.[139]

As of the present time, the Supreme Court has not addressed itself to problems of relief under the Fair Housing Act, and the degree to which that statute requires an affirmative remedy to correct practices which are neutral on their face but have a discriminatory impact as applied. On the basis of the record to date, however, one can predict with relative safety that the approach epitomized by *Louisiana v. United States*[140] will dominate the jurisprudence of equal housing opportunity.

V. The Victim's Remedy

We have come full circle. The Attorney General's authority to initiate civil rights litigation had its origin in the ineffectiveness of private litigation to secure equal treatment for blacks. Today, however, the expansion of governmental action to combat racial discrimination has been accompanied by a major advance

136 Radio Officers v. Labor Board, 347 U.S. 17, 45 (1954).

137 *E.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D. N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Southern Alameda Span. Sp. Org. v. City of Union City, Cal., 424 F.2d 291 (9th Cir. 1970); Dailey v. City of Lawton, Okla., 425 F.2d 1037 (10th Cir. 1970), *aff'g* 296 F. Supp. 266 (W.D. Okla. 1969); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971); Banks v. Perk, 339 F. Supp. 1194 (N.D. Ohio 1972); *see also* Sisters of Prov. of St. Mary's of Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971); United States v. City of Black Jack, Civil No. 71-C-372(1) (E.D. Mo., Mar. 30, 1972); Parkview Heights Corp. v. City of Black Jack —— F.2d —— No. 72-1006 (8th Cir. Sept. 25, 1972).

138 Dailey v. City of Lawton, Okla., 296 F. Supp. 266, 268 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

139 Crow v. Brown, 332 F. Supp. 382, 390-91 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

140 380 U.S. 145 (1965).

in the volume of private civil rights litigation. Individual plaintiffs now have an effective remedy against discriminatory conduct, whether it be public or private.

Congress and the courts have made it easier for a civil rights plaintiff to sue, even if he has limited financial resources. Under the more recent statutes, a court may appoint an attorney for the plaintiff, and may authorize the commencement of an action without the payment of fees, costs, or security.[141] Moreover, prevailing plaintiffs are entitled to recover counsel fees, more or less as a matter of course,[142] and the amounts awarded have been substantial.[143]

Congress and the courts have also been very generous in defining who has standing to sue to complain of discriminatory conduct. The laws prohibiting discrimination in employment and housing confer a right of action upon any person claiming to have been injured or aggrieved by a discriminatory practice.[144] This language has been broadly construed to provide standing as broad as Congress is constitutionally authorized to create, subject only to the Article III requirement of an actual case or controversy.[145] A Caucasian may, for example, complain of discrimination against himself based on the race of a black guest or associate[146] and a pupil has standing to challenge the constitutionality of a state anti-busing law which impairs his opportunity to associate with students of another race.[147] Even if there are limits to the liberality with which standing will be accorded in civil rights litigation,[148] the door is now wide open, and persons and organizations claiming injury from discriminatory practices can generally find among their number a willing and eligible prospective plaintiff who may assert his rights in court.

The private civil rights complainant is in a position to litigate for the purpose of improving both his own status and that of other members of his race, color, religion, or national origin. He may now bring a class action and the courts have not rigorously required identity of circumstances among all members of the class.[149] The Supreme Court has emphasized the public role of the in-

141 *See* 42 U.S.C. §§ 3612 (b) (housing), 2000a-3 (a) (public accommodations) and 2000e-5 (3) (1970) (employment). Congress has also provided a limited administrative remedy without cost to complainants in housing and employment cases. 42 U.S.C. §§ 3610, 2000e-5 (1970).

142 Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Lee v. Southern Homesites, 444 F.2d 143 (5th Cir. 1971).

143 *E.g.*, Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970) ($20,000).

144 42 U.S.C. §§ 2000e-5 (a) (employment), 3610 (a) (housing) (1970).

145 Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3rd Cir. 1971). *See* Marable v. Ala. Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969) (three judge court).

146 Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972).

147 Nyquist v. Lee, 402 U.S. 935 (1971), *aff'g per curiam* 318 F. Supp. 710 (W.D.N.Y. 1970).

148 In Moose Lodge, No. 107 v. Irvis, 407 U.S. 163 (1972), the Supreme Court held that a prospective black guest at an all-white private club lacked standing to challenge the club's discriminatory membership policies, as distinguished from its practices vis-à-vis non-white guests. Next term, the Court will review the decision in *Trafficante* v. *Metropolitan Life Ins. Co.*, 332 F. Supp. 352 (N.D. Cal.), *aff'd*, 446 F.2d 1158 (9th Cir. 1971), *cert. granted*, 405 U.S. 915 (1972), in which lower federal courts held that incumbent tenants lacked standing to complain of their landlord's alleged discriminatory policy vis-à-vis non-white rental applicants. Plaintiffs claimed economic and emotional injury from the alleged impairment of their opportunity for voluntary interracial association.

149 Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

dividual civil rights litigant as that of a "private attorney general."[150] Even though the plaintiff may not be able to prove discrimination against him personally, he is entitled to a wide-ranging "pattern or practice" type of relief if he can show that the defendant has engaged in discriminatory practices against others.[151]

The substantive relief available to plaintiffs alleging racial or related discrimination is substantial. The basic remedy remains the injunction, but the scope of injunctive relief accorded private litigants has been greatly expanded. It used to be, for example, that a black pupil who sought a desegregated education litigated only about his admission to a previously all-white school,[152] and often he would lose. Today, however, a similar suit results not only in relief for himself, but also in the desegregation of the faculty[153] and total reorganization of the entire school district,[154] with neighboring school districts also possibly included.[155] In employment discrimination cases, a private plaintiff may also cause the entire seniority system of a major industrial concern to be totally restructured.[156] In fair housing suits, he may secure an order prohibiting the construction of any further public housing in an entire section of a major city.[157]

Relief is now also readily available to the nonidealistic litigant who only seeks compensation for the wrong inflicted upon him. While the public accommodations title of the Civil Rights Act of 1964 expressly provides that an injunction shall be the exclusive remedy for violations thereof,[158] the employment title of the same Act provides for awards of injunctive relief, appropriate affirmative action, and back pay.[159] Back pay awards may be a very major element of recovery, for the courts have made awards for reduced earnings over extended periods of time at a substantial cost to the employer.[160]

The Fair Housing Act of 1968 is the most explicit of all the civil rights

150 Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).
151 Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972).
152 Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955).
153 Bradley v. School Board, 382 U.S. 103 (1965).
154 Green v. County School Board, 391 U.S. 430 (1968).
155 *See* Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971); Bradley v. School Board of City of Richmond, Va., 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, No. 72-1058 (4th Cir. June 7, 1972).
156 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
157 Banks v. Perk, 339 F. Supp. 1194 (N.D. Ohio 1972); *cf.* Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).
158 42 U.S.C. §§ 2000a-3(a), 2000a-6(b) (1970); United States v. Johnson, 390 U.S. 563 (1968); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). Since a violation of the public accommodations statute will ordinarily be a violation of 42 U.S.C. § 1981 or § 1982, *United States* v. *Medical Soc'y of South Carolina*, 298 F. Supp. 145 (D.S.C. 1969); *Scott* v. *Young*, 307 F. Supp. 1005 (E.D. Va. 1969), *aff'd*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970), and because damages are available under these old laws, *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969), some financial recovery may be possible for discriminatory denial of access to public accommodations.
159 42 U.S.C. § 2000e-5(g) (1970). The provision for "affirmative action" may authorize money damages if the wrong was intentional. *See* Garnean v. Raytheon Co., 341 F. Supp. 336 (D. Mass. 1972).
160 Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972). In this case, the court awarded back pay under 42 U.S.C. § 1981 for a period prior to the effective date of Title VII, even though discrimination was not unlawful at the time it occurred, under the law as then interpreted.

statutes with respect to financial compensation for the victim. It provides for injunctive relief, compensatory damages, and punitive damages up to $1,000.[161] Compensatory damages are awarded for humiliation and emotional distress, as well as for financial loss. A defendant who loses his case in court may be liable for more money than he thinks he can afford. In *Seaton v. Sky Realty, Inc.*[162] the court awarded a husband and his spouse $500 for embarrassment and inconvenience and $1,000 *each* against *each* of three defendants (a real estate company and two agents) in punitive damages. In *Peoples v. Doughtie,*[163] the court awarded a black couple $750 in compensatory damages and $1,000 in punitive damages against an elderly lady who had excluded them from her three-unit apartment house. Moreover, larger awards are in store, for discrimination in housing violates 42 U.S.C. § 1982[164] as well as the Fair Housing Act, and it has been held that the $1,000 limitation on punitive damages has no application under the old statute.[165]

A question remains as to whether, and to what extent, the United States is authorized to secure compensation for individual victims of discrimination in "pattern or practice" litigation. It is well settled that the Attorney General's prime function is to vindicate the public interest and deal with cases having a public, rather than a private, impact.[166] Several of the controlling statutes emphasize that the Attorney General is to sue for preventive relief.[167] They go on to say, however, that he should apply for whatever order he deems necessary to assure the "full enjoyment" of any rights protected by the title.

It has long been settled that some relief for individual victims of discrimination is authorized. In *State of Alabama v. United States,*[168] the court's equitable power was held to permit the District Judge to require the registration of specific Negroes who had been discriminatorily denied the right to vote. Courts have ordered adjustments of pay rates for individual blacks in the Government's employment cases[169] and offers to rent housing to unsuccessful black applicants in housing cases.[170] These decisions disclose a recognition by courts of equity that, at least to some degree, the Attorney General's "pattern or practice" authority should be used to put identifiable individuals, as well as the classes suffering discrimination, in their "rightful place."[171] But what about money?

The tradition has been negative. During the days of voting litigation, in

161 42 U.S.C. § 3612(c).
162 P-H 1972 E.O.H. Rep. ¶ 13,530 (N.D. Ill. Jan. 25, 1972).
163 P-H 1972 E.O.H. Rep. ¶ 13,528 (M.D. Ala. Nov. 19, 1971).
164 Jones v. Mayer Co., 392 U.S. 409 (1968).
165 Pierce v. Naughton, Civil No. 70-C-645 (N.D. Ill., Oct. 1, 1970); Young v. T. A. Real Estate & Constr. Co., Civil No. 70-C-1935 (N.D. Ill., Oct. 1, 1970).
166 United States v. Mitchell, 327 F. Supp. 476, 483 (N.D. Ga. 1971); United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).
167 42 U.S.C. §§ 1971(c) (voting), 2000a-5(a) (public accommodations), 3613 (housing) (1970). The word "preventive" was, however, omitted from 42 U.S.C. 2000e-6(a) (employment) (1970).
168 304 F.2d 583 (5th Cir.), *aff'd,* 371 U.S. 37 (1962).
169 *E.g.,* United States v. Medical Soc'y of South Carolina, 298 F. Supp. 145 (D.S.C. 1969).
170 United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971); *see* United States v. Reddoch, Civil No. 6541-71 (S.D. Ala., Jan. 23, 1972) (offer of preferential consideration).
171 United States v. Bethlehem Steel Corp., 446 F.2d 652, 661 (2d Cir. 1971).

which blacks were so often wilfully disfranchised on account of race, the idea of a financial remedy for them through suits by the Attorney General was never litigated or, so far as the writer is aware, even discussed. The same holds true for school desegregation cases. The Attorney General has, however, recently asserted his authority to an injunction, including back pay for the victims in employment discrimination cases. The courts are, so far, divided as to whether he has such authority.[172] The Attorney General has also negotiated a few consent decrees in fair housing cases in which the payment of compensation to individual victims is recited in the preamble as one of the elements of the bargain.[173] In general, the victim of discrimination in employment or housing has better prospects for compensation if he acts on his own behalf, through the administrative or judicial process, but some recovery even from suits primarily geared to assert the public interest is not foreclosed to him.[174]

VI. Conclusion

For the greater part of a century, the equal opportunity guarantees of the post-war amendments were honored more in breach than in observance. Rather than "warrants for the here and now," these rights were but "hopes to some *future* enjoyment of some formalistic constitutional promise."[175]

The machinery of federal enforcement initiated by the Civil Rights Act of 1957 and expanded by later laws, and the resourcefulness of judges and advocates in devising fair but effective remedies, have transformed the character of the battle. He who discriminates, or capitalizes on the discrimination of another, can no longer afford what was once quite justifiable confidence that nothing would be done. The United States and its citizens now have available the legal tools required to do racial justice. Whether this goal is reached in practice depends on the resources and commitment, both public and private, which are invested in the task.

172 In *United States* v. *Wood, Wire & Metal Lath., Int'l. U., Loc. U. 46,* 328 F. Supp. 429, 441 (S.D. N.Y. 1971), the court determined that back pay was a proper element of relief in suits by the Attorney General. A number of consent decrees negotiated by the Attorney General have also resulted in substantial back pay awards. *See, e.g.,* United States v. Household Finance Corp., Civil No. 72-C-515 (N.D. Ill., Feb. 29, 1972) (about $125,000 in back pay to female employees).

173 *E.g.,* United States v. Goldberg, Civil No. 70-1223 (S.D. Fla., Dec. 28, 1971); United States v. Magnolia Manor, Civil No. 4681 (S.D. Miss., Jan. 27, 1971).

174 In *United States* v. *Scott Management Co.,* Civil No. 21234 (D. Md., Mar. 24, 1971), the consent decree ordered defendants to negotiate in good faith with individual complainants under the aegis of the Secretary of HUD and to report to the court on any progress in the negotiations.

175 Watson v. Memphis, 373 U.S. 526, 533 (1963) (emphasis in original).