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Article

Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy

by
MINNA J. KOTKIN*

At the time Congress passed Title VII of the Civil Rights Act of 1964,[1] many of America's political and business leaders were persuaded that something had to be done about the economic status of racial minorities if domestic peace was to be preserved.[2] The Supreme Court had

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1. The Act was signed into law by President Lyndon B. Johnson on July 2, 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e-1 to -16 (1981)). Title VII addressed employment discrimination; other portions of the Act dealt with discrimination in public accommodations and in education as well as voting rights.

2. The sense of urgency surrounding the passage of the Act is reflected, albeit in measured tones, in the Judiciary Committee Report accompanying House of Representatives bill number 7152, which was eventually enacted after some modifications. The Report states:

> Considerable progress has been made in eliminating discrimination in many areas because of local initiative either in the form of State laws and local ordinances or as the result of voluntary action. Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated.

H.R. REP. NO. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393 [hereinafter HOUSE REPORT].

T. KHEEL, GUIDE TO FAIR EMPLOYMENT PRACTICES (1964), explicitly refers to the business community's attitude toward racial minorities' economic status. Kheel's guide, published shortly after Title VII's passage, was directed toward assisting employers with Title VII compliance. It provides 11 case studies of the efforts of major corporations to broaden job opportunities for minority workers. Kheel's underlying theme is that, although work force

taken a substantial first step by adopting the principle of equality of educational opportunity.[3] The decade following *Brown v. Board of Education*[4] demonstrated, however, that education in itself would not suffice to close—or even make an inroad into—the economic gap between blacks and whites. In 1964, the unemployment rate for minorities was double that of whites—for blacks the unemployment rate was ten percent; for whites, five percent.[5] Employed blacks held a vastly disproportionate share of the lowest status and lowest paying jobs: almost half of all black families earned less than sixty dollars a week, as compared to seventeen percent of white families.[6] These two basic indicators of economic position—unemployment rate and family income—showed no improvement for blacks in the ten years between the *Brown* decision and the enactment of Title VII.[7]

In the early 1960s the civil rights movement began to address workplace discrimination. Applying techniques learned from their efforts to integrate public accommodations, black leaders organized economic boycotts against employers who were notorious for not hiring minorities.[8] The American business community feared the possibility of a widespread economic disruption and an epic battle similar to the one that had taken

integration is a difficult undertaking, the alternative of labor unrest is more likely to stifle overall economic growth. Thus, he argues that change is inevitable and that an organized response by the business community is preferable to business disruptions. *Id.* at 1.

3. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954). For a description of the litigation history of this landmark decision see R. KLUGER, SIMPLE JUSTICE (1975).

4. 347 U.S. 483 (1954).

5. *See* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 3 (1966) (citing Holland & Wetzel, *Labor Force and Employment in 1964,* 88 MONTHLY LAB. REV. 393 (1965)). The 1963 manpower Report of the President prepared by the Department of Labor compared white and non-white unemployment rates in 1962. Total rates were 4.9% and 11.0%, respectively. Non-white unemployment comprised 22% of the nation's total unemployment. The report further compared levels of whites and non-whites represented in major occupational groups: non-whites made up 32.8% of service workers, while whites were only 10.6% of this group. Although overall the two groups had comparable concentrations of blue-collar workers, here too, discrimination was pervasive. As craftsmen and foremen, whites twice outnumbered non-whites: 13.6% versus 6.0%. Finally, non-whites were barely represented in white collar employment. They comprised only 5.3% of professional and technical employees; 2.6% of managers, officials, and proprietors; 7.2% of clerical workers; and 1.6% of sales workers. Overall, 47.3% of whites were white collar workers, while 16.7% of non-whites were white collar workers. HOUSE REPORT, *supra* note 2, at 2513-16, *also reprinted in* Operations Manual (BNA), The Civil Rights Act of 1964, 256 (1964).

6. *See* M. SOVERN, *supra* note 5, at 4.

7. *Id.* at 5.

8. *See* T. KHEEL, *supra* note 2, at 5-7 (describing consumer boycotts organized in Philadelphia, New York City, and Atlanta by local and national civil rights organizations); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973) (describing the Congress of Racial Equality's (CORE) protests that involved blocking access to a manufacturer's plant and headquarters).

place over Southern educational institutions and public facilities.[9] The courts were providing a vehicle for organized resolution of discrimination claims in these spheres,[10] but the law did not provide a vehicle for judicial intervention to address discrimination in the private work-place.

Against this backdrop, Congress enacted Title VII of the Civil Rights Act of 1964. The debates over its passage and the statute itself evidence what might be described as either a hopeful or a naive belief that not only economic parity for minorities, but also increased productivity for the nation as a whole, could be achieved through the elimination of blatant and easily identified discrimination.[11] The thrust of the Act was to get blacks into the work-force on an equal footing with whites.[12] From this starting point, it was presumed that economic disparities would disappear in the near future. The prohibition against gender discrimination was an afterthought, the repercussions of which neither Congress nor industry ever fully contemplated.[13]

In the decade following the passage of the Act, the country had some reason to believe that the promise of Title VII would be realized, eventually, if not quickly. There were some major employers who, when confronted with a legal prohibition against discrimination, changed their practices.[14] From the standpoint of judicial involvement, however, the

9. *See* T. KHEEL, *supra* note 2, at 3-5.

10. School desegregation cases include: Goss v. Board of Educ., 373 U.S. 683 (1963); McNeese v. Board of Educ., 373 U.S. 668 (1963); Cooper v. Aaron, 358 U.S. 1 (1958); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Wichita Falls Junior College Dist. v. Battle, 204 F.2d 632 (5th Cir. 1953), *cert. denied,* 347 U.S. 974 (1954).

Public facility cases decided after *Brown* but before the 1964 Act include: Johnson v. Virginia, 373 U.S. 61 (1963); Wright v. Georgia, 373 U.S. 284 (1963); Watson v. City of Memphis, 373 U.S. 526 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Baltimore v. Dawson, 350 U.S. 877 (1955); Department of Conservation & Dev. v. Tate, 231 F.2d 615 (4th Cir.), *cert. denied,* 352 U.S. 838 (1956).

11. *See, e.g.,* HOUSE REPORT, *supra* note 2, at 2515 (Representative McColloch noted: "The failure of our society to extend job opportunities to the Negro is an economic waste . . . [and] acts as a brake upon potential increases in gross national product.").

12. *See, e.g.,* HOUSE REPORT, *supra* note 2, at 2516 (The Equal Employment Opportunity Commission's (EEOC) "primary task is to make certain that channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.").

13. In the debate preceding the adoption of the amendment adding the sex discrimination prohibition, Congressman Celler commented that "when you examine carefully what the import and repercussions are concerning equal rights throughout American life . . . you run into a considerable amount of difficulty." 110 CONG. REC. 2577 (1963). "Sex" was added during the House debate and was not considered in any committee report. The debate, during what has come to be known as "ladies afternoon," included such substantive comments as "*Vive la difference.*" *Id.* at 2577. Nevertheless, the amendment passed on February 8, 1964, by a vote of 168 to 133. *Id.* at 2584.

14. A number of cases considered by the Supreme Court in the 1970s arose from situa-

process of eliminating work-place discrimination got off to a slow start. The Act became effective in July 1965 only for employers with more than one hundred workers; it was not until three years later that it reached employers of twenty-five, the original statutory threshold.[15] Moreover, Congress' plan for expeditious administrative resolution of charges against non-compliant employers proved unworkable. The agency charged with conciliating complaints, the Equal Employment Opportunity Commission (EEOC), was overwhelmed with an unanticipated volume of charges.[16] Furthermore, the requirement that claimants exhaust administrative remedies before moving to the federal courts[17] kept significant threshold procedural issues from judicial attention until the late 1960s.

Once cases finally began to reach the courts, however, there was cause for some optimism. Largely through class action litigation, policies and practices that effectively had excluded minorities from the workforce were struck down as violative of the statute.[18] Orders requiring the hiring or advancement of protected groups, as well as substantial back pay awards, encouraged employers to examine and reevaluate their employment and promotion criteria.[19] In its first round of statutory interpretation during the early 1970s, the Supreme Court made clear that it would insist on a broad construction of Title VII, one that was consistent

tions where, as a result of Title VII's passage, employers voluntarily eliminated purposefully segregated work-forces, but adopted other requirements that created the same result or did nothing to remedy the discriminatory effect of minority workers' lack of seniority. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (company maintained allegedly discriminatory pre-employment testing program); Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971) (company openly discriminated prior to passage of the Act but abandoned its policy of restricting blacks to certain positions in 1965).

15. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e (1981)). The threshold was lowered to fifteen employees in 1972. *See infra* note 82.

16. *See infra* notes 81-85 and accompanying text.

17. Civil Rights Act of 1964 § 706 (codified at 42 U.S.C. § 2000e-5 (1981)).

18. The Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), contributed substantially to Title VII's effectiveness. In *Griggs*, the Court established the notion of "disparate impact": a challenged policy that was neutral on its face but could be shown statistically to disproportionately exclude a protected group constituted a prima facie violation; the claimant had no need to show intent. Ultimately, unless the employer could prove that the policy was a "business necessity," it would be found illegal. *Id.* at 430-31.

19. In 1974, the EEOC settled two class actions involving large numbers of workers, highly visible companies, and over $60 million in back pay. The agency's agreement with nine steel companies and the United Steel Workers provided for $30,940,000 in back pay to approximately 40,000 minority and women employees. The agency's agreement with the American Telephone and Telegraph Company resulted in approximately 25,000 employees receiving $30 million in back pay and wage increases. NINTH ANNUAL REPORT OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1-2 (1975).

with the Act's remedial purposes.[20] In addition, Congress took steps to ameliorate the procedural defects of the Act and, in the 1972 amendments, increased the authority and power of the EEOC.[21]

In each term since then, the Supreme Court has issued several Title VII decisions, many of which have dealt with the propriety of various forms of negotiated or court-ordered injunctive and affirmative relief.[22] One issue that has not figured significantly in either judicial or congressional refinement[23] of Title VII, however, is the scope of monetary relief. This Article suggests that Title VII's limit on monetary relief to awards of back pay and exclusion of compensatory and punitive damages[24] must be readjusted if Title VII is to remain vital.

Over the years, the form and content of employment discrimination claims have changed yet the statute's remedial emphasis and structure have not. The broad ranging class action suit, remedied by affirmative injunctive relief and large aggregated monetary awards, no longer represents the paradigmatic Title VII case. Although this form of action remains associated with Title VII in both the public and the professional imagination, the new norm is the individual action, most frequently asserting a claim of discriminatory discharge.[25] Title VII has become es-

20. In the first Title VII case the Supreme Court heard, in a per curiam opinion, the Court reversed summary judgment in favor of a defendant employer who refused job applications from women with young children but otherwise hired a proportionate number of women. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971). Perhaps the clearest expression of the Court's belief in a broad construction of Title VII came several months later in *Griggs*. There, Chief Justice Burger condemned procedures that are "fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431. The Court interpreted Title VII as addressing more than simply "overt" discrimination. *Id.*; *see also supra* note 18.

21. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1981)); *see infra* notes 78-107 and accompanying text.

22. *See, e.g.*, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989); United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987); International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of the Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

23. Title VII was amended again in 1978 by the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1981)). The Act, which overrode the Supreme Court's decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), equates discrimination on the basis of pregnancy with discrimination on the basis of sex. *Gilbert* held that the exclusion of periods of disability related to pregnancy from disability plan coverage was not gender-based discrimination. *Id.* at 145-46.

24. For a discussion of the statutory language and judicial constructions that have led to this bar, see *infra* Part I.

25. Empirical evidence of shifts in the form and content of Title VII actions is set forth in Part III of this Article. The Supreme Court's recent Title VII docket also reflects this trend. Since the mid-1980s, the Court has been increasingly concerned with Title VII's application to subjective individualized decisionmaking. *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775

sentially a mechanism for the resolution of private disputes between employer and employee. These actions, which rest largely on proof of bias in individualized decision making rather than on explicit or implicit employer policies, do not lend themselves to class action treatment or injunctive relief.

What of the traditional Title VII remedies for the individual claim: reinstatement and back pay? These forms of relief do not provide a sufficient incentive for victims of discrimination to pursue the arduous course of federal litigation, which inevitably entails defending against the employer's charges of incompetence or lack of qualification.[26] Nor do they provide a sufficient incentive for employers to examine their subjective decisionmaking for evidence of discrimination.[27] In the individual action, reinstatement is often neither feasible nor desirable to the plaintiff.[28] Moreover, even if the plaintiff is reinstated, the rehiring of one employee does not have a significant economic impact on an employer. Back pay awards address only one element of the harm created by illegal employment practices, and do not encompass relief for factors such as damage to reputation and self-esteem, and loss of experience or professional opportunity. As with reinstatement, the deterrent effect of a threatened individual back pay award is often insignificant. Back pay eligibility terminates once a plaintiff finds or is offered comparable employment,[29] and interim earnings or amounts earnable with "reasonable diligence"

(1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Hishon v. King & Spaulding, 467 U.S. 69 (1984).

26. It is beyond the scope of the Article, and in fact may be impossible to prove empirically, that arguably meritorious Title VII actions go unlitigated because of limitations on potential monetary relief. The author's belief that this is the case is based on years of experience counselling clients in both a civil rights law school clinical program and a public interest law practice, and on conversations with other practitioners in this area. It is generally recognized by those who practice civil rights law that for every one client who chooses to pursue a Title VII claim, there are dozens who—once informed of the likelihood of recovery and the arduous course of litigation—prefer to put the experience of discrimination behind them and not to sue at all.

27. There is a substantial body of social science research showing how stereotypical thinking infects subjective decisionmaking in the employment context. *See* Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination,* 21 B.C.L. REV. 345, 349-61 (1980); Brief of NOW Legal Defense and Education Fund as Amicus Curiae for Respondents at 5-22, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167); Brief of the American Psychological Association as Amicus Curiae for Respondents, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (No. 87-1167).

28. For a discussion of one relevant empirical study on this point, *see infra* note 137.

29. *See, e.g.,* Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). In *Ford Motor,* the Court held that when a plaintiff rejects a defendant-employer's job offer during the course of litigation, the back pay period is terminated despite the fact that the offer does not include seniority or back pay dating from the original discriminatory decision. The Court reasoned that the plaintiff was entitled to pursue fuller compensation in the context of the litigation. *Id.* at 241.

must be offset against awards.[30] Thus, given the absence of any broad compensatory or punitive elements in the remedial scheme, the statute, in effect, deprives the most competent and qualified employees—those who become reemployed quickly and who are probably in the best position to prove discrimination—of any monetary incentive to litigate their claims. The occasional availability of common law or state statutory claims does not provide a sufficient substitute for a uniform national policy that encourages the assertion of discrimination claims.[31]

30. Title VII provides that "[i]nterim earnings or amounts earnable with reasonable diligence . . . shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g) (1982). The mitigation requirement has been used to terminate back pay eligibility when failure to exercise reasonable diligence is proved. *See, e.g.*, Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986); Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979). The burden of persuasion, however, rests with the defendant. *See, e.g.*, Nord v. United States Steel Corp., 758 F.2d 1462 (11th Cir. 1985); Jackson v. Shell Oil Co., 702 F.2d 197 (9th Cir. 1983); Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); Sprogis v. United Air Lines, 517 F.2d 387 (7th Cir. 1975).

31. The Supreme Court has recognized that state causes of action are not preempted by Title VII. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) (footnote omitted), the Court noted: "an individual [is to be allowed] to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *See also* Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975).

Thus, it can be argued that even if Title VII has significant remedial limitations, a plaintiff can simply add a state law cause of action to a federal court complaint under Title VII and thereby increase the scope of monetary relief. State employment laws or state common law tort claims like intentional infliction of emotional distress may provide other causes of action. *See* Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 5 HARV. WOMEN'S L.J. 35 (1982); Note, *State Constitutional Right to Damages for Private Discrimination in Employment*—Walinski v. Morrison & Morrison, 28 DE PAUL L. REV. 229 (1978) (authored by Gregory St. John); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151 (1979).

Reliance on state remedies, however, is an unsatisfactory solution. State tort claims are often very difficult to prove. For example, in a state tort action for intentional infliction of emotional distress, courts generally have required proof of more than mere intent to hurt the feelings of the plaintiff. The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and . . . [must be] regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

Moreover, a trial court has ultimate discretion over whether to exercise pendent jurisdiction. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). The trial court must consider whether the federal claim is substantial; whether the federal and state claims derive from a common nucleus of operative fact; whether the claims normally would be expected to be tried together; and whether judicial economy, fairness, and convenience all would be served by hearing the state claims in the federal proceeding. *Id.* at 725. Pendent jurisdiction, however, may not be exercised when Congress has indicated an intention to deny it. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978). On this basis, several district courts have ruled that when federal question jurisdiction is based on Title VII, there can be no pendent

In the period following Title VII's enactment, a few commentators passingly noted the inadequacy of the back pay remedy and suggested

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jurisdiction over state claims that may give rise to legal relief and a right to a jury trial. *See, e.g.,* Haroldson v. Hospitality Sys., Inc., 596 F. Supp. 1460, 1461 (D. Colo. 1984); Frye v. Pioneer Logging Mach., Inc., 555 F. Supp. 730, 733-35 (D.S.C. 1983); Bennett v. Southern Marine Management, 531 F. Supp. 115, 117-18 (M.D. Fla. 1982); Jong-Yul Lim v. International Inst. of Metro. Detroit, 510 F. Supp. 722, 725 (E.D. Mich. 1981); Kiss v. Tamarac Utils., Inc., 463 F. Supp. 951, 954 (S.D. Fla. 1978). These courts reasoned that since the relief provided by Congress under Title VII is equitable in nature and specific procedural limitations are mandated—such as trial to the bench and expeditious disposition—Congress implicitly intended to deny pendent jurisdiction over state law claims.

Only one circuit court has commented on the standard a district court should use when deciding whether to hear a state claim that is pendent to a Title VII claim. In Bouchet v. National Urban League, Inc., 730 F.2d 799, 805-06 & n.2 (D.C. Cir. 1984), the court affirmed the dismissal of pendent claims for defamation and "sexual extortion" in a sex discrimination action. It based its decision on the "great discrepancy" between limited equitable relief under Title VII and full compensatory relief under state causes of action and the fact that "the pendent claims might well become the predominant element of the lawsuit." *Id.* at 805. The Fifth Circuit in Womble v. Bhanagu, 864 F.2d. 1212 (5th Cir. 1989), declined to decide whether courts may exercise greater reluctance in asserting their pendent jurisdiction in cases where Title VII serves as the basis for the sole federal claim. The district courts, however, have cited *Bouchet* in declining jurisdiction over pendent claims where state-law claims threaten to predominate the lawsuit due to the limited nature of Title VII's relief. *See, e.g.*, Bennet v. Steiner-Liff Iron and Metal Co., 714 F. Supp. 895 (M.D. Tenn. 1989); Brown v. City of Miami Beach, 684 F. Supp. 1081 (S.D. Fla 1988); Rose v. Sorg. Products, Inc., 612 F. Supp. 212 (N.D. Ind. 1985); Spencer v. Banco Real S.A., 623 F. Supp. 1008 (S.D.N.Y. 1985) (declined to exercise jurisdiction over pendent state claims where the only substantial Federal claim arose out of Title VII); Curtain v. Hadco Corp., 676 F. Supp. 408 (D.N.H. 1987) (declined to address state claims in light of the interest of judicial economy, convenience, and fairness to litigants, and the interests of the jury); Bradford v. General Tel. Co. of Mich., 618 F. Supp. 390 (D.C. Mich. 1985) (declined to address state claims since it would not serve the interests of judicial economy).

Even when district courts decide that they may exercise their discretion and accept pendent claims for various reasons, many have declined to do so. A number of cases have rejected pendent claims. *See, e.g.,* Bouchet v. National Urban League, Inc., 730 F.2d 799 (D.C. Cir. 1984) (dismissal of pendent claims for defamation and "sexual extortion" in a sex discrimination action affirmed on basis of "great discrepancy" between limited equitable relief under Title VII and full compensatory relief relief under state causes of action since the pendent claims might well become the predominant element in the lawsuit); Wilhelm v. Continental Title Co., 720 F.2d 1173 (10th Cir. 1983) (affirming dismissal of private action for handicap discrimination owing to failure to state a claim on which relief could be granted and affirming dismissal of pendent state claim), *cert. denied,* 465 U.S. 1103 (1984); Lettich v. Kenway, 590 F. Supp. 1225 (D. Mass. 1984) (court will not assert pendent jurisdiction over state law claims in a case involving the Age Discrimination Employment Act); SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 741-42 n.14 (2d ed. 1983), 177 (2d ed. Supp. I 1987 & Supp. II 1989).

The inconsistency of state statutory protection and pendent state claims counters the express intent of Congress in enacting Title VII to establish national standards for relief from employment discrimination. *See generally* Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts,* 32 AM. U.L. REV. 777 (1983) (examining the federal and state remedies for employment discrimination and analyzing the application of pendent jurisdiction in employment discrimination cases).

that tort based remedies would be more appropriate.[32] But over the years, the statute's remedial limitations have come to be an accepted and unexamined feature of employment discrimination law. This Article attempts to look beyond the rather self-evident proposition that the availability of broader monetary relief would encourage the bringing of meritorious Title VII claims as well as the more critical examination of employment decisions for evidence of discrimination. It considers why the bar to damages has gone largely unquestioned and why it has an increasingly significant impact on the viability of the Title VII enforcement scheme.

Part I examines the genesis of Title VII's monetary relief provisions and suggests that the limitations grew out of a legislative compromise that unwittingly imposed remedies appropriate for a public enforcement model on a statutory scheme wholly directed toward private enforcement. Part II analyzes how the adoption of two distinct "burden of proof" models under Title VII further contributed to a "public/private" dichotomy and accentuated the statute's remedial limitations in individual enforcement efforts. Part III demonstrates empirically that the "private" model of Title VII actions has come to predominate in recent years. Part IV suggests that the inadequacy of Title VII remedies has been disguised somewhat by the availability of an alternative avenue of monetary relief, an avenue, however, that recently has been substantially

32. Articles critical of the back pay provisions of Title VII include: Anderson, *Civil Rights and Fair Employment*, 22 BUS. LAW 513, 521 (1967) ("Title VII has no teeth."); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 96-97 (1964) ("It seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination."); Kammholz, *Civil Rights Problems in Personnel and Labor Relations*, 53 ILL. B.J. 464, 479 (1965) ("[B]usinessmen subject to Title VII should disregard it."); Special Project, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1252-53 (1971) ("the rewards for the individual who successfully brings suit normally provide insufficient incentive to overcome the delay and expense necessarily entailed in litigation . . . the possible financial rewards, back pay less interim earning, are inadequate to overcome this delay as well as the trouble and expense of litigation"); Comment, *Title VII of the 1964 Civil Rights Act—A Prayer for Damages*, 5 CAL. W.L. REV. 252, 256 (1969) (authored by Dennis Avery) ("A claimant under Title VII may feel such time consuming recourse is unsatisfactory and leads to minimal personal relief, and employers may become increasingly aware of means by which to thwart the intent of the Act."); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 467 (1965). One student suggests in Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 492 (1968), that "the ineffectiveness of the private action derives primarily from the inadequacy of the remedies available to an aggrieved individual." The Note also postulates that the statutory language may be interpreted to provide for tort damages and cites the language of 42 U.S.C. § 2000e-5(g) (1964) as it existed before the 1972 amendment which stated that a court may "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." Note, *supra*, at 492.

restricted by the Supreme Court. Finally, Part V recommends legislative changes that would encourage the bringing of meritorious actions and would conform Title VII's remedial scheme to that of other discrimination statutes. I argue also that even within the confines of the existing statute, however, there is room for more judicial flexibility in the fashioning of monetary relief. I suggest that courts can compensate plaintiffs for loss of employment opportunity as part of their equitable authority.

Of course, disincentives to the commencement of Title VII litigation today do not stem solely from limitations on monetary relief. The entire civil rights arena has felt the impact of a newly reconstituted Supreme Court that is apparently intent upon substantively narrowing protections against discrimination. The decisions of the 1988 term,[33] however, have resulted in renewed congressional interest in Title VII and related claims, and employment discrimination statutes will be examined critically for the first time in many years. The proposed Kennedy-Hawkins Civil Rights Act of 1990 (1990 Act)[34] addresses several of the restrictive decisions that pertain to the "public" model of employment litigation.[35] In addition, it provides for the award of compensatory damages, for puni-

33. In City of Richmond v. J.A. Crosen Co., 109 S. Ct. 706 (1989), the Court struck down as violative of the fourteenth amendment a local ordinance requiring a percentage of city construction contracts to be awarded to minority businesses because there was no proof that the action was a justifiable remedial response to past discrimination. *Id.* at 708-09. The decision calls into question the legality of many state and local affirmative action hiring programs. In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), the Court announced that evidence of statistical racial imbalance does not completely shift the burden of justifying employment practices to the employer; the plaintiff must demonstrate causation between the imbalance and hiring or promotion practices. *Wards Cove* thus creates a substantial obstacle to the proof of a public class-based claim. Two procedural decisions also call into question the viability of public claims. Martin v. Wilks, 109 S. Ct. 2180 (1989), held that white employees may challenge court-approved affirmative action consent decrees to which they were not parties on the ground that the decrees create an illegal race-based preference. In addition, Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), held that the statutory period for challenging changes in a seniority system begins to run from the time the changes are adopted rather than from the time the changes begin to affect an employee.

The implications of Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), and its restructuring of the application of section 1981 to employment discrimination is discussed at length in Part IV *infra.*

All of these decisions will contribute to the already apparent shift in employment discrimination litigation to the private Title VII model and further accentuate the need for reconsideration of that remedial scheme.

34. S. 2104, 101st Cong., 2d Sess. (1990).

35. The Act primarily is aimed at overturning or altering the effect of five 1989 Supreme Court decisions that substantially limited protections available to victims of racial and sexual job discrimination. The first of those cases is *Patterson,* 109 S. Ct. at 2363, in which the Supreme Court held that section 1981 of the Civil Rights Act of 1866 does not prohibit racial harassment on the job, but only protects the right to make and enforce contracts. The Civil Rights Act of 1990 would amend section 1981 to reaffirm that the right "to make and enforce

tive damages in the case of "malice" or "reckless or callous indifference" to Title VII protections, and jury trials on demand.[36] The fate of the proposed 1990 Act is uncertain. While it seems likely that the legislature will enact it, a presidential veto is possible.[37]

There is a substantial risk that the existing patterns of judicial and congressional treatment of Title VII will be replicated in the final version of the 1990 Act. Under this scenario, the provisions that facilitate class action, "public" type litigation will be enacted in the wake of the widespread outcry over Supreme Court cutbacks, while the crucial damages provision addressing "private" claims will be cut as a result of political compromise or the failure of the legislature to fully appreciate the dilemmas faced by the private litigant. In the debate over the damages section

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contracts" includes the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. S. 2104, 101st Cong., 2d. Sess. § 12 (1990).

The Act would also return the burden of proof to employers in disparate impact cases to require that they demonstrate a business necessity for the disproportionate exclusion of women and minorities from jobs. Section four of the Act effectively would overturn Ward's Cove Packing Co. v. Antonio, 109 S. Ct. 2115 (1989), which interpreted the landmark case of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and held that the employer need no longer prove a business necessity no matter how strong the plaintiff-employee's proof of disparate effect. S. 2104, 101st Cong., 2d Sess. § 4 (1990).

Further, the Act would alter the holding in Martin v. Wilks, 109 S. Ct. 2180 (1989), by guaranteeing notice to persons who might be affected adversely by a proposed court order, but barring subsequent lawsuits challenging the court order except under certain unusual circumstances. S. 2104, 101st Cong., 2d. Sess. § 6 (1990). In addition, the Kennedy-Hawkins Act would clarify the time at which the statute of limitations for bringing a Title VII action begins to toll, altering the holding in Lorance v. AT&T Technologies, 109 S. Ct. 1775 (1989). *Lorance* held that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is applied to the individual. The Act permits persons to challenge discriminatory seniority plans when those plans actually harm them. The Act simultaneously confirms that proof of discrimination in the adoption of the seniority plan that implemented the lay off is required. S. 2104, 101st Cong., 2d. Sess. § 7 (1990).

Finally, the Act also is aimed at *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). There, the Supreme Court indicated that employment decisions motivated, at least in part, by prejudice do not violate the law if the employer can show after the fact that the same decision would have been made if it had not engaged in intentional discrimination. The Act would provide that any reliance on prejudice in the making of employment decisions is illegal, while clarifying that the consideration of appropriate relief does not entail court ordered hiring or promotion of a person not qualified for the job. S. 2104, 101st Cong., 2d. Sess. § 5 (1990). *See also* McMillion, *Push Begins for New Civil Rights Act*, 76 A.B.A. J. 113 (1990); *Summary of the Civil Rights Act of 1990*, Memorandum from the Office of Senator Edward M. Kennedy (May 17, 1990) (accompanying statement of the Senator announcing agreement on the civil rights legislation); Rasky, *Lawmakers Aiming at Reversing Bias Rulings*, N.Y. Times, June 14, 1989, at A18, col. 4; Greenhouse, *A Changed Court Revises Rules on Civil Rights*, N.Y. Times, June 18, 1989, sec. 4, at 1, col.1.

36. S. 2104, 101st Cong., 2d Sess. § 8 (1990).

37. McMillion *supra* note 35, at 114; Marcotte, *ABA Backs Civil Rights Bill*, A.B.A. J., Apr. 1990, at 104.

of the Act, the same bankrupt justifications for limited monetary relief that have preserved the Title VII remedial scheme in the past are being forwarded.[38] I hope that this Article will dispose of some of the myths surrounding the back pay remedy and highlight the importance of legislative action, which would enable Title VII to become an effective private enforcement mechanism for the individual litigant.

I. The Legislative History of the Back Pay Remedy

The courts have not extensively debated whether Title VII allows for the award of monetary relief beyond back pay. Apart from a few early decisions,[39] claims for compensatory and punitive damages have been summarily rejected.[40] Given the unanimity of opinion, it is not sur-

38. The Bush administration and other opponents' main objection to the damages section is that the allowance of compensatory and punitive damages under Title VII would "transform Title VII from a statute aimed at conciliation, administrative resolution, settlement and placing a victim of discrimination in his or her rightful place in the work force into a statute in which conflict in the work place will be exacerbated. Protracted costly litigation will be the weapon of first resort. The bill will simply be a bonanza for lawyers." 136 CONG. REC. S3144 (daily ed. Mar. 26, 1990) [hereinafter 1990 Act Legislative History] (Statement of Senator Orrin G. Hatch). These comments ignore the fact that the much touted conciliation/administrative resolution scheme resolves only a tiny fraction of Title VII claims and is in large part ignored by savvy litigants. In addition, the objections fail to acknowledge that in racial employment discrimination actions, damages were available widely during the period 1968-1989 through the operation of section 1981, without an obvious in workplace friction or an influx of opportunistic litigation.

39. *See* Claiborne v. Illinois Cent. R.R., 401 F. Supp. 1022 (E.D. La. 1975), *aff'd in part, vacated in part,* 583 F.2d 143 (5th Cir. 1978) (compensatory damages), *cert. denied,* 442 U.S. 934 (1979); Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832, 842 (W.D. Tex.), *rev'd on other grounds,* 488 F.2d 691 (5th Cir. 1973); Stamps v. Detroit Edison Co., 365 F. Supp. 87, 124 (E.D. Mich. 1973), *rev'd,* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975) (punitive damages); Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972) (punitive damages); Tidwell v. American Oil Co., 322 F. Supp. 424 (D. Utah 1971).

40. *See* Musikiwamba v. Essi, Inc., 760 F.2d 740, 748 (7th Cir. 1985) (compensatory damages); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 992 & n.2 (8th Cir. 1984) (compensatory damages); Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982) (neither compensatory nor punitive damages); Walker v. Ford Motor Co., 684 F.2d 1355, 1363-64 & n.14 (11th Cir. 1982); Farmer v. ARA Servs., Inc., 660 F.2d 1096, 1196 (6th Cir. 1981) (compensatory damages not available); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 194 (6th Cir. 1978) (compensatory damages available), *cert. denied,* 441 U.S. 932 (1979); Richerson v. Jones, 551 F.2d 918, 926-28 (3d Cir. 1977) (punitive damages not available); Pearson v. Western Elec. Co., 542 F.2d 1150 (10th Cir. 1976) (punitive damages not available); Seymore v. Reader's Digest Ass'n, 493 F. Supp. 257, 267 (S.D.N.Y. 1980) (neither compensatory nor punitive damages available); NOW v. Sperry Rand Corp., 457 F. Supp. 1338, 1347 (D. Conn. 1978) (neither compensatory nor punitive damages available); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1078 (D. Me. 1977) (neither compensatory nor punitive damages available); Wright v. St. John's Hosp., 414 F. Supp. 1202, 1205 (D. Okla. 1976) (compensatory damages not available); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368-71 (S.D.N.Y. 1975) (neither compensatory nor punitive dam-

prising that courts engage in a very limited analysis: the general response is that since Title VII speaks of "equitable" relief, "damages at law" are precluded.[41] To the extent courts delve deeper, they rely on the statute's legislative history as indicating an intent to bar broader monetary relief.[42] Support for this view rests on the premise that Congress modeled Title VII remedies on those of the National Labor Relations Act

ages available); Jiron v. Sperry Rand Corp., 423 F. Supp. 155, 165 (D. Utah 1975) (neither compensatory nor punitive damages available); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854, 855-56 (N.D. Ga. 1974) (neither available); Loo v. Gerarge, 374 F. Supp. 1338, 1345 (D. Haw. 1974) (neither available); EEOC v. Brotherhood of Painters, Decorators & Paperhangers Local 857, 384 F. Supp. 1264, 1269 (D.S.D. 1974) (neither available); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 835-38 (N.D. Cal. 1973) (neither available); Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972) (compensatory damages).

41. Cases holding that because Title VII allows only equitable remedies, compensatory and punitive damages (considered "legal" remedies) are not available include: *Harrington*, 585 F.2d at 194-96; *Seymore*, 493 F. Supp. at 267; *NOW*, 457 F. Supp. at 1347; *Curran*, 435 F. Supp. at 1078; *Whitney*, 401 F. Supp. at 1368-71; *Jiron*, 423 F. Supp. at 165; *Brotherhood of Painters, Decorators & Paperhangers*, 384 F. Supp. at 1269; *Van Hoomissen*, 368 F. Supp. at 835-38.

42. Some courts conclude from the language of 42 U.S.C. § 2000e-5(g) that compensatory and punitive damage awards are not allowed under the law. For example, in *Whitney* the court noted that the statute itself does not expressly authorize such awards. 401 F. Supp. at 1368-71. In numerous other cases as well, the courts have interpreted Congress' omission of specific reference to compensatory and punitive damages in Title VII as being significant. *See Pearson*, 542 F.2d at 1151-52; *Wright*, 414 F. Supp. at 1208; *Jiron*, 423 F. Supp. at 165; *Howard*, 372 F. Supp. at 855-56; *see also*, *Loo*, 374 F. Supp. at 1341-42; *Tooles*, 336 F. Supp. at 18.

Some courts have decided that the purpose of Title VII bars an award of compensatory and punitive damages. In *Jiron*, after finding that the purpose of Title VII was to eliminate discrimination in employment, the court noted that the back pay and other equitable remedies allowed under Title VII are sufficient to discourage discrimination in employment and, therefore, held that it was not necessary to award compensatory or punitive damages. 423 F. Supp. at 165; *see also Pearson*, 542 F.2d at 1151-52; *Tooles*, 336 F. Supp. at 18.

Some courts have compared Title VII with other statutes in deciding not to allow compensatory or punitive damage awards. For example, several courts have compared Title VII with the National Labor Relations Act (NLRA). "Title VII was enacted to regulate the employer/employee relationship with regard to discrimination of employment. It was explicitly patterned after the NLRA. In particular, Title VII's remedial provisions were drawn directly from section 10(c) of the NLRA." Musikiwamba v. Essi, Inc., 760 F.2d 740, 748 (7th Cir. 1985). Moreover, the similar remedial provisions of Title VII and the NLRA both have been interpreted as prohibiting the award of punitive damages and compensatory damages for mental humiliation, pain, and suffering. For this same reason the Eleventh Circuit in *Walker* stated that neither compensatory nor punitive damages are available in a Title VII suit. 684 F.2d at 1363-64; *see also Muldrew*, 728 F.2d at 992; *Harrington*, 585 F.2d at 194-96; *Richerson*, 551 F.2d at 926-28; *Pearson*, 542 F.2d at 1151-52; *Whitney*, 401 F. Supp. at 1368-71; *Howard*, 372 F. Supp. at 855-56; *Van Hoomissen*, 368 F. Supp. at 835-38.

(NLRA),[43] under which no damages are permitted,[44] and on the fact that Congress did not provide for a jury trial of Title VII claims.[45]

These bases for the limitation on remedy are not without some foundation. In a superficial sense, they accurately reflect the statute's legislative history. A closer examination of the development of Title VII, however, reveals that Congress never gave serious thought to the question of monetary relief. The indicia of intent upon which the courts have relied do not necessarily support the rigid interpretation of remedy that has been adopted. These indicia in fact arose from political compromises unrelated to the question of damages.

As originally enacted, the remedial section of Title VII provided that a court may enjoin discriminatory practices and "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."[46] In the 1972 amendments to the statute, the phrase "and any other equitable relief as the court deems appropriate" was appended to the original provision.[47] Because the statutory reference to equity is often viewed as a conclusive bar to damages, it is useful to consider first the original statute and then examine the intent of the amending language.

A. The Civil Rights Act of 1964

The 1964 Act did not grow out of a neat legislative process. In the twenty years prior to Title VII's passage, employment discrimination legislation was introduced in each congressional session, but none of the

43. 29 U.S.C. § 160(c) (1982) ("[w]here an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him"); *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) ("The 'make whole' purpose of Title VII is made evident by the legislative history. The back pay provision was expressly modeled on the back pay provision of the National Labor Relations Act."); *see also supra* note 39.

44. *See, e.g.*, Linn v. United Plant Guard Workers of Am. Local 114, 383 U.S. 53, 63 (1966); International Union, UAW v. Russell, 356 U.S. 634, 645-46 (1958); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938); Herald Co. v. NLRB, 444 F.2d 430, 436 (2d Cir.), *cert. denied*, 404 U.S. 990 (1971); Lummus Co. v. NLRB, 339 F.2d 728, 738 (D.C. Cir. 1964).

45. 42 U.S.C. § 2000e-5(f)-(g) (1982). The seventh amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. Commentators have suggested that if Congress wanted to allow for damage awards under Title VII, it would have provided specific authority for a jury trial. *See* 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION 55-59 (2d ed. 1988) [hereinafter SULLIVAN & ZIMMER].

46. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259-261 (1964) (codified as amended at 42 U.S.C. § 2000e-5(g) (1981)).

47. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104-107 (codified as amended at 42 U.S.C. § 2000e-5(g) (1981)).

bills came close to enactment.[48] Serious congressional consideration began with the 88th Congress in 1962, spearheaded by the administration's commitment to the passage of a civil rights law and a sense that the political climate required action.[49] After President Kennedy's assassination, many legislators viewed the passage of a bill as an urgent matter, and this in turn led to a departure from the usual system of careful committee deliberation.[50] Critical portions of the final law were forged on the floor of the Senate; thus, expressions of intent must be divined from the Congressional Record rather than from the more authoritative committee reports.[51] This truncated process particularly affected the consideration of enforcement and remedy and leaves in doubt whether Congress either explicitly or implicitly intended the back pay limitation.

Two highly distinct models of enforcement emerged from the many bills introduced in the 88th Congress. The first, adopted by the House Committee on Education and Labor, envisioned the creation of an Equal Employment Opportunity Commission (EEOC, The Commission) that would resemble the National Labor Relations Board (NLRB, The Board) in operation.[52] The Office of the Administrator would prosecute complaints upon a finding of reasonable cause, and the EEOC Board would perform the judicial function, with the power to issue cease-and-desist orders and to award back pay.[53] This scheme contemplated limited judicial review in the federal courts.[54]

The alternative model created a very different role for the EEOC. Developed by the House Judiciary Committee, this version viewed the agency as primarily responsible for the conciliation and settlement of discrimination claims, but the agency was not completely without enforcement powers. In the event that no agreement could be reached, the EEOC could seek injunctive and back pay relief in the federal courts.[55]

48. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 7-8; *see also* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

49. In June 1963, President John F. Kennedy submitted a special message to Congress urging the passage of fair employment legislation and referring to "a rising tide of discontent that threatens the public safety." 109 CONG. REC. 3245 (1963).

50. *See* H.R. REP. NO. 914, pt. 2, 88th Cong., 1st Sess. (1964), *reprinted in* Operations Manual (BNA), *The Civil Rights Act of 1964* at 22 (1964).

51. *See* Vaas, *supra* note 48, at 457-58.

52. H.R. REP. NO. 570, 88th Cong., 1st Sess. 5 (1963).

53. H.R. REP. NO. 405, 88th Cong., 1st Sess. (1963).

54. *Id.*

55. HOUSE REPORT, *supra* note 2, at 2405 ("This affirmative action may include the reinstatement or the hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).").

The committee report accompanying this version referred to the carry-over of the NLRA[56] remedial scheme without its administrative enforcement component but did not discuss the impact of this new scheme.[57] Rather, the rationale offered for a non-adjudicative agency model rested on the belief that the threat of judicial involvement would promote settlement, and that the federal bench should make the "ultimate determination of discrimination" after a de novo trial, thus providing a "fairer forum" for employers and unions.[58]

The full House adopted the Judiciary Committee's enforcement scheme.[59] The bill then went directly to the Senate floor without further committee consideration.[60] During the ensuing debate, which lasted eighty-three days, the statute went through substantial changes, not the least of which concerned enforcement. The so-called Mansfield-Dirksen substitute further weakened the EEOC's powers.[61] It eliminated the agency's authority to bring a civil action and transferred that power to individual complainants, after exhaustion of the conciliation process.[62] The substitute included only two concessions to a "public" enforcement model: it permitted the Attorney General to bring a federal action in the case of a pattern or practice of discrimination and it allowed for an

56. 29 U.S.C. §§ 151-168 (1973 & Supp. 1990).

57. 1964 U.S. CODE CONG. & ADMIN. NEWS at 2515-16 (additional views of Representative McCulloch).

58. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the federal judiciary.

> Through this requirement, we believe that the settlement of complaints will occur more rapidly and with greater frequency. In addition, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceeding together with the necessity of the Commission proving discrimination by a preponderance of the evidence.

Id.

59. 110 CONG. REC. 2804-05 (1964).

60. Whether the bill would be referred to committee was debated over several weeks. Senators Dirksen and Morse argued strenuously that defects in the bill required the Judiciary Committee's consideration. Senator Morse commented that his desire to send the bill to the Judiciary Committee was based on his concern that the Supreme Court have sufficient legislative history published so that it could adequately judge the intent of Congress. *Id.* at 6417-27. Senator Dirksen argued that the House bill was replete with examples of negligence in legislative drafting. He cited excerpts from several sections that he particularly thought would cause problems in the future if the Senate did not allow the Judiciary Committee to hold hearings and take the time needed to analyze a complex and comprehensive piece of legislation. In addition, he complained that the enforcement scheme of the House bill duplicated state enforcements already in operation. *Id.* at 6445-51.

61. *See id.* at 14,237-39. The substitute, an amendment that replaced the entire bill, was created by a bipartisan group to find compromises that would ensure the passage of the legislation.

62. *See id.* at 14,331-32 (memorandum analyzing changes prepared by Judiciary Committee staff).

award of attorney's fees to prevailing parties in court proceedings.[63] The House adopted this version of Title VII without conference or debate[64] and the President signed it into law on the same day.

This abbreviated history suggests that reliance on analogies between Title VII and the NLRA as authority for back pay limitations does not withstand close scrutiny. The process of adoption left Title VII with a remedy borne out of a particular enforcement ideology that did not survive in the final version of the statute. The labor scheme represents a very different allocation of responsibility between private and public enforcement and between agency and judicial power. The primary intent of the NLRA was to preserve industrial peace and to eliminate labor disruption that interfered with commerce.[65] The enforcement mechanisms adopted to achieve this purpose were designed with a view towards simplicity, directness, and prompt resolutions of disputes.[66] Thus, the Board was given extensive authority: it was empowered to hold full adjudicatory hearings on charges of unfair labor practices[67] and to devise remedies within the statutory framework as it saw fit.[68] The power to award back pay was placed firmly with the NRLA and subject to virtually no interference from the courts.[69] Indeed, limited judicial review of all as-

63. It has been suggested that the fee allowance provision was added to secure bipartisan support for the elimination of the EEOC's enforcement power. *See* Vaas, *supra* note 48, at 453-54.

64. 110 CONG. REC. 15,897 (1964).

65. *See* 29 U.S.C. § 151 (1982) (findings and declaration of policy); *see also* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 258 (1939) ("The purpose of the act is to promote peaceful settlement of disputes"); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 222 (1938) ("[I]t cannot be maintained that the exertion of federal power must await the disruption of [interstate and foreign] . . . commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq.").

66. *See, e.g.,* International Union, UAW v. Scofield, 382 U.S. 205, 211 (1965) ("The aim of the Act is to attain simplicity and directness both in administrative procedure and on judicial review.") (quoting Ford Motor Co. v. NLRB, 305 U.S. 364, 369 (1939)); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945) ("So far as we are here concerned, that purpose is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relation which the Board is to foster.").

67. 29 U.S.C. § 160(b)-(c) (1982).

68. *See, e.g., Republic Aviation Corp.,* 324 U.S. at 798 ("a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation").

69. *See, e.g.,* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263-64 (1969) (citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47 (1953)) ("When the Board in the exercise of its informed discretion makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."); NLRB v. Gissel Packing Co., 395 U.S 575, 612 n.32 (1969); Vaca v. Sipes, 386 U.S. 171, 179 (1967); NLRB v. Link-Belt Co., 311 U.S. 584, 597 (1941) ("Congress has left questions of law which arise

pects of labor board proceedings is central to the structure of the scheme.[70] Coupled with the Board's authority, however, was the notion that it was enforcing public rather than private rights.[71] The concern of the statute was not only to assist employees but also to assist employers.[72]

The Supreme Court recognized that the back pay limitation under the NLRA was part of this balance, both procedurally and substantively. In *United States v. Laburnum Construction Corp.*,[73] the Court noted that the public nature of the labor regulation provides the explanation for the law's failure to provide full compensation. It characterized back pay as only "minor supplementary" relief as compared to a "general compensa-

before the Board—but not more—ultimately to the traditional review of the judiciary . . . Congress entrusted the Board, not the courts, with the power to draw inferences from the facts.").

70. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) ("Where the question is one of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) ("The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. The exercise of the process was committed to the Board, subject to limited judicial review.").

71. *Phelps Dodge Corp.*, 313 U.S. at 194; *Vaca*, 386 U.S. at 182 n.8 ("The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies.").

72. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965) ("a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management"). Congressional interest in a fine and even balance of the dynamic and conflicting interests of labor and management is made still more explicit in the legislative history of the Act. The conference committee that produced the Act recorded the "paramount public interest" in labor disputes. H.R. REP. NO. 510, 80th Cong., 1st Sess. 1, *reprinted in* 1947 U.S. CODE CONG. & ADMIN. NEWS 1135. The committee then made explicit the "two sided" policy of the Act: it was concerned at once with affording organizational bargaining rights to labor and with minimizing the effects of labor unrest to benefit management and the public. 1947 U.S. CODE CONG. & ADMIN. NEWS at 1136. The House and Senate agreed to impose upon labor organizations a duty to bargain in Section 8(b)(1), to complement the parallel duty imposed on employers by Section 8(a)(5). 29 U.S.C. §§ 158(a)(5), 158(b)(1)(B), *discussed in* 1947 U.S. CODE CONG. & ADMIN. NEWS at 1149. The courts, out of a healthy respect for Congress' skill in compromising the inevitable conflicts of a functioning society, have endeavored to foster this congressional policy of even-handed treatment. When dealing with unions, courts demonstrate a willingness to strike down union actions which move beyond the permitted boundaries. *See, e.g.*, Mobile Mechanical Contractors Ass'n v. Carlough, 664 F.2d 481, 484-85 (5th Cir. 1981), *cert. denied.*, 456 U.S. 975 (1982); Kling v. NLRB, 503 F.2d 1044, 1046 (9th Cir. 1975); Douds v. Local 1250, Retail Wholesale Dept. Store Union of Am., 170 F.2d 700, 701 (2d Cir. 1948). Similarly, courts have found employers' discrimination between union and non-union employees to be inherently destructive of section seven bargaining rights and have uniformly held such conduct to be unlawful. *See, e.g.*, NLRB v. Great Dane Trailers Inc., 388 U.S. 26, 34-35 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 235-36 (1963).

73. 347 U.S. 656 (1954).

tory procedure."[74] Expanding on this view in a later case, Chief Justice Warren commented in a dissent that the availability of broader monetary relief would disturb the carefully wrought balance of competing interests and create increased friction rather than peaceful resolution in labor-management conflict.[75] On the procedural side, however, the back pay limitation represented a logical trade-off for an efficient administrative process.[76]

The differences between Title VII and the labor law structure as they pertain to back pay are apparent.[77] There is no equivalent to what

74. *Id.* at 663-65. The Court explained that state procedures existed to remedy tortious conduct. Then the Court stated:

> The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.
>
> The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay.

See also Virginia Elec. & Power Co. v NLRB, 319 U.S. 533, 543 (1943):

> The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this [respect] both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights.

75. I can conceive of nothing more disruptive of congenial labor relations than arming employee, union and management with the potential for "smarting" one another with exemplary damages. Even without the punitive element, a damage action has an unfavorable effect on the climate of labor relations. Each new step in the proceedings rekindles the animosity. Until final judgment the action is a constant source of friction between the parties.

International Union, United Auto. Workers v. Russell, 356 U.S. 634, 653 (1958).

76. *See, e.g.,* International Union, United Auto. Workers v. Scofield, 382 U.S. 205, 217-18 (1965).

77. The court in Claiborne v. Illinois Cent. R.R., 401 F. Supp. 1022 (E.D. La. 1975), *aff'd in part, vacated in part,* 583 F.2d 143 (5th Cir. 1978), *cert. denied,* 442 U.S. 934 (1979), explained some features that distinguish the NLRA from Title VII:

> Congress, in denying cease and desist powers to the EEOC, rejected rather than adopted the NRLB scheme originally proposed. It is illogical to conclude from such Congressional action that Congress intended to limit Title VII remedies to those allowed under the N.L.R.A., 29 U.S.C. § 160(c), when it rejected the N.L.R.A. as a model for Title VII enforcement procedures. In fact, if any inference is to be drawn from this, it is that Congress did not intend Title VII to duplicate N.L.R.A. enforcement procedures and remedies.
>
> Moreover, the aim of the N.L.R.A. was to establish a framework within which management and labor could resolve their conflicts, whether by collective bargaining or economic warfare, e.g., strikes and lock-outs. The N.L.R.A. was not meant to be outcome determinative, i.e., it was not to ensure that management or labor wins every conflict. It simply defined permissible methods of engaging in industrial con-

Congress viewed as a legitimate need to protect employers from the disruption caused by union organizing in the discrimination context. Substantively, because Title VII is motivated by a unitary concern for the protection of workers, the concerns regarding balance hold less force. Procedurally, Congress decided against authoritative administrative resolution of discrimination claims and instead transformed the enforcement scheme into an essentially private model directed by individual litigants. In stark contrast to the NLRA, the power to effectuate the statute was intentionally transferred from the agency to the judiciary. Given both the legislative process by which these changes in Title VII came about and the language of the resulting statute, reliance on analogies to the limitations on monetary relief in the labor law context is unpersuasive as an indicator of congressional intent.

B. The 1972 Amendments

In the years following the passage of Title VII, the inadequacies of its enforcement mechanisms became glaringly apparent. While addressing other provisions of Title VII, the Equal Employment Opportunity Act of 1972 primarily focused upon strengthening the powers of the EEOC.[78] However, as with the consideration of the original enactment, Congress did not look at the necessary relationship between enforcement and remedy. Moreover, political compromises resulted in a failure to achieve the logical balance between modest remedial power and strong enforcement power that characterizes the NLRA.

In the mid and late 1960s, a number of bills were introduced that would have restored the Commission's authority to issue cease-and-desist orders;[79] however, definitive consideration of the issue did not come

> flict and sought to channel labor/management conflict into peaceful negotiations. Title VII is radically different. It seeks to end all employment discrimination. It does not define permissible methods of discrimination nor does it establish a framework allowing for employment discrimination. Its aim is to be outcome determinative and to see that employees who are discriminated against win every conflict.

Id. at 1024-25.

78. The Act substantially expanded the coverage of Title VII. For example, government and agencies were added to those liable for discrimination, and the exemption for educational activities was eliminated. Furthermore, the statute lowered from 25 to 15 the minimum number of persons employed that render an employer subject to the provisions of the Title. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, §§ 1-3, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000a, 2000e, e-1 (1981)).

79. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 825, 830 (1972). For example, in 1965 Representative Adam Clayton Powell (D-N.Y.), Chairman of the House Education and Labor Committee, introduced a bill, H.R. 9222, which would have "granted the EEOC the authority to issue administrative cease-and-desist orders, enforceable in federal court . . . and [which would have]

about until the 92nd Congress. By then, substantial documentation and statistical evidence of enforcement problems persuaded the legislature that modifications were required. Indeed, one committee report referred to the then existing mechanisms as a "cruel joke" on victims of discrimination.[80] For various reasons, the three enforcement mechanisms available under the 1964 Act—EEOC conciliation, Attorney General suits, and private actions—had failed to fulfill their aims.

The EEOC conciliation process received the closest scrutiny by Congress. The Commission lacked the ability to achieve conciliations and to handle the volume of filings with any efficiency. By 1971, the Commission had a backlog of some 25,000 cases.[81] Investigations could not begin until four to five months after filing, and it took an average of twenty months to complete conciliation attempts.[82] During its first five years of operation, the Commission investigated only 35,000 of the 52,000 charges filed, found reasonable cause in sixty-three percent of these cases, but achieved full or partial settlement in less than half that number.[83] These figures compared unfavorably with statistics from the NLRB: it took an average of seven and one-half months from filing to decision, and ninety-five percent of complaints were disposed of at that

immediately extend[ed] coverage of Title VII to all employers and labor unions with eight or more employees or members." *Id.* Moreover, in 1967 President Johnson submitted an omnibus civil rights package to Congress which proposed to grant the EEOC administrative cease-and-desist powers. *Id.* at 831.

80. S. REP. NO. 415, 92d Cong., 1st Sess. 8, *reprinted in* SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE UNITED STATES SENATE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 417 (1972) [hereinafter LEGISLATIVE HISTORY].

81. *See* H.R. REP. NO. 238, 92d Cong., 1st Sess. 64 (1971) ("H.R. REP. NO. 238"), *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 124.

82. *See Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 1st Sess. 111 (1969) [hereinafter *Hearings on S. 2453*].

83. *See* H.R. REP. NO. 238, *supra* note 81, at 3-4, *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 63-64. By the end of fiscal year 1969, the Commission had accepted 40,357 new charges. Of these, 28,065 were recommended for investigation, 13,665 investigations were completed by the end of fiscal year 1969, and by that same time the EEOC had received 2333 cases to conciliate. Conciliation was completed in 1656 cases and 683 were considered successful, 139 partially successful and 834 unsuccessful. *Hearings on S. 2453, supra* note 82, at 111. A successful agreement is one in which EEOC, the respondent and the charging party are all signatories. In a partially successful conciliation, the respondent does not sign an agreement but does agree to eliminate the discrimination identified in the decision. If no relief is secured, the conciliation is considered unsuccessful. UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 327 (1970) [hereinafter FEDERAL EFFORT].

stage.[84] This comparison led many to view cease-and-desist authority as the answer to enforcement delays.[85]

Criticism of the Attorney General's enforcement authority rested on evidence that the Justice Department was less than fully committed to exercising its powers.[86] In fact, between 1965 and 1971 that office brought only fifty-seven actions.[87] While in many of these actions significant injunctive relief was awarded, the Justice Department had not, as a general matter, sought back pay relief. It perceived its role as creating a body of precedent, not as maximizing individual relief. Therefore, it shied away from attempting to impose financial liability under the rationale that courts might be hesitant to overturn questionable but long standing employment practices when large sums were at stake.[88] Thus, the statute's one major concession to public enforcement proved to be of little real benefit to the individual claimant.

The third enforcement mechanism, the private right of action, also failed to provide an effective means for securing compliance with the statute. In the period prior to the 1972 amendments, less than ten percent of those who filed EEOC complaints brought a federal court action when the agency's conciliation efforts failed.[89] Several factors may explain the under-utilization of judicial proceedings. First, claimants' motivation to pursue relief naturally would decrease as the EEOC process dragged on. A second explanation relates to the awarding of attorney's fees to prevailing parties, a provision that was inserted into the 1964 Act to encourage private actions.[90] Although the degree to which an unsuc-

84. *See* H.R. REP. NO. 238, *supra* note 81, at 11, *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 71.

85. *See* Comment, *Enforcement of Equal Employment Opportunity Under the Civil Rights Act: How About Cease and Desist Powers?,* 9 DUQ. L. REV. 75, 88 (1970) (authored by Elmer S. Beatty).

86. *See* H.R. REP. NO. 238, *supra* note 81, at 13, *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 73.

87. *See* FEDERAL EFFORT, *supra* note 83, at 376; Special Project, *supra* note 32, at 1230.

88. Special Project, *supra* note 32, at 1243.

89. *See Hearings on S. 2453, supra* note 82, at 40 (statement of William H. Brown, Chairman, EEOC).

90. *See* Newman v. Piggie Park Enter. Inc., 390 U.S. 400 (1968).

> When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

cessful plaintiff risked liability for the defendant's fee was uncertain,[91] this risk must have created a substantial deterrent to the bringing of private actions. Even if plaintiffs were willing to undertake such a risk, the awards granted by the courts in Title VII's early years were far from generous[92] and did not provide the needed impetus for the private bar to leap into a largely uncharted area of litigation.[93] Most importantly, how-

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Id. at 402.

91. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

> [M]any of the statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of the statutory policy to the discretion of the district courts . . . . It seems clear, in short, that in enacting § 706(k) Congress did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith in bringing the action. As pointed out in *Piggy Park*, if that had been the intent of Congress, no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith. . . . [Congress] also wanted to protect defendants from burdensome litigation having no legal or factual basis.

Id. at 416, 419-20. Therefore, plaintiffs could reasonably fear the assessment of defendant's attorney fees if a district court found that the plaintiff's case was frivolous or without foundation.

92. *See, e.g.*, Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977); Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969).

93. Plaintiffs have had difficulties securing counsel. *See* Poindexter v. FBI, 737 F.2d 1173, 1181 & nn.15-16 (D.C. Cir. 1984); Bradshaw v. Zoological Soc. of San Diego, 662 F.2d 1301, 1319 & n.44 (9th Cir. 1981) ("The only plausible reason for enactment of the provision was Congress' recognition that some civil rights claimants with meritorious cases would be unable to obtain counsel. . . . the provision for appointment of counsel would be wholly unnecessary if all meritorious claims attracted retained counsel. . . . As Miss Bradshaw's affidavits filed in support of her motion indicate, there is also the problem that attorneys otherwise willing to take the case on a contingency basis may prove unwilling to do so without an advance of substantial costs."). *See also* H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152 (5th Cir.) ("The courts of this circuit have previously found that competent lawyers are not eager to enter the fray in behalf of a person who is seeking redress under Title VII. This is true even though provision is made for payment of attorney's fees in the event of success."), *cert. denied*, 412 U.S. 939 (1973); Sol v. I.N.A. Ins. Co., 414 F. Supp. 29, 30 & n.1 (E.D. Penn. 1976) ("[A]lthough the Court may be able to appoint counsel to represent plaintiffs in Title VII proceedings, there is no guarantee that court-appointed counsel will receive compensation for the services they render. No funds have been appropriated by Congress to pay the fees of counsel appointed pursuant to 42 U.S.C. § 2000e-5(f)(1) . . . Presumably counsel appointed pursuant to § 2000e-5(f)(1) would either be compensated on a contingent fee basis, or willing to work *pro bono.*" [Same problem mentioned in *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1322 (9th Cir. 1981) (Wallace, J., dissenting)]).

See also Edmonds v. E.I. DuPont de Nemours & Co., 315 F. Supp. 523 (D. Kan. 1970):

> The Court took into account the fact that few attorneys are qualified by study or experience to quickly serve a claimant who has but thirty days to obtain counsel and file a proper proceeding in Court. . . . This Court . . . determined . . . that plaintiff was unable to obtain the services of counsel because none she could find would take her case . . . .

Id. at 525-26; Petete v. Consolidated Freightways, 313 F. Supp. 1271 (N.D. Tex. 1970).

ever, the fee shifting provision, even if it achieved its desired purpose, simply removed a bar to the prosecution of claims in court. It did nothing to affirmatively encourage claimants through economic incentives to litigate. The back pay limitation must have worked to discourage the pursuit of claims beyond the conciliation process.[94]

With much of this evidence of enforcement failure before Congress, it is not surprising that both the relevant House and Senate committees adopted bills that gave the EEOC cease-and-desist powers with limited judicial review.[95] While the back pay limitation remained, the bills contemplated a return to the NLRA model.[96] Again, however, the process of compromise on the House and Senate floors resulted in only a halfway measure of improvement. In the Senate, it became clear that the bill would be defeated unless the cease-and-desist power was eliminated.[97] The compromise that was reached permitted the EEOC to bring actions

> [P]laintiff has . . . been unsuccessful on several occasions in attempting to secure the services of an attorney on a contingent-fee basis. Further complicating plaintiff's problem has been the reluctance of the attorneys she has approached to undertake the specific and complex challenges of a Title VII lawsuit which are not common to more frequently litigated areas of the law.

Id.

94. One commentator's speculation as to the reason why such a low percentage of EEOC claimants litigate is that "the charging party cannot afford the expense and time involved in private litigation." FEDERAL EFFORT, *supra* note 83, at 336. Another commentator stated:

> But let us suppose that we have an unusually dogged complainant. The Commission cannot give him relief nor can it provide him with an attorney to help him obtain judicial relief. Very well then, he will get his own attorney . . . The attorney tells the complainant that his claim is a solid one or the Commission probably would not have attempted to conciliate it . . . The attorney should also tell the complainant that in deciding whether to sue he must take into account the possibility that victory may bring him no personal gain.

M. SOVERN, *supra* note 5, at 75.

95. Section 706(h) of H.R. 1746, as introduced in the House and as reported out by the House Committee on Education and Labor read:

> If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful employment practice an order requiring the respondent to cease and desist from such unlawful employment practice . . . .

LEGISLATIVE HISTORY, *supra* note 80, at 7; *see also* H.R. REP. NO. 238, *supra* note 81, at 43-44, *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 45. The version of S. 2515 reported to the Senate contains the same language at section 706(h). S. REP. NO. 92, *supra* note 80, at 39-40, *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 382-83.

96. *See supra* Part II-A.

97. Some southern Senators had instituted a modified form of filibuster whereby they would introduce numerous amendments to each portion of the bill that they found objectionable. After two motions for cloture failed, the Senate sponsors realized that they would not get a bill passed unless they compromised on the cease-and-desist scheme. Senator Javits complained that "[e]ven though the majority of the Senate wants cease and desist, it cannot have it

in court if conciliation failed and also transferred the Attorney General's pattern and practice authority to the Commission.[98] Thus, the incongruence between enforcement and remedy was slightly ameliorated but certainly not eliminated.

Congress did not, however, entirely ignore the remedial section of Title VII. It appended to the list of permissible relief a catch-all phrase: "any other equitable relief." This language sometimes has been viewed as suggesting that Congress explicitly ruled out non-equitable relief, including damages. Yet, in actuality, the addition of these words was never the subject of debate; nor do these words appear in the bills that were the subject of committee reports. The words were added by amendment on the Senate floor.[99] The only explication of what the words were intended to mean appears in the "section-by-section analysis" submitted with the Conference Committee Report, which states that the purpose of the subsection was to give the courts "wide discretion" to fashion "the most complete relief possible."[100] The analysis further approves the view

. . . the way rule XXII [the rule on cloture] operates." Sape & Hart, *supra* note 79, at 843-44. Senator Pastore recounted:

> They stood up and said, "All right, you have lamented the fact up to now that we are giving the agency the power of cease and desist, which is a judicial power, and you do not like it." So all right, the Senators from New York [Javits] and New Jersey [Williams] say we will amend the amendment on our own initiative, even though we have won the first round. On our own initiative, we will amend the amendment and give the court that original jurisdiction.

LEGISLATIVE HISTORY, *supra* note 80, at 1413.

98. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107 (codified as amended at 42 U.S.C. § 2000e-6(c)-(e) (1982)). The Justice Department retains authority to bring suit against a governmental entity that engages in unlawful discrimination: "If the Commission is unable to secure an acceptable conciliation agreement, the Commission is authorized to bring a civil action against any respondent which is not a governmental entity." EEOC v. General Tel. Co. of the Northwest, Inc., 599 F.2d 322, 326 (9th Cir. 1979), *aff'd,* 446 U.S. 318 (1980) (citing 42 U.S.C. § 2000e-5(f)(1) (Supp. V. 1975)).

99. This phrase first appears in Senator Dominick's Amendment No. 611 to S. 2515 dated November 8, 1971. *See* LEGISLATIVE HISTORY, *supra* note 80, at 557. A later amendment sponsored by Senator Dominick, No. 884, which included the same phrase, was adopted. 118 CONG. REC. 1881 (1972), *reprinted in* LEGISLATIVE HISTORY, supra note 80, at 1557.

100. From *Section-by-Section Analysis of H.R. 1746, Accompanying the Equal Employment Opportunity Act of 1972—Conference Report,* 118 CONG. REC. 7166, 7168 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 1848:

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate. . . . The provisions of this subsection are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular un-

of courts that had interpreted Title VII as not only requiring the elimination of discriminatory practices, but also mandating that victims be "made whole" and "restored to a position where they would have been" but for the unlawful acts.[101] In general, the additional phrase seems to have been directed to increasing and confirming flexibility, rather than to restricting options for relief.

One other change in the remedial section of Title VII deserves comment. The 1972 Act established a limit on back pay awards to a period beginning two years prior to the filing of a charge with the EEOC.[102] Although this provision is sometimes viewed as indicating congressional intent to restrict monetary relief, it was adopted over an even more restrictive proposal that would have allowed awards for only two years prior to the filing of a federal action.[103] The limitation adopted also guarded against the possibility that courts would exercise discretionary authority to narrowly calculate the backward scope of awards. Thus, the addition of this language does not necessarily suggest that Congress intended more than the establishment of fair parameters for monetary relief.

Another factor sometimes cited as indicative of an intent to bar damage relief is Congress' rejection of an amendment that would have allowed for a jury trial in Title VII actions.[104] The congressional debate indicates that those favoring the amendment were concerned with insuring "citizen participation"; those opposing saw the amendment as creating additional delay, contrary to the primary intent of the Act.[105] Both sides acknowledged, however, that the law was equitable in nature and

lawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

101. *Id.*

102. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (codified as amended at 42 U.S.C. § 2000e-5(a)-(g) (1982)).

103. *See* Sape & Hart, *supra* note 79, at 882-83. As cited earlier in this paper at text accompanying notes 81-82—the EEOC often took two years from the time when a complaint was filed to the time that a conciliation was completed. If the more restrictive proposal had been enacted—the one that allowed back pay awards for only two years prior to the filing of a federal action—then complainants conceivably may have been inadequately compensated even for back pay. For example, if an employer delayed as much as possible in the EEOC conciliation procedures, an aggrieved party would not be able to file a court action until two and one half or three years after his or her unlawful dismissal from employment. Any period over two years could not be compensable under the more restrictive back pay proposal.

104. Amendment No. 908 to S. 2515, *reprinted in* LEGISLATIVE HISTORY, *supra* note 80, at 1682. The amendment permitted a jury trial upon the demand of any party.

105. *See* LEGISLATIVE HISTORY, *supra* note 80, at 1713.

the allowance of a jury trial would have been a departure from general custom.[106] The issue ultimately attracted little attention and was not considered in light of its implications for monetary relief.

These slices of legislative history show that the 92nd Congress recognized inadequacies in the 1964 Act, but diagnosed the problems solely as related to the enforcement mechanisms, without consideration of the need for a congruent remedy. Compromise again led to the dilution of an enforcement scheme that would have created an administrative agency with the power to resolve complaints expeditiously and would have articulated a legitimate rationale for the back pay remedy.

The EEOC's authority to bring suit did little to solve the enforcement problems. In the years following the amendments, the EEOC's backlog grew and it litigated only a small fraction of the cases in which conciliation failed.[107] Thus, the threat of court action did not achieve an increase in the agency's conciliation rate as Congress had hoped. Privately initiated enforcement remained the norm. One real effect of the amendments, however, was to solidify the prior majority judicial interpretation of the Title VII remedial scheme.

The explicit characterization of relief under the statute as "equitable" was a sufficient indication to most courts that broader monetary remedies were precluded. Had courts looked in detail at the statute's history, this result might not have obtained. At the very least, it seems evident that the statutory reference to back pay came about more through an unthinking incorporation of an alternative enforcement mechanism than through a considered judgment of what relief actually would be necessary to make victims whole. Moreover, in the broadest sense, both the original statutory language and the additional reference to equity were directed toward giving the courts latitude in fashioning relief, rather than toward creating a remedial scheme that gives litigants little incentive to enforce their claims.

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106. *Id.* The amendment was defeated by a vote of 30 to 56.

107. A General Accounting Office (GAO) study reported that in 1975 the EEOC had little impact on resolving employment discrimination. It found that the EEOC retained some charges for as long as seven years. Charging parties, on the average, waited two years for the resolution of their claims. The GAO revealed that for fiscal year 1975, the EEOC failed to completely investigate ninety percent of its 126,340 backlogged cases. U.S. COMPTROLLER GENERAL, REPORT TO CONGRESS, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 9 (1976), *cited in* Lehr, *EEOC Case-Handling Procedures: Problems and Solutions*, 34 ALA. L. REV. 241, 246 n.44 (1983). The EEOC's litigation authority proved ineffective as well. Through fiscal year 1975 the EEOC had successfully litigated or settled through litigation only one percent of more than 12,800 charges that were not resolved by conciliation during the preceding three years. *Id.* at 245.

II. The Public/Private Dichotomy in Title VII Litigation

The legislative history of Title VII demonstrates that there was an ongoing concern about the balance between public and private enforcement during the development of the statute. Despite some increase in the EEOC's authority, the power of enforcement came to rest with the federal courts, rather than with the EEOC. A public/private dichotomy emerged in the courts also, although it rarely has been characterized as such. The distinction has significant implications in the consideration of the adequacy of Title VII remedies.

A. The Development of the Public/Private Dichotomy

The distinction between public and private adjudicatory models first was drawn by Professor Abram Chayes,[108] and his comparisons provide a useful starting point for the examination of the structure of Title VII litigation. As Chayes outlines, the private law model centers on the resolution of a dispute concerning the occurrence, intent, and effect of past events between two parties with diametrically opposed interests.[109] Relief follows logically from the harm caused by the defendant's action and is limited to compensation in the form of money.[110] The trial judge serves as a "neutral arbiter" without involvement in fact-finding or formulation of remedy.[111] In contrast, the emergence of the public law model can be traced to the legislative regulation of social good. Under the public law model, group interests, often in the form of class actions, are represented, and the dispute centers on whether a finding of liability will further legislative policy.[112] Positive regulatory goals make historical fact-finding and questions of intent largely irrelevant.[113] Equitable relief in the form of injunctions requiring complex affirmative action with broad future implications for absentees as well as parties is the norm, and monetary remedies play a subsidiary role. The complexity of fact evaluation and structuring of relief result in active and on-going judicial involvement.[114]

108. *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976). The models suggested by Professor Chayes have served as a point of departure for numerous analyses of doctrinal developments. *See* Marcus, *Public Law Litigation and Legal Scholarship,* 21 J.L. REFORM 647 (1988).

109. *Id.* at 1282.

110. *Id.* at 1282-83.

111. *Id.* at 1283.

112. *Id.* at 1289-92, 1294-95.

113. *Id.* at 1296-98.

114. *Id.* at 1298-1301.

Chayes specifically labels employment discrimination an "avatar" of this new form of public law action.[115] But Title VII litigation is not monolithic in this sense. It has developed along two distinct lines, which have been labelled as disparate impact and disparate treatment cases. These theoretical formulations correspond strikingly to the public/private models with respect to many of Chayes' distinguishing characteristics. On the question of remedy, however, there has been no recognition that the equitable principles, well suited to the public model, fail to answer litigants' needs in the private form of action.

The disparate impact analysis grew out of the Supreme Court decision in *Griggs v. Duke Power Co.*[116] In *Griggs,* the Court established the principle that a facially neutral employment policy that affects a protected group more harshly than others can only be justified by a showing of business necessity. The employer in *Griggs* conditioned advancement on standardized test scores and a high school diploma requirement.[117] Generalized statistics, not related to Duke's operation, indicated these criteria would work to exclude a disproportionate percentage of blacks in the community.[118] The Court held that this showing was sufficient to make out a prima facie case of discrimination; the plaintiff need not prove an intent to discriminate.[119] To defend against the claim, the employer must justify the requirements by demonstrating empirically that they are related to job performance.[120] A good faith concern with improving the general quality of the work-force is insufficient.[121] Liability is premised on the consequences of the practices, not on motivation.

115. Chayes, *supra* note 108, at 1284. Professor Chayes also cites Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), as an example of judicial concern with effectuating public policy at both the liability and remedial stages. Chayes, *supra* note 108, at 1297 n.74. In *Pettway,* black employees of a cast iron manufacturer brought a class action for equitable relief and damages, including back pay under both Title VII and 42 U.S.C. § 1981. 494 F. 2d 216-17. The Fifth Circuit found that the testing and high school education requirements imposed by the employer in the areas of hiring and promotion in its apprenticeship program had resulted in fewer black employees being employed and promoted in that program. In addition, the panel found that the adverse effects of the employer's past discrimination were being carried forward by the employer's otherwise neutral practice of requiring that employees, to qualify for on-the-job training for journeyman status in a craft position, meet length of service requirements in the apprenticeship program. *Id.* at 236-37. Therefore, the court ordered both back pay and affirmative injunctive relief, judging that it would alleviate the perpetuated effects of the company's intentional discrimination and testing and educational requirements and place the victims in their "rightful place". *Id.* at 263.

116. 401 U.S. 424 (1971).

117. *Id.* at 427-28.

118. *Id.* at 430, n.6.

119. *Id.* at 432.

120. *Id.* at 431.

121. *Id.* at 432.

The disparate impact test has spawned a jurisprudence of incredible complexity. Since *Griggs,* the Supreme Court has provided increasingly more detailed guidance on the required showings for both the plaintiff and defendant.[122] The lower courts have been thrust into the evaluation of statistically based evidence needed to prove impact and job-related validity.[123] The theory itself has been extensively debated in the scholarly literature.[124] But in its broadest terms, the structure of the disparate impact analysis has created certain enduring principles that fit within the model of public law litigation. First, such claims obviously lend them-

122. *See* Ward's Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989) (A comparison of the percentage of cannery workers who are nonwhite and the percentage of non-cannery workers (supervisory, at-issue jobs) who are nonwhite does not make out a prima facie disparate-impact case. Rather, the proper comparison is between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market.); Connecticut v. Teal, 457 U.S. 440 (1982) (An employer does not establish an affirmative defense to the charge of a discriminatory impact policy by claiming to have compensated for that policy by hiring or promoting a number of employees from the group discriminated against by that discriminatory impact policy.); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (Statistical evidence did not support district court's conclusion that Transit Authority's blanket exclusion from employment of persons who regularly used narcotic drugs, including methadone, had the effect of denying members of one race equal access to employment opportunities.); Dothard v. Rawlinson, 433 U.S. 321 (1977) (The Supreme Court held that the district court did not err in holding that Title VII prohibited application of the statutory height and weight requirements to women applying for positions as prison guards. The Supreme Court, however, held that the district court erred in rejecting employer's contention that the regulation in question fell within the narrow ambit of the bona-fide-occupational-qualification exception of section 703(e) of Title VII. This result obtained because Alabama maintained a prison system in which violence was "the order of the day," inmate access to guards was facilitated by dormitory living arrangements, every correctional institution was understaffed, and a substantial portion of the inmate population was composed of sex offenders mixed at random with other prisoners. Because of these factors, the use of women guards in "contact" positions in the maximum-security male penitentiaries posed a substantial security problem, directly linked to the sex of the prison guard.); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (If employer meets burden of proving that its pre-employment tests are "job related," the complaining party must show that other non-discriminatory tests or selection devices also would serve the employer's legitimate interest; such showing would evidence that the employer was using its tests merely as a pretext for discrimination.).

123. *See, e.g.,* Cohen, *Use of Statistics in Employment Discrimination Cases,* 55 IND. L.J. 493 (1980); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII,* 91 HARV. L. REV. 793 (1978); Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination,* 1981 U. ILL. L. REV. 33.

124. *See, e.g.,* Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation,* 46 U. PITT. L. REV. 555 (1985); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982).

selves to class action treatment.[125] The test permits a presumption, based on a statistical showing, that members of a protected group are harmed by a neutral policy. Thus, Federal Rule of Civil Procedure 23 (Rule 23) requirements of commonality, typicality, and adequacy of representation[126] are almost implicitly established. Class treatment shifts the focus of the litigation away from the individually named plaintiffs and puts a greater burden to direct the action on the counsel for the class.[127] Second, the fact-finding aspects of the disparate impact action do not relate to historical events. The existence of a policy, since it is neutral on its face, is not disputed, and questions of motivation for the policy specifically are excluded from consideration. The court is concerned with evaluating the effect of and necessity for the policy, which are largely prospective inquiries. Finally, the disparate impact action commonly results in the negotiation of detailed changes in the employer's policies[128] and the imposition of affirmative action requirements as a remedy.[129]

125. *See* SCHLEI & GROSSMAN, *supra* note 31, at 1232; Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980):

> As is now well recognized, the class action commonality criteria are, in general, more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim. The disparate impact "pattern or practice" is typically based upon an objective standard, applied evenly and automatically to affected employees: an intelligence or aptitude test, e.g., Griggs v. Duke Power Co., 401 U.S. 424 . . . (1971); an education requirement, *id.*; a physical requirement, e.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Both the existence and the "common reach" of such objectively applied patterns or practices are likely to be indisputable from the outset, so that no real commonality problems for class action maintenance ever arise in this regard. On the other hand, the disparate treatment pattern or practice must be one based upon a specific intent to discriminate against an entire group, to treat it as a group less favorably simply because of its sex (or other impermissible reason). The greater intrinsic difficulty in establishing the existence and common reach of such a subjectively based practice is obvious. *See* Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Pa. 1978).

Id. at 274 n.10.

126. Federal Rule of Civil Procedure 23 states that one or more members of a class may sue on behalf of all members only if there are questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23.

127. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 534-35 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978).

128. *See, e.g.*, Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 363 (8th Cir. 1982) (all of the parties and their experts should work together to formulate an examination for the position of fire captain); Guardian Ass'n of the New York City Police Dep't v. Civil Serv. Comm'n of N.Y., 633 F.2d 232, 238 (2d Cir. 1980) (order that defendants consult with plaintiffs' counsel and plaintiffs' experts in drawing of new examinations for immediate future).

129. *See, e.g.*, United States v. City of Chicago, 663 F.2d 1354, 1362 (7th Cir. 1981); Asso-

Thus, the formulation of relief frequently implicates the rights of absentee employees[130] and requires careful balancing in the equitable tradition.

The disparate treatment case presents a stark contrast in terms of proof required. The Supreme Court specifically has identified this model as useful in analyzing "private" forms of discrimination,[131] referred to as "the most easily understood type of discrimination."[132] This model addresses the situation in which the plaintiff alleges that, because of a protected characteristic, she was treated differently in the employment context. Proof of discriminatory motive is essential.[133] Because of the difficulty of showing intent, however, the Supreme Court established a sequencing of proof that permits certain inferences of motivation. To make a prima facie case, the plaintiff must show that she was qualified for the position and that the position was available. The burden then shifts to the defendant to provide a legitimate non-discriminatory reason for the employment action or to rebut the claim of qualification. Finally, the plaintiff has the opportunity to show that the defendant's reason is a pretext for discriminatory motivation.

B. The Litigation Consequences of the Public/Private Dichotomy

The emphasis on intent in the disparate treatment analysis has far-ranging implications for the manner in which these cases actually are litigated. First, they rarely can be brought as class actions because they involve personal and individual issues of fact.[134] The individual plaintiff must put her performance and qualifications before the court and is not

ciation Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 284 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982). In Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC, 478 U.S. 421, 445-47 (1986), the Supreme Court confirmed the power of the lower courts to order preferences and quotas in cases of egregious discrimination; but in cases when preferences are adopted through consent decrees this power is not so limited.

130. The fear that the disparate impact theory forces employers to establish quotas in order to avoid potential liability is among the reasons for the Supreme Court's recent reformulation of the plaintiff's burden of proof in such cases. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (Justice O'Connor, with the Chief Justice and two Justices concurring, and four Justices concurring in result).

131. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973).

132. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

133. *McDonnell Douglas,* 411 U.S. at 807 ("On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application."); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

134. *See, e.g.,* Patterson v. General Motors Corp., 631 F.2d 476, 481-82 (7th Cir. 1980), *cert. denied,* 451 U.S. 914 (1981).

shielded by the presumptions of intent that characterize the impact model. Credibility is key to both the plaintiff's and defendant's cases, and the factual findings of the trial court are reviewed under the restrictive "clearly erroneous" standard.[135] Employers generally have little difficulty articulating some legitimate reason for the challenged action, given that anything less than perfection on the employee's part will suffice. For example, the employer will claim some nondiscriminatory basis for a termination. Among the most commonly asserted justifications are "insubordination," incompetence, elimination of the position or "reorganization," failure to conform to workplace rules, and lateness. Cases most often will turn on the pretextual stage, in which the plaintiff will attempt to prove that the proffered reason is not the "real" reason for the action, but a smoke screen for discrimination. The plaintiff can prevail by showing direct evidence of discrimination, but such "smoking guns" are rarely available. Statistical evidence of disparities in the work-force may bolster the plaintiff's case but are insufficient to prove pretext.[136] The plaintiff most frequently relies on comparative evidence showing that other persons who were not members of a protected class were treated more favorably in similar situations. For example, the employee may show that white or male employees with equivalent performance evaluations or lateness records were not terminated.

This brief description of the content of proof in the disparate treatment case shows how closely it replicates the private law model. While an inference of discrimination is permitted to require justification by an employer, the proof centers on historical facts. There is no assumption, as in the impact model, that discrimination is the root cause of disparity. With regard to remedy, the individualized nature of the action generally precludes injunctive relief beyond hiring or reinstatement. Given the time lag between the instance of discrimination and the eventual judgment, many prevailing plaintiffs do not take advantage of these forms of relief.[137] The amount of monetary relief has no relation to the culpability

135. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). Federal Rule of Civil Procedure 52(a) states: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52.

136. *See, e.g.*, Hudson v. IBM, 620 F.2d 351, 355 (2d Cir. 1980) ("statistics standing alone do not create [his case]"); King v. Yellow Freight Sys., Inc., 523 F.2d 879, 882 (8th Cir. 1975) ("[Statistical evidence] is not determinative of an employer's reason for the action taken against the individual grievant." (*quoting* Terrell v. Feldstein Co., 468 F.2d 910, 911 (5th Cir. 1972)).

137. Professor Martha S. West in *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, has compiled a strong case against reinstatement as a remedy for the related NLRA cases. She discusses a 1962-64 NLRB study which found that

of the employer, but depends largely on the work history of the plaintiff following the discriminatory act. In a hiring or discharge case, for example, if the victim of the unlawful employment practice quickly finds other comparable work, her recovery may be close to nothing.[138]

The distinctions between disparate impact and disparate treatment cases and their correspondence to the public/private dichotomy are,

> although 80% of discharged employees initially indicated that they wanted to return to work, by the time they obtained the reinstatement offer, only 50% accepted. . . No employee offered reinstatement during the first month after discharge[, however,] turned it down. The 1971-72 NLRB study found that if employers offered reinstatement within two weeks of discharge, 93% of employees accepted, whereas if over six months had elapsed, only 5% accepted.

Id. at 30.

138. For example, in Miller v. Marsh, 766 F.2d 490, 492-93 (11th Cir. 1985), the court held that the plaintiff failed to mitigate her damages and was not entitled to a back pay award where she voluntarily removed herself from the labor market by enrolling as a law student on a full-time basis and then remaining unavailable for any alternative employment, despite her contention that she was ready to leave school and to accept the job that she had been denied on the basis of sex. In EEOC v. General Lines, Inc., 865 F.2d 1555, 1557 (10th Cir. 1989), the appellate court summarized the unreported district court decision. Two female employees of a liquor store were discharged in retaliation for their good faith objection to what they believed to be an unlawful employment practice. The district court jury found that the employer was guilty of unlawfully discharging the two employees, but the jury awarded only $916 to the employee who sought approximately $27,000 in back pay and $1000 to the employee who sought approximately $4000 in back pay. Both employees had found other work following their discharges and therefore, upon a motion for judgment notwithstanding the verdict, the district court refused to alter the back pay award.

In EEOC v. Fotios, 671 F. Supp. 454, 462 (W.D. Tex. 1987), a claimant's back pay award was lowered to $1690 because for a period of time her interim income exceeded the income she would have received had she not been terminated unlawfully.

In Goodwin v. Circuit Court of St. Louis County, Missouri, 729 F.2d 541, 543 n.3 (8th Cir. 1984), a demotion case in which sex discrimination was found, the appellate court noted that "[n]o back pay was awarded, because plaintiff was transferred to an attorney position that paid no less than the salary of hearing officers."

In Bradford v. Sloan Paper Co., Inc., 383 F. Supp. 1157, 1163-64 (N.D. Ala. 1974), the court found that one employee had been discharged unlawfully because he had made a complaint to the EEOC. But the court decided that no back pay would be awarded because the plaintiff had lost only $368 in compensation in the 21 months that he had been unlawfully discharged. This finding, coupled with the court's finding that he had not been sufficiently diligent in seeking alternative employment for a six-month period, resulted in the denial of a back pay award.

In Oliver v. Moberly Missouri School District, 427 F. Supp. 82, 88 (E.D. Mo. 1977), a certified teacher was not hired for a teaching position and filed an action in federal court under both Title VII and 42 U.S.C. § 1981. The court found in her favor but declined to award back pay "in light of the fact that her actual earnings were nearly the same as they would have been under defendants' employment."

Some courts have held that awarding back pay to short-term employees requires too much speculation and, therefore, no back pay award should be allowed. *See, e.g.*, Haynes v. Miller, 669 F.2d 1125, 1127 (6th Cir. 1982). One court held that full-time enrollment as a college student does cut off back pay liability. *See* Waters v. Heublein, Inc., 485 F. Supp. 110, 116 (N.D. Cal. 1979).

however, obviously overdrawn. One major caveat concerns a third category of Title VII litigation, known as "systemic disparate treatment." Systemic disparate treatment can be proven either by evidence of a policy that specifically treats a protected group differently than others[139] or a pattern of decision-making that reveals bias.[140] While the analytic structure of the systemic case is different from the impact case, its practical implications for the parties and the court make it all but indistinguishable from the impact case. Courts have recognized the essential convergence of these two theories, in that they both look to group rather than

139. *See* United Steelworkers of America v. Weber, 443 U.S. 193, (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). In *Weber,* a white employee brought an action against employer and union challenging legality of a plan for on-the-job training which mandated a one-for-one quota for minority workers admitted to the program. The white employee claimed that this plan violated Title VII's prohibition against racial discrimination. *Weber,* 443 U.S. at 197-200. The court stated that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *Id.* at 198 n.1. It then stated that "prior to 1974 only 1.83% (5 out of 273) of the skilled craft-workers at the . . . plant were black, even though the work force in the . . . area was approximately 39% black." *Id.* at 198-99.

In *Dothard,* a female applicant for a position as a correction officer in the Alabama state penitentiary system brought an action under Title VII. The Supreme Court held that evidence that 33.29% of women in the United States between the ages of 18 and 79 would be excluded from employment as correctional counsel because of the height requirement, that 22.29% of the women would be excluded because of the minimum weight requirement, and that only 1.28% and 2.35% of the men would be excluded by the height and weight requirements, respectively, established a prima facie case of discrimination. *Dothard,* 433 U.S. at 329-30.

In *Gilbert,* women employees challenged their employer's disability plan that provided non-occupational sickness and accident benefits to all employees, but excluded disabilities arising from pregnancy. The Supreme Court agreed with the employer and stated that the employer's disability-benefits plan did not violate Title VII because of its failure to cover pregnancy-related disabilities. *Gilbert,* 429 U.S. at 145-46. The Court observed that "there is no risk from which women are protected and men are not" or from which "men are protected and women are not," and therefore the coverage is exactly the same for men and for women. *Id.* at 138.

140. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In *Teamsters,* an employment discrimination action was brought by the United States against an employer and union alleging that the employer had engaged in a pattern or practice of discriminating against blacks and persons with Spanish surnames and that its seniority system perpetuated effects of past racial and ethnic discrimination. The Court cited evidence in the record that the employer had treated the protected classes differently from the way it treated white employees. *Id.* at 335-36 & n.15. Later the court stated that "[e]vidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant . . . " *Id.* at 340 n.20. In Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), the Supreme Court attempted to determine whether the Hazelwood School District had been engaged in a "pattern and practice" of discriminatory hiring that resulted in too few blacks being hired as teachers in the system. The government based much of its proof of discrimination upon historical facts, such as the fact that the School District recruited at a number of colleges and universities in Missouri and bordering states but did not recruit at "predominantly Negro four year colleges in Missouri." *Id.* at 302-03 & n.4. In addition, the School District was found to have hired its first black teacher in 1969. *Id.* at 303.

individual disparity premised on the effect of an announced or implicit policy—neutral or otherwise—and upon a statistically based showing.[141]

Beyond all of the complex differences in content, structure, and proof that the disparate impact and disparate treatment models present, there also are important differences in the ultimate consequences for plaintiffs and defendants as they relate to incentive and deterrence. The "pure" disparate treatment case requires an intimate exploration of the plaintiff's qualifications, conduct, and performance in exchange for little in the way of monetary or vindicatory reward. The systemic case focuses much more on the defendant's conduct. The plaintiff plays a truly representative role, and is rewarded not only monetarily but by the achievement of broad-based change in the work-place.

These differences also affect the legal marketplace for employment discrimination actions. The incentive for lawyers in private practice to take on the individual claim is limited because compensation is dependent on the fee-shifting provisions of Title VII. While the amount of a fee award is not absolutely geared to the plaintiff's monetary recovery, it is one factor that a court considers in making its decision.[142] Class-based

141. *See, e.g,* Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985). In the Sixth Circuit, disparate impact analysis has been applied in cases challenging rehiring based on unguided opinions of foremen. *See* Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92-93 (6th Cir. 1982). The Second Circuit has applied disparate impact analysis to employment systems that relied on subjective employee evaluations. Zahorik v. Cornell Univ., 729 F.2d 85, 95-96 (2d Cir. 1984).

142. *See* City of Riverside v. Rivera, 477 U.S. 561 (1986) (Even though the district court gave a $245,000 attorney's fee award after plaintiffs were awarded $33,350 in compensatory and punitive damages, the Supreme Court did not reverse, although it stated that "[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988." *Id.* at 574 (plurality opinion); *id.* at 585 (Powell, J., concurring).); *see also* Thompson v. International Ass'n of Machinists, 664 F. Supp. 578 (D.D.C. 1987).

> To be sure, any successful attack on unlawful discrimination must be viewed as a benefit to society at large. Nevertheless, plaintiff's suit was essentially a private one—she did not challenge pervasive discrimination practices by defendants, she sought primarily monetary relief, and the injunctive relief she requested would have inured to the benefit of herself alone. To the extent she prevailed, she did not vindicate any civil or constitutional right, the deprivation of which is peculiarly noncompensable; on the contrary, courts and juries frequently award large damages to victorious plaintiffs in discrimination suits. Nor can it be said that plaintiff primarily sought or obtained injunctive relief. . . . Here plaintiff's request for attorney's fees totalling nearly a quarter million dollars is so grossly disproportionate to her $2,000 recovery that the court must significantly reduce the fee award . . . .
>
> Faced with this difficulty, it appears most appropriate to reduce plaintiff's award by three-fourths . . . .
>
> In all likelihood, this Solomonic division will leave both parties dissatisfied: plaintiff's counsel will fail to recover for hours that the court has not said, and cannot say, were unreasonably spent; defendants, on the other hand, will be forced to pay plaintiff's attorneys nearly 30 times more in fees than they paid plaintiff herself

back pay awards and broad injunctive relief tend to make the courts view fee applications more generously, since the rationale for the fee-shifting provision is the vindication of the "public interest."[143]

Finally, the deterrent aspect of Title VII is far more pronounced in the systemic realm. An aggregate class-based recovery can have substantial economic repercussions, and the threat of affirmative relief serves as a substantial incentive to cure disparities. The statute, however, provides no additional impetus for employers to carefully examine individual decision-making for bias when the consequences of a finding of discrimination may be so minimal.

The following Parts of this Article suggest that the public/private dichotomy within Title VII was obscured until relatively recently.

> in damages . . . discrimination suits are typically among the more remunerative of civil rights claims, and a refusal to permit full recovery here is unlikely to overly chill the bar's willingness to undertake such work . . . plaintiff's attorneys billed $204,440.50 for time spent on the merits of her suit, and incurred an additional $27,185.23 in expenses. A 75 percent reduction of this amount yields a figure of $57,906.43.

Id. at 582-84.

In United States Football League v. National Football League, 704 F. Supp. 474, 486 (S.D.N.Y.), *aff'd,* 887 F.2d 408 (2d Cir. 1989), *cert. denied,* 110 S. Ct. 1116 (1990), the court decided to award less than what the prevailing plaintiff requested for attorney's fees because the amount of the damage award was minimal, namely one dollar. It did so "in order that the fees awarded reflect some relation to the award." And, in Sas v. Trintex, 709 F. Supp. 455, 460-61 (S.D.N.Y. 1989), the court addressed the plaintiff's application for costs, including attorney fees of approximately seven times the amount of the accepted judgment. The court said, "when what is essentially a private action for damages masquerades under the banner of vindicating important civil rights, when in reality there is little community or societal benefit to be derived from the action, we think it to be well within the court's discretion—if not its obligation—to consider that fact in assessing attorney's fees." The court went on to explain *Rivera:*

> Further, *Rivera* was a 4-1-4 decision. The concurring opinion of Justice Powell, which creates the majority, constitutes the controlling law. He notes that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought."

Id. (quoting *Rivera,* 477 U.S. at 595). The *Sas* court used this fact among others in awarding $7500 instead of the $33,000 plaintiff requested for attorney fees.

143. *See* Newman v. Piggie Park Enter. Inc., 390 U.S. 400 (1968). There the Court explained that

> when a plaintiff brings an action under [Title VII], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

Id. at 402. As mentioned in *Thompson* and *Sas,* these public interests often are not present in the private discrimination claim. *See also* Northcross v. Board of Educ., 412 U.S. 427, 428 (1973).

Whether due to doctrinal changes or changes in employers' practices, the private model now predominates, thus bringing to light the weaknesses in the statute's remedial scheme as it applies in the individual action.

III. The Growth of the Private Model

While the characteristics of the public and private models were established by early Supreme Court Title VII decisions, the statute still generally is perceived to address primarily public forms of discrimination. In the minds of both the public and the professional sector, Title VII suggests issues of quotas, affirmative action, and consent decrees that work broad and sweeping changes. It can be demonstrated empirically, however, that the private model now predominates. With this shift, the problems inherent in Congress' harnessing of a private enforcement scheme with a public remedial scheme become more apparent.

A. Class Action Litigation

The disincentives arising out of the private enforcement of Title VII claims could have been—and were for some time—ameliorated by the liberal availability of class action treatment. For a period of years after the enactment of the statute, many courts routinely would certify classes without an exacting review of Rule 23's requirements. Some courts simply equated class-based discrimination with class actions; one court noted, "racial discrimination is by definition class discrimination,"[144] and another pronounced that Title VII suits are "necessarily" class actions because the evil addressed is based on class characteristics.[145]

Eventually these less than analytical presumptions evolved into a theory that permitted large-scale class actions to be mounted on the basis

144. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). In *Oatis* the court held that under Title VII a class action is permissible within the following limits:

> First, the class action must meet the requirements of Rule 23(a) and (b)(2). Next, the issues that may be raised by plaintiff in such a class action are those issues that he has standing to raise (i.e., the issues as to which he is aggrieved, . . . and that he has raised in the charge filed with the EEOC). . . . Additionally, it is not necessary that members of the class bring a charge with the EEOC as a prerequisite to joining as co-plaintiffs in the litigation. It is sufficient that they are in a class and assert the same or some of the issues.

145. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969), *aff'd in part and rev'd on other grounds,* 489 F.2d 896 (7th Cir. 1973); *see also* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) ("Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated."). *But see* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., concurring). In *Georgia Highway Express,* the concurring opinion criticizes this approach: "The broad brush approach of some of the Title VII cases is in sharp contrast to the diligence with which in other areas we carefully protect those whose rights may be affected by litigation." 417 F.2d at 1127.

of an "across-the-board" approach. Under this theory an alleged victim of race discrimination in discharge, for example, could challenge as racially discriminatory through a class action all of an employer's personnel practices, including hiring and promotion, despite the fact that the representative party may not have been subject to these practices.[146] Thus, a plaintiff could transform an individual disparate treatment case into a systemic class action and benefit from the incentive and deterrent aspects of the "public" model. Several courts specifically adopted the across-the-board approach on policy grounds, noting that it provided an effective means to implement the congressional purposes of Title VII.[147]

Given the liberal allowance of class treatment under the across-the-board approach,[148] it is hardly surprising that by the mid-1970s, class actions accounted for more than twenty percent of the employment discrimination actions filed in the federal courts. As Appendix I[149] indi-

146. *See, e.g.,* Donaldson v. Pillsbury Co., 554 F.2d 825, 830-31 (8th Cir.) (because plaintiff's allegations of employment discrimination, while factually differing in detail from those of other employees, are plainly rooted in the same bias asserted as the source of the discrimination, appellant may properly challenge such practices), *cert. denied,* 434 U.S. 836 (1977); Crockett v. Green, 534 F.2d 715, 717-18 (7th Cir. 1976) (class action status is particularly appropriate in a case involving class discrimination); Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976) (race discrimination is peculiarly class discrimination); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975) (courts have consistently ruled that even though it appears that the named plaintiffs have not suffered discrimination, they are not prevented from representing the class); Barnett v. W.T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975) (an "across the board" attack on all discriminatory actions by the defendant on the grounds of race fit comfortably within the requirements of rule 23(b)(2)); Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974) (as a person aggrieved, plaintiff can represent other victims of the same policies, whether or not all have experienced discrimination in the same way); *Georgia Highway Express,* 417 F.2d at 1124 (the threat of a racially discriminatory policy hangs over the racial class and is a question of fact common to all members of the class).

147. *See, e.g.,* Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 1332-33 (9th Cir. 1977); *Barnett,* 532 F.2d at 547; *Sapp,* 502 F.2d at 42-43; Ciarrochi v. Provident Nat'l Bank, 83 F.R.D. 357 (E.D. Pa. 1979); Mack v. General Elec. Co., 329 F. Supp. 72, 75-76 (E.D. Pa. 1971) (Employment discrimination based on race, sex, or national origin is, by definition, class discrimination since the purpose of Title VII is to eliminate such class based discrimination; class actions are favored in Title VII actions for salutory policy reasons.).

148. Liberal class certification was considered during the debate over the 1972 amendments. The House-passed bill would have restricted relief in the federal court only to persons who had filed claims with the EEOC, thus effectively precluding class-based remedies. The Senate bill contained no such restriction, and the accompanying Committee report endorsed the lower court decisions that viewed Title VII suits as class action by their very nature. *See* S. REP. NO. 415, 92d Cong., 1st Sess. 27 (1971). The Senate's position was the one adopted. The section-by-section analysis noted that the new enforcement mechanisms were not intended to affect class treatment and approved "the leading cases" recognizing that "Title VII claims are necessarily class action complaints." 118 CONG. REC. S. 2300 (1972).

149. All figures are derived from data in *Annual Report of the Director of the Administrative Office of the United States Courts* (in volumes published from 1978 to 1988 at Table C-2 and Table X-5). The period used by the Administrative Office is the fiscal year completed on

cates, however, that percentage has dramatically declined. In 1988, class actions represented only one half of one percent of employment discrimination filings.

These statistics permit a number of inferences. They might be interpreted to suggest that employers no longer are engaging in discrimination that has systemic implications, and that the numerical disparities in the work force, upon which class actions typically are premised, have been eliminated. It may also be that the complexity of proof in class action litigation has created a substantial disincentive.[150] It seems at least plausible, however, that the Supreme Court's effort to tighten Rule 23 requirements in the Title VII context[151] may account for the decrease, particularly since the precipitous drop between 1977 and 1979 corresponds with the Court's first indication that it would not adopt the lower courts' liberal view of the across-the-board approach. Whatever the explanation, the decline of employment class actions in the federal courts clearly indicates the new supremacy of the "private" model.

The two Supreme Court decisions that effectively did away with the across-the-board approach pay only lip service to the public facets of Title VII enforcement that might motivate a liberal view of class certifi-

June 30 of the year indicated. For example, data for 1988 includes the 12-month period ending June 30, 1988. Some data that was not contained in the published annual reports is derived from computer print-outs obtained directly from the Statistic Analysis and Reports Division of the Administrative Office of the United States Courts [on file at *Hastings Law Journal*]. Plaintiffs commence a civil action by filing a form that the Administrative Office uses to classify cases. The form contains many different categories of cases; categories in the civil rights area include: 440 "Other Civil Rights"; 441 "Voting"; 442 "Jobs"; 443 "Accommodations"; and 444 "Welfare." The Administrative Office recommends that actions filed under the following statutes be coded as "442": Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985); Title VII; and Performance Rating Act of 1950, 5 U.S.C. § 4303 (1982). ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES, TRANSMITTAL NO. 64, at II-45 to -50 (1985).

150. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 400 (1986) (multiple regression analysis); Hazelwood School Dist. v. United States, 433 U.S. 299, 310-12 (1977) (approving binomial distribution analysis).

151. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178-79 (1974), the Supreme Court held that class actions brought under Rule 23(b)(3) require pre-certification notice to class members at plaintiff's expense, with provision for opting out. After 1974, plaintiffs' counsel were faced with a dilemma: the notice requirement under Rule 23(b)(2) created a expensive and time-consuming task for plaintiffs' counsel, particularly in hiring cases, in which identification of class members was a problematic endeavor. Rule 23(b)(2) class actions did not require class notification, but for classes certified under that subdivision, the rule suggested that only injunctive or declaratory relief would be available. Most lower courts, however, found a way to preserve liberal class treatment for Title VII actions. They certified them as Rule 23(b)(2) actions thus not requiring notice and awarded back pay under the theory that it was ancillary to an injunction or was a form of equitable relief within the contemplation of the (b)(2) subdivision. *See* P. COX, EMPLOYMENT DISCRIMINATION paras. 21-36 (1989).

cation. In *East Texas Motor Freight System, Inc. v. Rodriguez*,[152] the Supreme Court overturned the certification of a class of minority truck drivers. The named plaintiffs were drivers on city routes who claimed that the employer's rule prohibiting transfer of city drivers to road driving positions kept minority drivers out of the more lucrative road jobs and perpetuated the effects of past discrimination in hiring.[153] In the district court, the plaintiffs made no claim that they had been actually discriminated against when hired;[154] and at trial, it was found that they did not meet the experience and physical requirements for the road positions.[155] Because they had failed to move for class certification, the court dismissed all claims.[156] The court of appeals reversed, certifying the class sua sponte and finding liability on the class claims without passing on the validity of the individual claims.[157] The Supreme Court reversed again, relying largely on the principle that since the named plaintiffs were not injured as a result of the discriminatory practices alleged, they were "simply not eligible to represent a class of persons who did allegedly suffer injury."[158]

Rodriguez arose in a somewhat unique procedural posture, resulting from the failure to seek certification before trial,[159] and its narrow holding did not have widespread direct application. The Court's intent, how-

152. 431 U.S. 395 (1977).

153. *See* Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), *vacated,* 431 U.S. 395 (1977).

154. In fact, plaintiffs stipulated to this. *Rodriguez,* 431 U.S. at 398.

155. *Id.* at 400.

156. *Id.*

157. *Id.* at 401-02.

158. *Id.* at 403-04. The Court also commented that since "each named plaintiff stipulated that he had not been discriminated against with respect to his initial hire . . . they were hardly in a position to mount a class-wide attack on a no-transfer rule and seniority system." In addition, the Court stated that the record disclosed at least two other strong indications that they would not "fairly and adequately protect the interests of the class." One was their failure to move for class certification prior to trial. *Id.* at 405. "Another fact, apparent on the record, suggesting that the named plaintiffs were not appropriate class representatives was the conflict between the vote by members of the city- and line-driver collective-bargaining units, and the demand in the plaintiffs' complaint for just such a merger." *Id.*

159. The Supreme Court suggested that the result might have been different if a class motion had been made and certified by the district court. In such a case, the class claims already would have been tried, and even if it later appeared that the named plaintiffs were inappropriate class representatives, the claims of the class members would not need to have been mooted or destroyed. *Id.* at 406 n.12. *See* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE 23-190 to -191 (1987) ("[A] finding of inadequacy of representation does not necessarily result in dismissal of the class suit. Rather, under the flexible powers granted in Rule 23, and in furtherance of the substantive goals at stake in the particular suit, the court may cause representation to become adequate by redefining the class, by creating subclasses, by giving notices and inviting intervention, . . . and by a number of other devices.").

ever, to send a general message about Title VII class actions was unmistakable. It acknowledged that discrimination suits are often "by their very nature" class suits, but added that "careful attention" to Rule 23 requirements is "indispensable." The Court went on to note that a mere allegation of discrimination does not mean that the claimant is an adequate representative of "the real victims of that discrimination."[160]

After *Rodriguez,* the lower courts were divided as to whether the court had completely discredited the across-the-board theory of certification.[161] There was little disagreement, however, that Rule 23 requirements could no longer be glossed over with a simple reference to the appropriateness of class treatment in Title VII actions. Any remaining uncertainty about the survival of liberal certification was eliminated by the Supreme Court's 1982 decision in *General Telephone Co. of the Southwest v. Falcon,*[162] in which the across-the-board rule specifically was referred to as an inherently erroneous application of Rule 23 requirements.[163] In *Falcon,* a Mexican-American employee claimed discrimination in promotion, but sought to represent a class of applicants for employment as well. Following the across-the-board approach, the lower court certified a combined class, and found that the named plaintiff had proved a disparate treatment case as to his promotion, but not as to his hiring. On the other hand, he had proved class-based disparate impact discrimination in hiring but not in promotion. On appeal to the circuit court, both substantive findings were remanded and the Supreme Court accepted the case to consider only whether the named plaintiff

160. 431 U.S. at 405-06.

161. *See, e.g.,* Abron v. Black & Decker (U.S.) Inc., 654 F.2d 951 (4th Cir. 1981). In *Abron* the majority relied on *Rodriguez* in holding that an employee who suffers racial discrimination as a result of her employer's employment practices may not bring a class action and serve as the representative of a class consisting of other employees or would-be employees who do not endure identical injuries. *Id.* at 954-55. The dissent stated that the holding of *Rodriguez,* denying the appropriateness of class certification, was limited to employees who never suffered any discrimination and had not, in fact, requested class certification at the district court level. *Id.* at 958-59; *cf.* Scott v. University of Del., 601 F.2d 76, 87-88 (3rd Cir.) (The plaintiff conceded that he personally suffered no discrimination when he was hired and the court stated that this fact "makes this case an even stronger one than *East Texas Motor Freight.*"), *cert. denied,* 444 U.S. 931 (1979); Hill v. Western Elec. Co., 596 F.2d 99, 102 (4th Cir.) ("A person who has been injured by unlawful, discriminatory promotion practices in one department of a single facility may represent others who have been injured by the same discriminatory promotion practices in other departments of the same facility."), *cert. denied,* 444 U.S. 929 (1979); Payne v. Travenol Laboratories, Inc, 565 F.2d 895, 898 (5th Cir.) (Named plaintiff who had a tenth grade education could not adequately represent a class of job applicants challenging the employer's requirement of a tenth grade education for position in the employer's facility.), *cert. denied,* 439 U.S. 835 (1978).

162. 457 U.S. 147 (1982).

163. *Id.* at 160.

could represent the applicant class. Building on *Rodriguez,* the Court found that an allegation of discriminatory treatment in promotion and a generalized charge of discriminatory policies do not necessarily mean that there exists a class of persons suffering the same injury and that the individual's claims are typical of the class. To create a bridge that would justify class treatment, the plaintiff must show common questions of fact. Therefore, in order to represent applicants, the plaintiff would need to show that the discriminatory promotion practices operate in the same way in the hiring process.[164] Otherwise, the Court noted, every Title VII action could be brought on behalf of a class, a result not intended by Congress.[165] While the Court remanded the action for a consideration of whether the plaintiff could show the requisite nexus,[166] the thrust of the opinion clearly signaled an end to the across-the-board approach. In addition, it suggested a more stringent view of class certification even when a plaintiff seeks to represent only a group subject to the same form of allegedly discriminatory treatment. For example, if a plaintiff brings a disparate treatment case on discriminatory promotion and offers comparative evidence of the promotion of less deserving whites to show pretext, he cannot maintain a class action on this basis alone. A policy of discrimination, or a showing that the plaintiff's treatment was typical of the

164. *Id.* at 157-59.

165. The *Falcon* court made no reference to the legislative history of the 1972 amendments, however, which seems to approve the across-the-board theory. *See supra* note 148.

166. Chief Justice Burger commented that remand was not necessary "since it is entirely clear on this record that no class should have been certified in this case." *Falcon,* 457 U.S. at 161 (Burger, C.J., concurring in part and dissenting in part). He based his conclusion on the fact that the named plaintiff, a Mexican-American, alleged discrimination in promotion on the basis of a disparate treatment claim, although the class he purported to represent were Mexican-Americans who were unsuccessful job applicants with the same employer, and who were allegedly victims under the disparate impact theory. Chief Justice Burger continued:

> The success of this claim depends on evaluation of the comparative qualifications of the applicants for promotion to field inspector and on analysis of the credibility of the reasons for the promotion decisions provided by those who made the decisions. Respondent's class claim on behalf of unsuccessful applicants for jobs with petitioner, in contrast, is advanced under the "adverse impact" theory. Its success depends on an analysis of statistics concerning petitioner's hiring patterns.

Id. at 162. In a footnote, Burger added:

> There is no allegation that those who made the hiring decisions are the same persons who determined who was promoted to field inspector. Thus there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent. The record in this case clearly shows that there are no common questions of law or fact between respondent's claim and the class claim . . . . Accordingly, the class should not have been certified.

Id. at 162 n.*.

treatment of others, must be proved. Such a showing would, in essence, require the same proof as that needed for a systemic case. Thus, the Court's call for "rigorous analysis" of Rule 23 requirements did more than eliminate the across-the-board rule; it virtually ensured a presumption that "pure" disparate treatment cases—which turn on credibility and comparative evidence—will typically qualify only as individual actions.

These limitations on class certification vastly decreased Title VII's effectiveness as a deterrent to discrimination. In *Falcon,* for example, the plaintiff's individual back pay recovery amounted to approximately $1,040; the class—comprising only ten applicants—would have received almost $70,000, about $29,000 of which represented attorney's fees.[167] After *Falcon,* employers faced with a claim of disparate treatment in one aspect of their employment practices easily could calculate their outside financial liability and analyze the risk of litigation. The threat of a class action, on the other hand, particularly when it may address all aspects of employment practices and encompass, for example, a large pool of applicants, poses a substantially greater financial liability—one difficult to accurately project. During the period preceding these two decisions, when class actions accounted for one-fifth of all employment discrimination suits, a risk-adverse employer had good reason to closely examine his practices and decisions. In many ways, liberal certification stood as a replacement for public enforcement.

With the Court's adoption of more restrictive requirements, the private elements of Title VII litigation became even more prominent. This has become particularly apparent in the context of discharge claims. These cases generally lend themselves to litigation only under the disparate treatment theory.[168] A neutral policy rarely can be shown to affect termination in a disproportionate manner. Moreover, a discharge claim infrequently allows for a systemic disparate treatment analysis because no employer today uses facially discriminatory discharge criteria, and it is extremely difficult to prove a de facto policy given the problem of showing a statistically significant disparity. Class certification is also unlikely because of the numerosity requirement; rarely are there enough discharged employees to constitute a class. The across-the-board approach provided a means to sidestep these obstacles of the individual ac-

167. *Id.* at 153 & n.7; *see also* Falcon v. General Tel. Co., 463 F. Supp. 315, 317 (N.D. Tex. 1978) (the relief granted included awards for back pay, overtime pay where evidence of overtime work performed was presented, and loss of job security), *aff'd in part and remanded in part,* 626 F.2d 369 (5th Cir. 1980), *vacated* 450 U.S. 1036 (1981).

168. SCHLEI & GROSSMAN, *supra* note 31, at 594.

tion. Since *Rodriguez* and *Falcon,* however, it appears that courts have adopted an almost per se rule, excluding discharge cases from class treatment, either by relying on the individualized quality of proof that defeats a claim of typicality or by rejecting across-the-board attempts.[169] Since discharge claims now are by far the most common form of discrimination complaint, as discussed in the next section, Title VII litigation has become in large part "privatized."

169. *See, e.g.,* Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1387 (5th Cir. 1983) ("*General Telephone* . . . prohibits plaintiff, who alleges only discrimination in discharge, from mounting an across-the-board attack on defendant's employment practices."); O'Neal v. Riceland Foods, 684 F.2d 577, 581 n.2 (8th Cir. 1982) ("O'Neal's complaint provided an insufficient basis for concluding that the adjudication of her claim of discriminatory firing would require the decision of any common question concerning Riceland's failure to hire more blacks"); Pendelton v. Rumsfeld, 628 F.2d 102, 104-05 (D.C. Cir. 1980) (the named plaintiff alleged racial discrimination on behalf of herself and all other black employees at Walter Reed Army Medical Center. The court found that the district court properly refused to certify the case as a class action and commented that the named plaintiff and only one other plaintiff were discharged supposedly for participating in a demonstration, while the unnamed plaintiffs had never been summarily removed from a position at Walter Reed in the alleged demonstration.); Alexander v. Gino's, Inc., 621 F.2d 71, 74-75 (3d Cir.) (The named female plaintiff alleged unlawful discharge on the basis of sex discrimination. The district court could find no evidence that any other members of the purported class had resigned or been discharged on the basis of sex discrimination and, consequently, refused to certify the class, stating that "the claims were so individualized that certification was improper."), *cert. denied,* 449 U.S. 953 (1980); Paxton v. Union Nat'l Bank, 519 F. Supp. 136, 171-72 (E.D. Ark. 1981), *aff'd in part and rev'd in part,* 688 F.2d 552 (8th Cir. 1982) (class certification denied because, with the exception of two other black employees and the named plaintiff, no black employees of the bank testified that the bank had discriminated against them), *cert. denied,* 460 U.S. 1083 (1983); Sheehan v. Purolator, Inc., 103 F.R.D. 641, 643, 648-49 (E.D.N.Y. 1984) (Female plaintiffs sought certification of class of employees and applicants for employment alleging sex discrimination by employer in hiring and promotion. Citing the fact that the plaintiffs had submitted an affidavit alleging sex discrimination from only one aggrieved employee other than the three named plaintiffs, the court could not find sufficient evidence to support certification of a class of individuals that contained some "indeterminate number of members in excess of 315 persons."), *aff'd,* 839 F.2d 99 (2d Cir. 1988), *cert. denied,* 109 S. Ct. 226 (1988); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 199-200, 204-05 (E.D. Pa. 1982) (Plaintiff sought certification of a class including all blacks either employed by Conrail in the United States between 1965 and 1982, or who unsuccessfully sought employment with Conrail in the United States at any time between 1965 and 1982. The class accused Conrail of discriminatory hiring, promotion, and termination practices. The court found that since the named plaintiff had been hired by Conrail, he could not adequately represent persons who had not been hired. The court also found that because the plaintiff had not provided any evidence to show that the alleged discriminatory policies were practiced throughout the Conrail organization, he did not establish the commonality between himself and the purported class needed for certification.); Cormier v. Gulf Supply Co., 30 Fair Empl. Prac. Cas. (BNA) 549 (S.D. Tex. 1979) (Plaintiff was not an adequate class representative because she did not submit any evidence of the employer's discriminatory hiring practices or termination policies, and she could not recall anyone else who had been discharged as she allegedly had been, namely unlawfully on the basis of race.)

B. The Change in Content of Title VII Claims

Additional evidence of the privatization of Title VII actions can be found through an analysis of the content of claims filed with the EEOC. Since its inception, the EEOC has issued annual reports that break down the filings received each year by category of discriminatory treatment.[170] Appendices II and III following this Article are constructed from those reports. Appendix II[171] shows the number of claims of racial discrimination against private employers by the major categories of employment practices, and Appendix III[172] provides the same information for discrimination based on gender.[173]

These appendices evidence the steady and dramatic increase of discharge claims, in comparison to the decline or minimal increase of claims in all other major categories of discriminatory practices. With regard to racial discrimination, the total number of claims almost doubled from approximately 43,000 to 82,000 between 1974[174] and 1985. The number of hiring complaints decreased absolutely from 5500 to 5000 and as a percentage of total claims from twelve percent to six percent. Claims of biased job classification, and qualification and testing requirements show even more pronounced declines: by 1985 these categories together represented less than one percent of total claims. While promotion and "terms and conditions" charges increased somewhat, neither kept pace with the overall increase in claims. The striking change is in the discharge category, where the number of claims has tripled from 9919 in 1974 to 30,652 in 1985. As a percentage of total claims, discharge represented only twenty-three percent in 1974 and stood at thirty-seven per-

170. The EEOC's first annual report was published in 1966 for the fiscal year July 2, 1965 - June 30, 1966. EEOC 1st Ann. Rep. FY (1965-66). The most recent report used here is for the fiscal year ending June 30, 1985. According to telephone conversations with EEOC personnel, a more current statistical report is in preparation.

171. *Id.*

172. *Id.*

173. EEOC annual reports also give information concerning unions, state employment agencies, private employment agencies, joint apprenticeship committees, governments (state or local), public colleges or universities, private colleges or universities, public elementary or secondary schools, and private elementary or secondary schools. Private employment, however, is by far the largest group: of the 117,204 total discrimination claims analyzed for the 1985 fiscal year, 97,757 were against private employers. For race claims, the private employment charges comprised 82,556 of the 99,365 total; for sex claims 50,060 of the 58,998 total; for religion claims 3,024 of the 3,769 total; for national origin claims 15,260 of the 18,430 total.

174. The year 1974 was chosen as a basis of comparison with the most recent statistics. While the choice is somewhat arbitrary, it reflects the fact that the EEOC's increased enforcement power had been established by that time. Further, in 1974 the agency began to provide a more detailed breakdown of charges and added a number of more specific categories of discrimination.

cent in 1985. In terms of sex discrimination, the trends are even more pronounced.[175] The percentage increase of total claims is approximately the same as for race: close to doubling. The decrease in hiring complaints is proportionately much greater, however: from 3356 in 1974 to 1742 in 1985, and as a percentage of total claims, from twelve percent to three percent. Other major categories of discrimination show increases even more modest than those for race. Discharge claims have increased from 4078 to 15,077, or 370 percent, representing a change as a percentage of total claims from fifteen percent to thirty percent. The next greatest area of increased charges is sexual harassment,[176] which shares with discharge the almost certain need for individualized proof.

Given the clear progressions shown in these appendices, it hardly would be surprising if the figures today showed that discharge claims are approaching one-half of all claims filed. This apparent trend means that the predominant model of Title VII litigation is now the disparate treatment, non-class, individual action. This is not to say that the other categories of claims necessarily fall within the public model. Certainly a hiring or a promotion claim might be brought under a disparate treatment theory. The difference is that discharge claims cannot be litigated under the systemic theories, while most other claims can be, if evidence of group disparity is present. The combination of the increase in discharge claims with the prohibition against across-the-board class actions has transformed Title VII into a private dispute resolution mechanism.

IV. The Effect of Section 1981

The preceding Part suggests that the private model of Title VII enforcement has come to dominate employment discrimination litigation. This change calls into question whether the statute, given the weaknesses in its remedial scheme, continues to provide an adequate incentive for the bringing of a meritorious action and a sufficient deterrent to bias in the work place. These weaknesses largely have been disguised until very recently, however, and the majority of employment discrimination victims—those claiming racial bias[177]—have been shielded from Title VII's

175. Figures for gender discrimination are more representative of the true distribution of Title VII claims since all such federal claims must be filed with the EEOC. Race discrimination claimants have the option of bypassing the EEOC and filing directly in federal court under 42 U.S.C. § 1981 (1982). *See infra* Part IV.

176. The EEOC added sexual harassment and pregnancy discrimination as categories of discriminatory treatment in 1981. EEOC 16TH ANN. REP. F.Y. 1981.

177. Although I have found no direct statistical evidence that the majority of federal court Title VII actions are premised on race discrimination, it seems fair to make this assumption, given that race claims easily represent the majority of EEOC filings. In 1985, for example,

restrictive remedial impact. Yet, just as the Supreme Court has impaired the feasibility of "public" actions, it similarly also has cut back on avenues of relief in the "private" sphere. These additional changes accentuate the need to change the present Title VII remedial scheme.

For most of Title VII's history, section one of the Civil Rights Act of 1866,[178] generally referred to in its codified version as section 1981,[179] has been interpreted to permit the award of compensatory and punitive damages for intentional discrimination by private employers on the basis of race.[180] *Patterson v. McLean Credit Union,*[181] decided by the Supreme Court in June 1989, will substantially narrow this avenue of expanded monetary relief, if it is read to hold—as seems likely—that section 1981 bars racial discrimination only in decisions to hire and is inapplicable to discrimination in an existing employer-employee relationship.[182]

In recent history, section 1981 race claims have been viewed as coextensive with Title VII claims. This history is significant in several respects. First, it helps to explain why so little attention has been directed to Title VII's remedial inadequacies. Second, it demonstrates that there is nothing inherently unfair or unwieldy about the use of tort-based concepts of relief in the discrimination context.[183] Third, the co-existence of

race claims filed by the EEOC were nearly double the number of sex claims and more than triple the number of age claims. Race claims represented the most numerous with 99,365 claims; sex claims were second with 58,998 claims; and age claims were third with 30,307 claims. EEOC 20TH ANN. REP. F.Y. 1985 at 12.

178. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1982)).

179. 42 U.S.C. § 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

180. *See infra* notes 185-235 and accompanying text.

181. 109 S. Ct. 2363 (1989).

182. The narrow holding of *Patterson* is that section 1981 does not provide a cause of action for racial harassment. *Id.* at 2374. The Court, however, repeatedly speaks more broadly of the statute's inapplicability to post-employment contract formation conduct. *Id.* The impact of *Patterson* is discussed more fully *infra* at text accompanying notes 236-50.

183. In section 1981 discrimination suits, a victim is entitled to a jury trial because section 1981 provides specifically for compensatory and punitive damages. The Supreme Court, however, stated in dicta in Curtis v. Loether, 415 U.S. 189 (1974), that Title VII claimants are not entitled to a jury trial when they seek reinstatement and back pay. *Id.* at 196.

The Supreme Court examined the right to a jury trial for claims of discrimination under Title VIII of the Fair Housing provisions of the Civil Rights Act of 1968. Since the damages under that Act are described as compensatory and punitive, the Court held that a jury trial was a right based on the guarantee of a jury trial for "legal rights" under the seventh amendment. It held to the contrary for Title VII claims. Since Title VII provides for "reinstatement, back pay and other equitable relief," no legal rights are in question and thus there was no right

dual remedies for some discrimination claimants and not others points to the underlying inequity that has pervaded the Title VII remedial scheme. Finally, the retrenchment worked by *Patterson* has resulted in calls for congressional action that have opened the door for a reconsideration of remedies across the entire spectrum of employment discrimination claims, not only those premised on race.[184]

to a jury trial conferred by the seventh amendment. However, in Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981), the court of appeals held that an action with a claim for back pay must be tried by jury because back pay is a legal remedy. In its analysis, the court examined the rationales for holding that back pay is an equitable remedy. For example, some courts have held that back pay is equitable based on the characterization of back pay as incidental to reinstatement. *See* Lynch v. Pan Am. World Airways, Inc., 475 F.2d 764, 765 (5th Cir. 1973). Courts also have analogized back pay to the equitable doctrine of restitution. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 308 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972); Harkless v. Sweeny Indep. School Dist., 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Demkowicz v. Endry, 411 F. Supp. 1184, 1191 (S.D. Ohio 1975). Lastly, courts have held that back pay in Title VII cases is equitable in nature because it is awarded by the discretion of the trial judge. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975). The court in *Setser*, however, found those rationales unpersuasive. It reasoned that it is a "misconception" to label restitution as solely an equitable remedy. The court noted that restitution is suited both to actions at law and in equity based on the nature of the rights sought to be vindicated. It held that a claimant who seeks back pay often does not seek reinstatement. This occurs where the plaintiff claims a wrongful refusal to hire and also in cases of unlawful firings and unlawful failure to promote. 638 F.2d at 1142. Thus, the court held that back pay more accurately is characterized as a compensatory remedy. It noted that "the calculations necessary to determine the hours of lost work stemming from a section 1981 violation are straight forward damage computations certainly within the practical capabilities of juries." *Id.* On the other hand, in Lincoln v. Board of Regents of the University System of Georgia, 697 F.2d 928 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983), the court of appeals held that a section 1981 claim for damages is legal in nature and a claim for back pay and reinstatement is equitable in nature. When a victim of discrimination brings both a section 1981 claim and a Title VII claim, the right to a jury in the legal (section 1981) action encompasses the issues common to both. 697 F.2d at 934. Also, "when a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." *Id.* In Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983), the court of appeals held that under the Age Discrimination in Employment Act of 1967 (ADEA), where a victim of age discrimination recovers money damages at trial, she cannot be denied equitable relief such as reinstatement, back pay, pension, and profit sharing unless the purposes of the Act (compensation for discrimination and deterrence to employers who discriminate) will be thwarted by such an award. Although the plaintiff had recovered $62,000 at trial for willful violation of the ADEA, the court of appeals held that "the underlying purpose of liquidated damages is to compensate the aggrieved party for non-pecuniary losses arising out of a willful violation of the ADEA, [thus], liquidated damages are not intended to take the place of equitable relief." *Id.* at 280. Therefore, when the judge makes his determination of the equitable claims, "in the absence of exceptional circumstances . . . the jury's verdict in favor of plaintiff on the issue of age discrimination is *res judicata* for the purposes of the equitable claim of reinstatement." *Id.* (quoting Cleverly v. Western Elec. Co., 950 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979)).

184. *See supra* notes 33-38 and accompanying text.

Section 1981 affords to all persons within the jurisdiction of the United States the same right to make and enforce contracts as is enjoyed by white citizens.[185] At least until 1968, as a result of the Supreme Court decisions in the *Civil Rights Cases*[186] and *Hodges v. United States,*[187] the section was understood to apply only in situations where state action was present. In 1968, however, the issue of whether private acts were subject to section 1981 was reopened when the Supreme Court decided *Jones v. Mayer Co.*[188] There, the Court construed section 1982,[189] a companion statute to section 1981 that bars discrimination in housing, as reaching private action and not requiring state involvement.[190] While the facts of *Jones* did not directly implicate section 1981, the Court expressly overruled *Hodges v. United States,* a case upon which the section 1981 state action requirement rested.[191] In the following years a number of circuit courts upheld race claims under section 1981 attacking private employment discrimination based on the same reasoning used in *Jones.*[192]

185. 42 U.S.C. § 1981 (1982).

186. 109 U.S. 3 (1883). In the *Civil Rights Cases,* the Court invalidated a companion statute prohibiting private discrimination in public accommodations. The Court looked at Congress' two sources for authority to enact section 1981, the thirteenth and fourteenth amendments. Under the fourteenth amendment, Congress could enact statutes addressing only public acts, while under the thirteenth amendment, private conduct could be regulated only as necessary to abolish the "badges and incidents of slavery," which, according to the Court, did not include the denial of public accommodations. *Id.* at 13, 20-24, 28-31.

187. 203 U.S. 1 (1906). While *Hodges* did not specifically invalidate section 1981, the Court indicated that the Civil Rights Act of 1866 prohibited only involuntary servitude and did not protect against interference by private persons with the right to work at an occupation. *See also* Hurd v. Hodge, 334 U.S. 24, 31 (1948) (companion statute to section 1981 is "directed to governmental action").

188. 392 U.S. 409 (1968).

189. 42 U.S.C. § 1982 (1981). Section 1982 gives all citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property." *Id.*

190. The Court, relying on the plain meaning of the statute and its legislative history, held that the thirteenth amendment's "badges and incidents" language gives Congress sufficient authority to regulate private acts, contrary to the holding of the *Civil Rights Cases. Jones,* 392 U.S. at 420-40.

191. *Id.* at 441 n.78.

192. *See* Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied,* 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d. 1097 (5th Cir. 1970); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970); Fitzgerald v. United Methodist Community Center, 335 F. Supp. 965, 966 (D. Neb. 1972); League of Academic Women v. Regents of Univ. of Cal., 343 F. Supp. 636. 637-40 (N.D. Cal. 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 439-40 (N.D. Cal. 1972); Braden v. Univer-

At the same time that the courts were applying an expansive reading to section 1981 with regard to the private racial discrimination they were rejecting attempts to raise claims of gender discrimination under the statute.[193] Although section 1981 speaks of "all persons," the courts found support in the genesis of the statute for the exclusion of women from its terms.[194] The courts reasoned that the Reconstruction Congress focused exclusively on the legal disabilities of blacks and therefore it would be a violation of congressional intent to permit a victim of gender discrimination to assert a section 1981 claim.[195] While this narrow reading has been the subject of some criticism,[196] it nevertheless has endured.

sity of Pittsburgh, 343 F. Supp. 836, 837-38 (W.D. Pa. 1972), *vacated on other grounds,* 477 F.2d 1 (3d Cir. 1973).

193. *See, e.g.,* Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373 (N.D. Tex. 1975); Strunk v. Western Ky. Univ., 11 Fair Empl. Prac. Cas. (BNA) 355 (E.D. Ky. 1975); Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974); Olson v. Rembrant Printing Co., 375 F. Supp. 413 (E.D. Mo. 1974), *aff'd,* 511 F.2d 1228 (8th Cir. 1975); Held v. Missouri Pac. R.R., 373 F. Supp. 996 (S.D. Tex. 1974); Terry v. Bridgeport Brass Co., 11 Fair. Empl. Prac. Cas. (BNA) 628 (S.D. Ind. 1974), *aff'd,* 519 F.2d 806 (7th Cir. 1975); Evans v. Frito-Lay, Inc., 7 Fair Empl. Prac. Cas. (BNA) 675 (N.D. Ohio 1974); Johnson v. Thomson Brush Moore, Inc., 7 Fair Empl. Prac. Cas. (BNA) 921 (N.D. Ohio 1974); Kumbalek v. Bahcall Indus., Inc., 6 Fair Empl. Prac. Cas. (BNA) 1269 (E.D. Wis. 1974); O'Connell v. Teachers College, 63 F.R.D. 638 (S.D.N.Y. 1974); Abshire v. Chicago & East Ill. R.R., 352 F. Supp. 601 (N.D. Ill. 1972); Braden v. Univ. of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972), *vacated on other grounds,* 477 F.2d 1 (3d Cir. 1973); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Fitzgerald v. United Methodist Community Center, 335 F. Supp. 965 (D. Neb. 1972). Since the courts consistently have refused to afford section 1981 protections to women, most courts no longer examine the issue. Two cases do, however, analyze the applicability of section 1981 to employers that discriminate against women. NOW v. Bank of Calif., 6 Fair. Empl. Prac. Cas. (BNA) 26 (N.D. Cal. 1973); League of Academic Women v. Regents of Univ. of Cal., 343 F. Supp. 636 (N.D. Cal. 1972).

194. The question of coverage for national origin met with more mixed results and was not finally resolved until 1987, when the Supreme Court held in two decisions that section 1981 protects persons discriminated against because of their "ancestry or ethnic characteristics," to the extent they were viewed as distinct racial groups in the mid-19th century. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). *See also* Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

195. In League of Academic Women v. Regents of University of California, 343 F. Supp. 636 (N.D. Cal. 1972), the court concluded that section 1981 did not apply to women because the statute "was enacted to protect the rights of two groups of people—non-whites and non-citizens who were not afforded equal treatment to white citizens." *Id.* at 638-39. White citizens refers not to white men only, but to both white men and women. Thus, the court reasoned, since the statute was aimed at racial problems and inequities and "makes no distinction in granting the rights between males and females, it provides the same rights to everyone, but does not extend an additional right to any of them." *Id.* at 639. Moreover, women are denied the punitive and compensatory damages available to blacks and other minorities for the same discriminatory acts.

196. Many commentators have criticized the Court's narrow interpretation of section 1981 that denies redress under the statute to women. The Court has interpreted section 1981 more broadly in other instances. For example, the Supreme Court read the language of section 1981

When Congress considered the 1972 amendments to Title VII,[197] it was well aware of the implications of the *Jones* decision.[198] It rejected an amendment that would have made Title VII the exclusive remedy for employment discrimination.[199] The prevailing view was that victims of discrimination should be afforded as many remedies as possible,[200] while the minority concern focused upon the inefficiency of permitting more than one cause of action.[201] It does not appear, however, that Congress was aware that dual claims would result in an inequitable remedial structure. The first court decisions excluding gender discrimination were almost contemporaneous with the 1972 amendments, and the subject is not mentioned in the congressional debates or committee reports.[202] It is therefore conceivable that by rejecting the "exclusive remedy" amendment, Congress believed that it in fact was providing expanded relief for "all persons" who suffer private employment discrimination.

Any remaining uncertainty over the applicability of section 1981 to private acts was resolved in 1975 with the Supreme Court's decision in *Johnson v. Railway Express Co.*[203] *Johnson* addressed whether the filing of an EEOC charge tolled the statute of limitations on a section 1981

broadly in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), in which it held for the first time that section 1981 applied to the formation of contracts exclusively by private individuals.

197. Equal Employment Opportunity Act of 1972, Pub. L. No. 261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e, 5108, 5314-16 (1981)).

198. See, *e.g.*, H.R. REP. NO. 238, *supra* note 81, at 66 ("charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of 1866.") Senator Williams explicitly referred to *Jones* and noted, "Courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances." 118 CONG. REC. 3371 (1972). Furthermore, the Senate Committee Report stated, "The committee would also note that neither the above provisions regarding the individuals right to sue under Title VII, nor any of the provisions of this bill are meant to affect existing rights granted under other laws." S. REP. NO. 415, 92d Cong., 1st Sess. 24 (1971).

199. The amendment was introduced by Senator Hruska, 118 CONG. REC. 3172 (1972), and failed to pass by a tied vote. *Id.* at 3373.

200. Senator Williams, the floor manager of the bill, in speaking against the "exclusive remedy" amendment, noted "that the individual, who is frequently forced to face a large and powerful employer, should be accorded every protection that the law has in its purview." *Id.* at 3372.

201. *See* H.R. REP. NO. 238, *supra* note 81, at 66, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2175 (minority view) ("[n]o public interest is served in continuing to permit a multiplicity of statutes or forums to deal with discrimination in employment").

202. *See generally* H.R. REP. NO. 238, *supra* note 81, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137 (report of the Committee on Education and Labor on the Equal Employment Opportunity Act).

203. 421 U.S. 454 (1975). Two years before *Johnson*, the Court decided Tillman v. Wheaton-Haven Recreational Association, Inc., 410 U.S. 431 (1973), which upheld a claim of private discrimination under section 1982. Again, the Court indicated that "the historical

claim arising out of the same facts. In the course of ruling against a toll, the Court ratified the holdings of the circuit courts that section 1981 provided a federal remedy for private employment discrimination on the basis of race.[204]

By the time *Johnson* was decided, there was a consistent body of case law holding that section 1981 does not bar gender discrimination.[205] While the Court did not explicitly address the remedial inequity created by dual causes of action available to only some victims of discrimination, there are several indications in Justice Blackmun's opinion that this issue might have been lurking in the background. First, the Court made much of the supposed advantages of Title VII's enforcement mechanisms, noting that Title VII provides a comprehensive scheme for administrative investigation and conciliation, and allows for appointment of counsel and reimbursement of fees to a prevailing party.[206] These advantages were viewed as offsetting the benefit of section 1981's compensatory and punitive damages.[207] Even as early as 1971, however, it was apparent that the effectiveness of Title VII's administrative process had not been demonstrated.[208] A second indication of concern is evidenced by Justice Blackmun's description of Title VII remedies: "Some [d]istrict [c]ourts have ruled that neither compensatory nor punitive damages may be awarded in the Title VII suit."[209] Given the rather tentative nature of this statement, it might be read as implicitly questioning the correctness of those holdings, particularly since it did not accurately portray the state of the law. Damage relief, in fact, had been overwhelmingly rejected by district and circuit courts by the time *Johnson* was decided.[210] Yet, even to the extent that *Johnson* can be read as opening a line of attack on those lower court holdings, the opportunity never was utilized.

Lack of any provision for attorney's fees was the only serious disadvantage to litigation under section 1981 noted by the *Johnson* Court.[211] This impediment was removed with the passage of the Civil Rights Attorney's Fees Awards Act of 1976.[212] Once section 1981 began to be

relationship between § 1981 and § 1982" dictated a similar interpretation of the statutes' application to private acts. *Id.* at 440.

204. 421 U.S. at 459-60.

205. *See supra* notes 193-96 and accompanying text.

206. 421 U.S. at 460.

207. *Id.* at 461.

208. *See supra* text accompanying note 81.

209. 421 U.S. at 458.

210. *See supra* notes 40-41 and accompanying text.

211. *See Johnson,* 421 U.S. at 460.

212. 42 U.S.C. § 1988 (1981). The Civil Rights Attorney's Fees Awards Act of 1976 was enacted "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing

recognized as a remedy for racial discrimination that was coextensive with Title VII, some lower courts took the view that attorney's fees allowed to prevailing plaintiffs under Title VII should be equally available to section 1981 litigants. These courts employed the theory that individual section 1981 plaintiffs were vindicating important public rights and serving as private attorneys general.[213] The Supreme Court, however, turned back this trend in *Alyeska Pipeline Service Co. v. Wilderness Society,*[214] a case decided just one week before *Johnson.* It held that, absent statutory authority, a court cannot shift the cost of litigation even when a public interest or civil right is implicated. Congress acted quickly to overturn *Alyeska,* and explicitly authorized awards of fees in section 1981 actions, as well as in other statutory civil rights matters.[215] The passage of the Attorney's Fees Awards Act was in part a recognition by Congress that Title VII's administrative enforcement scheme, even as amended, had not created an effective alternative to private actions.[216]

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parties in suits to enforce the civil rights acts which Congress has passed since 1866." S. REP. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5909-10. The bill was enacted shortly after the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), because Congress felt that the decision created anomalous gaps in its civil rights laws. S. REP. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5909. Congress recognized:

> The citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nations's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Id. at 5910.

213. Souza v. Travisono, 512 F.2d 1137 (5th Cir.), *vacated,* 423 U.S. 809 (1975); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied,* 410 U.S. 955 (1973); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973).

214. 421 U.S. 241 (1975). Although *Alyeska Pipeline* involved an environmental organization suing a pipeline company to prevent permits to be issued by the Secretary of Interior for construction of a trans-Alaska oil pipeline, the Court held that attorney's fees cannot be awarded without express congressional mandate to do so. *Id.* at 269.

215. The legislative history of the Attorney's Fees Act does not mention the unavailability of section 1981 claims for gender discrimination or section 1981's relationship to Title VII. For a summary of the legislative history of the Attorney's Fee Act, see Fioretti, *Attorneys' Fees Under the Civil Rights Act—A Time for Change,* 16 J. MARSHALL L. REV. 261 (1983).

216. *See generally* Note, *Attorneys' Fee Award Is Upheld Where It Exceeds the Amount of Damages Recovered by the Plaintiff in the Underlying Civil Rights Case,* 30 HOW. L. J. 859 (1987) (authored by Venita Lang); Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636 (1974).

Also in 1976, the Supreme Court announced its final decision in the series of cases expanding the scope of section 1981 to private acts. In *Runyon v. McCrary,*[217] the Court held that racial discrimination in private schools was actionable under the statute. *Runyon* did not break new ground; the majority noted that section 1981's applicability to private institutions was well established and controlled by principles of stare decisis.[218] Two aspects of the decision, however, are significant. First, the Court indicated in dicta that it approved the exclusion of gender discrimination from the statute's scope.[219] It commented that the question whether a school could limit admission on the basis of sex or religion was not presented because section 1981 "is in no way addressed to such categories of selectivity."[220] Second, *Runyon* planted the seeds of retrenchment regarding its applicability to gender discrimination: four justices expressed disagreement with the majority's construction of the language of the statute, its legislative history, and pre-*Jones* precedent.[221]

In the period after *Runyon,* section 1981 became a very attractive complement to Title VII for victims of race discrimination in employment.[222] One empirical study of federal district court race-based employ-

217. 427 U.S. 160 (1976).

218. *Id.* at 175.

219. *Id.* at 167.

220. *Id.*

221. Justice Powell and Justice Stevens both wrote separate concurring opinions and Justice White wrote a dissenting opinion which was joined by Justice Rehnquist. In his concurrence, Justice Powell indicated that but for precedent holding that section 1981 applies to private acts of discrimination, he might have joined the dissent to hold that section 1981 should not apply to private contracts. He wrote separately also to emphasize his concern that the holding in Runyon would be "construed more broadly than would be justified." *Id.* at 187. He noted that "a small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of preidentified students, for example, would present a far different case." *Id.* at 188. Thus, he believed that the holding in *Runyon* left undecided questions that will undoubtedly arise in the gray area existing between the circumstances in *Runyon* and the aforementioned example. *Id.* at 188.

Justice Stevens also filed a separate concurring opinion. He stated that *Jones* was wrongfully decided because it was not within the intention of Congress to apply the protections of section 1981 to private acts of discrimination in contracts. However, he emphasized that where precedent accurately reflects society's mores, it should not be overturned. *Id.* at 191.

In his dissent, Justice White went deep into the legislative history to assert that section 1981 does not apply to private acts of discrimination. He stated that Congress' power to enact section 1981 was built on the authority of the thirteenth and fourteenth amendments which only involve public acts. *Id.* at 201-02, 204. Justice White distinguished *Jones* by limiting its holding to private acts of discrimination under section 1982. He believed that section 1982 had a different legislative history than section 1981 and thus it was not irrational to hold that one prohibits discrimination by private entities but the other does not.

222. *See, e.g.,* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); General Building Contractors Ass'n Inc. v. Pennsylvania, 458 U.S. 375 (1982); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

ment discrimination filings shows that eighty-four percent of these actions alleged claims under both section 1981 and Title VII.[223] Because of *Johnson*'s rule that the Title VII administrative process does not toll the section 1981 statute of limitations,[224] race claimants bypassed EEOC procedures. The typical practice involved filing an EEOC charge solely for purposes of meeting Title VII's exhaustion requirements.[225] Once the requisite time period during which the agency had exclusive jurisdiction over the charge had elapsed, the claimant requested a "right-to-sue" letter from the agency and proceeded within ninety days to federal court with both Title VII and section 1981 causes of action. There, the claimant sought the full panoply of legal and equitable remedies, as well as attorney's fees for both claims, and had the option of requesting a jury trial of the section 1981 claim. As a general matter, the standards and burdens of proof under both statutes have been viewed as analogous.[226]

The one exception to the comparability of the two statutes, and the one limitation on section 1981's effectiveness, resulted from the decision in *General Building Contractors Association v. Pennsylvania.*[227] In that case, the Supreme Court held that section 1981 requires proof of discriminatory purpose and does not reach practices that only result in a *Griggs*-type disparate impact.[228] As discussed above, however, disparate impact actions not only account for a small percentage of employment discrimination claims, but also carry with them independent sources of

223. Eisenberg & Schwab, *Comment: The Importance of Section 1981,* 73 CORNELL L. REV. 596, 603 & n.43 (1988).

224. The section 1981 statute of limitations is borrowed from state law. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). However, in Burnett v. Grattan, 468 U.S. 42 (1984), the Court found that the state's six-month statute of limitations was inappropriate because such a short statute failed to accommodate the policies and goals of section 1981.

225. 42 U.S.C. §§ 2000e to 2000e-16 (1982). A charge of discrimination must be filed first with a local or state fair employment practices agency which may retain jurisdiction for sixty days. *Id.* § 2000e-5(c). Thereafter, a charge must be forwarded to the EEOC which has an additional thirty days attempt at creating a conciliation between the parties. The complainant may then request a "right to sue" letter. *Id.* § 2000e-5(f). Additionally, the charge of discrimination must be filed initially within 180 days of the discriminatory act. *Id.* § 2000e-5(e). Further, the complainant must file any suit in federal district court within the 90 days of receipt of a "right to sue" letter from the EEOC. *Id.* § 2000e-5(f)(1).

226. *See, e.g,* McCalpine v. Foertsch, 870 F.2d 409, 414 (7th Cir. 1989); Ramsey v. American Air Filter Co., 772 F.2d 1303, 1307 (7th Cir. 1985); Mason v. Continental Ill. Nat'l Bank, 704 F.2d 361, 364 (7th Cir. 1983); Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983), *cert. denied,* 469 U.S. 892 (1984); Wilson v. Legal Assistance of N.D., 669 F.2d 562, 563 (8th Cir. 1982); Davis v. County of Los Angeles, 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated,* 440 U.S. 628 (1979); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281 n.3 (7th Cir. 1977).

227. 458 U.S. 375 (1982).

228. *Id.* at 391; *see supra* notes 116-33 and accompanying text.

incentive and deterrence. The availability of broad damage relief has its greatest significance in the purposeful discrimination context.

The existence of an independent section 1981 claim for racial discrimination has led to startling disparities in relief, both in amount and availability. Compensatory and punitive damages frequently increase monetary relief numerous times over the amount of the back pay award available under Title VII.[229] In addition, section 1981 has provided a monetary remedy in some circumstances under which one does not exist at all under Title VII. Title VII requires a loss of back pay for a monetary recovery. Discrimination in the terms and conditions of employment that does not carry with it economic consequences may be remedied only by injunctive relief. In cases of racial harassment, for example, section 1981 has filled this significant gap.[230] In cases of sexual harassment that do not result in the loss of a job or in a disparity in pay, however, no monetary relief is available under Title VII. This disparity has become all the more apparent since the Supreme Court recognized a cause of action under Title VII for the existence of a "hostile work environment."[231] In *Meritor Savings Bank, FSB v. Vinson,*[232] the Court, in part reasoning from the decisions finding racial harassment actionable, explicitly rejected the employer's claim that only discrimination resulting in a tangible loss is cognizable under the statute. Yet because the Court failed to focus on the distinctions in relief created by section 1981, *Vinson* truly creates a right without a remedy.[233] As the concurring opinion

229. *See, e.g.,* Webb v. City of Chester, 813 F.2d 824, 836 (7th Cir. 1987) (in a discharge claim under section 1983, a female police officer, claiming sex discrimination under state law, recovered $30,000 for embarrassment and humiliation, $9,750 of which represented lost wages); *Ramsey,* 772 F.2d at 1306, 1313-14 (In a section 1981 claim based on race discrimination, an employee recovered $75,000 for "mental distress" for improper lay-off procedures; the court entered a remittitur of $20,000 in punitive damages, reduced from $150,000, and ultimately awarded $55,000, $37,486 of which represented lost wages.); Block v. R.H. Macy & Co., 712 F.2d 1241, 1243, 1245-48 (8th Cir. 1983) (claimant sued under Title VII and section 1981 for discharge and racial harassment and recovered $20,000 in actual damages and $60,000 in punitive damages—of which only $7598 was back pay under Title VII); Fisher v. Dillard Univ., 499 F. Supp. 525, 537 (E.D. La. 1980) (under Title VII and section 1981 claims for discharge and salary discrimination, plaintiff was awarded $50,000 in compensatory damages, $10,000 in punitive damages, and only $11,127 plus interest in back pay under Title VII).

230. Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986); Hunter v. Allis-Chalmers, 797 F.2d 1417, 1421 (7th Cir. 1986); Wilmington v. J.I. Case Co., 793 F.2d 909, 916 (8th Cir. 1986); Hamilton v. Rogers, 791 F.2d 439, 442 (5th Cir. 1986); *Ramsey,* 772 F.2d at 1307; Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1254-57 (6th Cir. 1985), *cert. denied,* 475 U.S. 1015 (1986); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984); Lucero v. Beth Israel Hosp., 479 F. Supp. 452, 453-55 (D. Colo. 1979).

231. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

232. *Id.*

233. The compensation of sexual harassment victims who suffer no wage related damage

suggests, the " 'pure' hostile environment case" allows only for injunctive relief and not money damages.[234] In essence, the relief allowable merely reiterates the command of the statute.[235]

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has been problematic for the lower courts. In Huddleston v. Roger Dean Chevrolet, Inc., 849 F.2d 900 (11th Cir. 1988), the court reversed judgment for the employer, finding that a prima facie case of sexual harassment had been established, but that plaintiff's leaving her job had been voluntary and not constructive discharge. Apparently concerned that without some monetary award, the plaintiff would not be eligible to recover attorney's fees, the court remanded the case for a consideration of an award of "nominal" damages. Both the underlying premise and the conclusion the court reached seem wrong. When a plaintiff does not seek injunctive relief in the form of reinstatement, as was the case in *Huddleston,* a declaratory judgment of a Title VII violation should be sufficient to support a fee application. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983) (suggesting that prevailing party status is questionable only when the plaintiff is denied the primary relief sought).

As to the propriety of nominal damages, the Seventh Circuit has rejected the *Huddleston* approach, noting that Title VII provides no authority for such non-equitable relief. *See* Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 758 (1990); Bohen v. City of E. Chicago, 799 F.2d 1180 (7th Cir. 1986). The court in *Swanson,* however, found that because the plaintiff's discharge was not related to sexual harassment, although the harassment was proved, she was not entitled even to judgment in her favor, and therefore was precluded from a fee award. This bizarre result demonstrates the inherent problems of the Title VII remedial scheme, which the court recognized to some extent, but felt impelled to " 'enforce that statute as written.' " 882 F.2d at 1240.

234. 477 U.S. at 77. In *Vinson,* not even injunctive relief was of use, since the plaintiff was terminated for reasons unrelated to the harassment and after the harassment had ceased. Under Title VII, injunctive relief only may be available where the plaintiff alleges sexual discrimination in work conditions. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied,* 441 U.S. 932 (1979).

235. The problem of relief in sexual harassment actions has been the subject of some critical commentary. The following commentaries generally have criticized remedies for sexual harassment under Title VII: Andrews, *The Legal and Economic Implications of Sexual Harassment,* 14 N.C. CENT. L.J. 113 (1983); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII,* 97 HARV. L. REV. 1449 (1984); Note, *Legal Remedies for Employment-Related Sexual Harassment,* 64 MINN. L. REV. 151 (1979) [hereinafter Note, *Remedies*]; Note, *The Emerging Law of Sexual Harassment: Relief Available to Public Employees* 62 NOTRE DAME L. REV. 677 (1987); Note, *Employer Liability for Co-worker Sexual Harassment Under Title VII,* 13 N.Y.U. REV. L. & SOC. CHANGE 83 (1984-1985) (authored by Christine O. Memman and Cora G. Young) [hereinafter Note, *Employer Liability*]; Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace,* 24 WASHBURN L.J. 572 (1985) (authored by Matthew C. Hoss and Lester J. Hubble); Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace,* 134 U. PA. L. REV. 1461 (1986) (authored by Krista J. Schoenheider) [hereinafter Comment, *Tort Liability*].

Commentators also have viewed as insufficient state claims such as assault, battery, intentional infliction of emotional distress, invasion of privacy, and intentional interference with contractual relations because application of sexual harassment to these theories of liability requires quite liberal interpretations of the standards for liability. Many commentators therefore have found it necessary to suggest amending Title VII and/or devising a new state remedy. *See, e.g.,* Andrews, *supra,* at 169-70; Note, *Remedies, supra,* at 178-80; Note *Employer Liability, supra,* at 112; Comment, *Tort Liability, supra,* at 1485-89.

While section 1981 created a certain inequity in the employment discrimination sphere, it alleviated the remedial limitations of Title VII for many claimants, and thus provided an expanded incentive and deterrent effect during most of Title VII's history. That era may well have ended with the Supreme Court's decision in *Patterson v. McLean Credit Union.*[236] In *Patterson,* a black woman brought an action under only section 1981, claiming racial harassment and discrimination in promotion and discharge. Although the question originally before the Court was whether racial harassment is actionable under section 1981,[237] the court also sought reargument on whether *Runyon* should be overruled.[238] On the latter issue, the Court found that principles of stare decisis outweighed the views of some justices that *Runyon* was incorrectly decided. With regard to harassment, the Court held that section 1981 does not reach such conduct. The Court's reasoning stems from the words of the statute, which protects only the equal right to "make and enforce" contracts. According to the Court, discriminatory hiring decisions, but not post-contract formation conduct, come within the "making" language.[239] The "enforcement" language protects employees only from conduct that impairs their ability to utilize the available legal processes to enforce contractual rights.[240] Harassment falls within neither category, and is therefore not actionable.[241] This can be viewed as the narrow holding of *Patterson.* The decision, however, has had a negative impact on other employment decisions as well. The scope of promotion decisions that have been found to fall under section 1981's protective coverage has been severely curtailed. With a few noteworthy exceptions, the courts have held that all discharge decisions are similarly excluded by *Patterson.*[242]

The Court remanded *Patterson*'s promotion claim on other grounds, but criticized the view of the circuit court that, unlike harassment claims, promotion claims "fall easily within" the statute because they go to the nature and existence of the contract. The Court took the opportunity to address this issue even though it had not been raised by the em-

236. 109 S. Ct. 2373 (1989).

237. A second issue involved the burden of proof on the promotion claim. The Court found error in a jury instruction that plaintiff was required to prove that she was better qualified than the white employee who received the promotion. *Id.* at 2377-78.

238. Patterson v. McLean Credit Union, 485 U.S. 617 (1988) (per curiam) (ordering reargument on whether *Runyon* should be overruled).

239. *Patterson,* 109 S. Ct. at 2372-73.

240. *Id.* at 2373.

241. *Id.* at 2373-75.

242. *See infra* note 250 and accompanying text.

ployer, indicating that only when the promotion would create a new employment relationship would such a claim be actionable.[243] The court cited a law firm's decision to admit an associate into a partnership as one example of such a new relationship.[244] It seems fair to predict that many promotion decisions will not encompass a change in relationship equivalent to partnership admission.[245]

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243. *Id.* at 2377.

244. *Id.*

245. In Malhotra v. Cotter & Co., 855 F.2d 1305 (7th Cir. 1989), the Seventh Circuit construed the language in *Patterson* mandating that only when promotion rises to the level of an opportunity for a new and distinct relationship between the parties is a denial of promotion claim actionable under section 1981. It found that there were three possible interpretations of the *Patterson* "new and distinct relation" test. The first interpretation, a contract test, simply analyzes whether the employee's contractual terms would change. The second, what could be labeled "the outsider test," focuses on whether the position sought by the plaintiff employee could have been filled only from within the company. The third and final test focuses on job requirements and whether the plaintiff's job duties and responsibilities would be substantially altered. *Id.* at 1311-12; *see also* White v. Federal Exp. Corp.,729 F. Supp. 1536, 1545-46 (E.D. Va. 1990) (outlines and expands upon the three *Malhotra* tests). The *Malhotra* court remanded the case for a determination of whether promotion from an auditor to a manager would constitute a new and distinct relation between employee and employer. The court added in dicta that "[w]e show no disrespect to the Supreme Court by suggesting that the scope of *Patterson* is uncertain." 855 F.2d at 1312.

In Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908 (4th Cir. 1989), the Fourth Circuit held that promotion from clerk to supervisor with a consequent increase in responsibility and pay satisfied the new and distinct relation test. *Id.* at 910. Nevertheless, since many changes in job status will not entail so significant an increase in pay or responsibility, the fate of less drastic job description changes under this standard is unsettled.

The district courts have applied the *Patterson* dicta to promotion cases restrictively. In *White,* the court applied the most limiting of the three *Malhotra* tests: the contract test. 729 F. Supp. at 1545-46. The court in *White* took the position that the contract test most faithfully interprets the *Patterson* mandate to give section 1981 "a fair and natural reading." *Id.* (citing *Patterson,* 109 S. Ct. at 2377 (quoted in *Malhotra,* 885 F. 2d at 1318 (Ripple, J. concurring))). The *White* court used the contract test to hold that a change in job description from courier to dispatcher did not meet the new and distinct relation test since it "was more in the nature of a lateral transfer than a promotion." *Id.* at 1546. Although the change of job description would have entailed a raise of one dollar per hour, the court saw this as a minor difference that did not amount to "an opportunity to enter into a new contract with the employer." *Id.*

Likewise, a Texas district court in Doffney v. Board of Trustees for Beaumont Independent School District, 731 F. Supp. 781 (E.D. Tex 1989), held that the court's decision in *Mallory* did not apply to a case in which a school district employee was denied a raise. The court found that "a change in financial remuneration for an employee who would continue to perform essentially the same job does not rise to the level of a new and distinct relation between the employee and the employer." *Id.* at 783. Thus, even a major revision of an important contract term—salary—was held not to satisfy the *Patterson* test.

In Greggs v. Hillman Distributing Co., 719 F. Supp. 552 (S.D. Tex. 1989), another Texas district court held that a promotion from local sales supervisor to "area supervisor" would not constitute a "new and distinct" employer-employee relation under *Patterson* because the plaintiff failed to establish facts that would demonstrate a change in his responsibilities. *Id.* at 555.

The court did not address the actionability of discharge decisions at all. The plaintiff had not pursued her discharge claim beyond the district court, and the circuit court had assumed that discharge, like promotion, was cognizable.[246] Part of the Court's rationale for eliminating harassment claims is, however, equally applicable to discharge claims. After analyzing the language of section 1981, the Court considered the policy justification for its holding. It noted that the allowance of dual claims undermines the administrative enforcement scheme of Title VII, which it viewed as of particular utility after an employer-employee relationship is established.[247] Moreover, the Court recognized that the overlap of claims is less significant in the hiring context, because there is no relationship that conciliation might salvage.[248] Finally, it commented that the more generous monetary relief under section 1981 discourages utilization of EEOC procedures.[249] Thus, it seems apparent that the majority in *Patterson* was intent on returning to the Title VII scheme the major enforcement authority for employment discrimination. Discharge does not logically fall within the protection for the "making" of contracts, and

As a result, the court made it clear that even promotions that involve management level changes must be individually scrutinized to determine whether they meet the *Patterson* test.

The *Patterson* test for promotions was applied retroactively in Williams v. BLM Co., Inc., 731 F. Supp. 231 (N.D. Miss. 1990), in which the court held that a promotion from the position of nursing aide or therapist to a position of activities director or social director did not constitute a new and distinct contractual relationship. The Court contrasted the job changes at issue in *Williams* with the *Patterson* example of an attorney who is denied partnership status. The court held that switching from one employment-at-will relationship to another is not a promotion analogous to the *Patterson* model. *Id.* at 236. In Crader v. Concordia College, 724 F. Supp. 558 (N.D. Ill. 1989), an Illinois district court held that failure to promote a male housekeeper for a college campus to director of housekeeping was not an adequate basis for a section 1981 claim. Like the *Williams* court, the court in *Crader* found that the promotion would not have fundamentally altered the quality of the employee's relationship with the employer so as to give rise to a new contractual relationship. *Id.* at 563.

In Bush v. Commonwealth Edison Co., 732 F. Supp. 895 (N.D. Ill. 1990), an Illinois district court found that salary and job function distinctions between mechanic and clerk positions in an automobile garage company did not constitute a *Patterson* new and distinct relationship. The court in *Bush* criticized the holding in *Mallory* as "far too expansive a reading" of *Patterson. Id.* at 898.

If courts continue to read *Patterson* to exclude substantial changes in job responsibility and remuneration from coverage under section 1981, few if any promotion decisions will be remedied under the statute.

246. Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *aff'd in part and vacated in part*, 109 S. Ct. 2363 (1989). Interestingly, the Supreme Court majority, in quoting the Fourth Circuit's opinion, referred only to the lower court's view that promotions are within section 1981's protection and deleted the mention in this sentence of discharge decisions being similarly included. *Patterson*, 109 S. Ct. at 2377.

247. *Patterson*, 109 S. Ct. at 2374-75.

248. *Id.* at 2375 n.4.

249. *Id.* at 2375.

it is difficult to envision how non-retaliatory discharge can be viewed as creating a legal disability to the enforcement of an employment contract. The articulated policy justifications for the Court's statutory construction apply with equal force to discharge as to harassment.[250]

250. Only two circuits have rendered decisions squarely addressing the issue whether discharge constitutes a claim under section 1981 after *Patterson.* The Ninth Circuit in Overby v. Chevron USA, Inc., 884 F.2d 470, 472-73 (9th Cir. 1989), relying heavily on the Supreme Court's language excluding post-contact formation conduct, held in conclusory fashion that *Patterson* bars a section 1981 claim for retaliatory discharge. In Courtney v. Canyon Television & Appliance Rental Inc., 899 F.2d 845 (9th Cir. 1990), the Ninth Circuit again held that "discharge is the type of post-formation breach of contract conduct not protected by section 1981," expanding *Overby* to include non-retaliatory discharge. *Id.* at 849 (citing *Overby,* 884 F.2d at 473).

The Eighth Circuit, however, has taken the opposite view. In the recently decided Hicks v. Brown Group, Inc, 902 F.2d 630 (8th Cir. 1990), the court held that even after *Patterson,* a claim for discriminatory discharge continues to be cognizable under section 1981. The court held that "post formation discharge continues to be actionable under the right to make contracts when it totally deprives the victim of the fundamental benefit the right to make the contracts was intended to secure—the contractual relationship itself." *Id.* at 640. The *Hicks* court also fits *retaliatory* discharge under section 1981's coverage of discrimination in the enforcement of contract rights because such retaliatory discharge "may intimidate [employees] into refraining from resorting legal process to vindicate [his or] her § 1981 rights." *Hicks* cites dicta in Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989), suggesting that retaliatory discharge continues to be actionable after *Patterson. See id.* at 1314 n.1, (Cudahy, J., concurring); *see also* English v. General Dev. Corp., 717 F. Supp. 628, 632-33 (N.D. Ill. 1989) (*Patterson* leaves retaliatory discharge intact); Jordan v. U.S. West Direct Co., 716 F. Supp. 1366, 1368-69 (D. Colo. 1989) (retaliation claims actionable after *Patterson* under right to enforce contract). *But see* Sherman v. Burke Contracting Inc., 891 F.2d 1527, 1534-35 (11th Cir. 1990) (retaliatory discharge no longer actionable under section 1981 after *Patterson*); Overby v. Chevron U.S.A., Inc., 884 F. 2d 470, 472-73 (9th Cir. 1989) (same); Miller v. Swissre Holding Inc., 731 F. Supp. 129, 132-33 (S.D.N.Y. 1990) (retaliatory dismissal alone is an insufficient obstacle to the enforcement of employment contract to be actionable under section 1981); Alexander v. New York Medical College, 721 F. Supp. 587, 588 (S.D.N.Y. 1989) (same); Williams v. National R.R. Passenger Corp. 716 F. Supp. 49, 51-52 (D.D.C. 1989) (retaliation not actionable under section 1981 because right to enforce contracts unimpeded); Dangerfield v. Mission Press, 50 Fair Empl. Prac. Cas. (BNA) 1171, 1172 (N.D. Ill. 1989) (same).

Hicks finds further support for the continued viability of discharge claims under section 1981 in the Supreme Court's decision in Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989), decided one week after *Patterson.* The *Hicks* court reasoned that since the Supreme Court addressed a section 1981 reverse discrimination claims in *Jett* without making "any reference, favorable or unfavorable, to the substantial body of Supreme Court Section 1981 jurisprudence developed in Section 1981 discharge claims," the court must have meant for *Patterson* to leave those decisions intact. *Hicks,* 902 F.2d at 637; *cf.* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).

Much of the court's reasoning, however, seems weak. The Eighth Circuit majority in *Hicks* may be engaging in the "twisting of interpretation of section 1981" cautioned against in *Patterson,* 109 S. Ct. at 2375, in its struggle against the confines of *Patterson*'s remedial restrictions. As the *Hicks* dissent by Judge Fagg points out, "[O]ur court lamely declines to apply *Patterson* because discriminatory discharge was not at issue or discussed in *Patterson* . . . . When a Court of Appeals is faced with a factually distinguishable, but legally relevant,

There is no question that *Patterson* already has substantially impaired a longstanding vehicle for escaping the restrictive scope of Title VII's monetary relief and that it will further impair the viability of private enforcement of employment discrimination claims.

V. Increasing Incentives and Deterrents in the Employment Discrimination Sphere

As established in previous Parts of this Article, Title VII's remedies are inadequate for the types of claims now most commonly asserted. If private initiative is to remain the main enforcement mechanism of Title VII, potential monetary relief must be maximized.[251] There are several

Supreme Court decision, the Court may not employ a different standard in analyzing the different facts." *Hicks,* 902 F.2d at 656 (Fagg, J., dissenting).

Despite the Eighth Circuit's attempt to preserve discharge as a claim under section 1981, if the holdings of the district courts are any indication, other circuits will fall in line with the Ninth Circuit's analysis barring such claims. *See* Hayes v. Community General Osteopathic Hosp., 730 F. Supp. 1333, 1337 (M.D. Pa. 1990) (racially motivated discharge is not actionable under section 1981 as interfering with the right to make or enforce contracts); Gregory v. Harns Teeter Supermarkets, Inc., 728 F. Supp. 1259, 1262-63 (W.D.N.C. 1990) (discharge claim involved conditions of continuing employment not actionable under section 1981); Bush v. Commonwealth Edison, 721 F. Supp. 895 (N.D. Ill. 1990) (wrongful demotion and discharge claim did not implicate section 1981's right to enforce contracts absent showing of employer's interference with judicial process); Greggs v. Hillman Distrib. Co., 719 F. Supp. 552, 554 (S.D. Tex. 1989) (claim of racially motivated discharge without more is outside scope of section 1981); Hall v. County of Cook, 719 F. Supp. 721, 723-24 (N.D. Ill. 1989) (*Patterson* precludes the applicability of § 1981 to discharge claims). *But see* Padilla v. United Air Lines, 716 F. Supp. 485, 490 (D. Colo. 1989) (possibility of termination affects the making of a contract and is thus actionable under section 1981); Birdwhistle v. Kansas Power and Light, 723 F. Supp. 570, 575 (D. Kan. 1989) (discharge directly related to contact enforcement and is still actionable under section 1981); Booth v. Terminix Int'l Inc., 722 F. Supp. 675, 676 (D. Kan. 1989) (same). *Padilla,* the case most often cited in support of discharge claims under section 1981, was distinguished or criticized in eight out of the 12 cases that cite it. Thus, with the exception of the *Hicks, Padilla, Birdwhistle,* and *Booth* courts, every court to address the issue has held that non-retaliatory discharge does not constitute a section 1981 claim.

251. An alternative to the expansion of monetary relief would be to bolster administrative enforcement of the statute. Judge Posner recently suggested this route:

> How many plaintiffs can successfully negotiate the treacherous and shifting shoals of present-day federal employment discrimination law? Perhaps strengthened enforcement by the Equal Employment Opportunity Commission is the answer. Perhaps it is time for Congress to replace the present crazy quilt of federal discrimination remedies with a single, simple, swift administrative remedy.

Malhotra, 885 F.2d at 1313 (footnote omitted). As discussed in Part I, limited monetary relief in the labor context has a lesser impact on the assertion of claims because the NLRB has the ability to adjudicate disputes and order reinstatement and back pay. No equivalent administrative enforcement is provided for under Title VII.

Congress recently adopted administrative procedures for the enforcement of the federal fair housing laws in an effort to increase the federal effort to eliminate housing discrimination. Under the 1968 legislation, the Department of Housing and Urban Development had authority only to conciliate complaints. If the agency was unsuccessful, claimants were left to a

routes to this end. The first involves congressional changes in either Title VII itself or in its companion statute, section 1981. The second requires broader judicial construction of the existing remedial provisions, which has some doctrinal support.

A. Legislative Solutions

Although Title VII's remedial limitations are not unique in the civil rights realm,[252] neither are they uniformly applicable.[253] Other models

private action in federal court. Under the new scheme, if the agency finds "reasonable cause," it must prosecute the claim on behalf of the claimant. The adjudication may be conducted before an administrative law judge or in federal court, at the election of either party. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3620, 3631 (Supp. 1989)) [hereinafter FHAA]; H.R. REP. NO. 711, 100th Cong., 2d Sess. (1988) (House Judiciary Committee Reports on 1988 amendments).

If Title VII were amended to provide the EEOC with similar responsibilities and authority, economic incentives for litigants to pursue claims would be unnecessary because the burden of prosecution would rest with the government. It is unlikely that such a change in Title VII will be seriously contemplated, however, given the volume of complaints filed with the EEOC, and the fact that the EEOC effectively has been unable to control its docket even for purposes of investigation and conciliation. Moreover, HUD receives some 5000 complaints per year; the EEOC handles over 100,000. *Compare* 134 CONG. REC. H4603, H4605-06 (June 22, 1988) (Representative Fish noted during the debate on the FHAA that in 1987, 4699 housing discrimination complaints were filed with HUD) *with* 1985 EEOC ANN. REP., *supra* note 177.

252. For example, several federal statutory schemes that bar employment discrimination borrow Title VII's remedial provisions. *See, e.g.,* Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (1982 & Supp. 1988) (prohibits discrimination on the basis of race, color, sex, national origin, or religion in programs receiving federal financial assistance); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1683 (1982) (prohibits gender discrimination in educational programs receiving federal financial assistance). In addition to enforcement through proceedings to halt federal funding, private rights of action have been recognized under both statutes. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX); Lau v. Nichols, 414 U.S. 563 (1974) (Title XI). Moreover, both statutes may be used to attack employment discrimination.

253. At least for intentional violations, the Supreme Court has held that the same back pay remedy available under Title VII should be permitted in Title VI actions, and implicitly in Title IX actions as well. Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582 (1983). The Rehabilitation Act of 1973, 29 U.S.C. § 791 (1982), barring discriminations on the basis of handicap in federally funded programs, is explicitly enforced by the remedies established under Title VI, 29 U.S.C. § 794a(a)(2). In Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), a handicapped person alleged employment discrimination and sought back pay. The Court followed the *Guardians'* view that in cases alleging intentional discrimination, back pay is appropriate, but specifically did not decide "[t]he extent to which money damages are available in under § 504." *Id.* at 630. The lower courts have split on the issue of broader monetary relief. *Compare* Miener v. Missouri, 673 F.2d 969 (8th Cir.) (general damages approved), *cert. denied,* 459 U.S. 909 (1982), *with* Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981) (back pay and other losses denied), *cert. denied,* 456 U.S. 937 (1982) *and* Drayden v. Needville Indep. School Dist., 642 F.2d 129 (5th Cir. Unit A Apr. 1981) (same). Thus, although the basic entitlement to back pay under these statutes springs from Title VII, it is unclear whether Title VII's restrictions on monetary relief also will be adopted.

of monetary relief fashioned by Congress have proven workable.[254] The statutory allowance of compensatory and punitive damages, or some alternative method of compensation beyond back pay, has not been viewed as overly burdensome on defendants or as creating particularly difficult problems of proof.

The best evidence of the viability of a damages remedy comes from the courts' experience with dual section 1981 and Title VII claims. Beginning in the early 1970s and continuing until the *Patterson* decision,[255] these claims have been widely available to individual claimants other than those alleging gender or religious discrimination. Among the provisions of the proposed Civil Rights Act of 1990 is an amendment to section 1981 making explicit the statute's coverage of post-contract formation employment decisions, and in essence reversing *Patterson.*[256] This amendment to section 1981, however, represents only a half-step in curing the statute's limitations. Another option for Congress would be to extend section 1981's protection to the same classes of persons protected under Title VII, instead of just to a substantial subset thereof. The statute could be amended to read: "All persons . . . shall have the same right [as broadly defined in the amending language] . . . to make and enforce contracts . . . as is enjoyed by white citizens, regardless of race, color, national origin, sex or religion." The advantage of this statutory change is its simplicity: it leaves the body of Title VII case law undisturbed and simply puts cases of gender discrimination on the same footing as those of race discrimination in terms of the allowance of dual causes of action. The potential disadvantage of this solution is the same as that which now plagues employment discrimination claims based on race. The broad monetary relief under section 1981 will be available only when intentional discrimination under the "disparate treatment" model is proved. This limited extension of relief would address only the type of "private" claim for which existing remedies are the weakest; "public" Title VII claims, to the extent they remain provable after *Ward's Cove,* still lend themselves more readily to injunctive and class-based relief.[257]

An alternative to this route—and the one Congress is now pursuing—is amendment of Title VII itself to empower courts to award "legal" as well as equitable relief. The bill before Congress uses the most

254. *See infra* notes 262-265 and accompanying text.

255. See *supra* Part IV.

256. S. 2104, 101st Cong., 2d Sess. (1990). Apparently, the Bush Administration does not oppose this amendment. *See* 1990 ACT LEGISLATIVE HISTORY, *supra* note 38; address by John Dunne, Assistant Attorney General for Civil Rights to the Association of the Bar (May 30, 1990).

257. *See supra* notes 116-30 and accompanying text.

obvious path: the allowance of compensatory and punitive damages in case of malice or reckless or callous indifference.[258] The Administration and congressional opponents of the bill have expressed strong reservations about punitive allowances;[259] and have also put forth the "liquidated damages" concept.[260] Without adoption of the current congressional proposal, however, Title VII remedies will remain less than complete.

Compensatory damages are significant particularly in those situations in which there are no wage-related consequences of the discriminatory conduct. The "hostile work environment" and racial or sexual harassment claims are the primary examples of the need to provide "pain and suffering" recompense. In many situations, however, compensatory damages will not provide any substantial increase in monetary relief. The discriminatorily discharged employee who soon finds comparable work might well have difficulty proving any substantial psychological harm. Thus compensatory damages alone will not fully respond to the need for increased incentives. Moreover, compensatory damages for mental distress are generally recognized as reflecting elements of punishment as well as compensation.[261]

Another model of relief is provided in the Age Discrimination in Employment Act of 1967 (ADEA).[262] That statute, which closely mirrors Title VII in its substantive coverage and enforcement structure,[263] expands monetary recovery through the allowance of liquidated damages that require the doubling of the back pay award in the case of "willful violations."[264] The liquidated damage provisions of the ADEA were in-

258. S. 2104, 101st Cong., 2d Sess., § 8 (1990).

259. *See* 1990 ACT LEGISLATIVE HISTORY, *supra* note 38.

260. *Id.*

261. *See, e.g.*, RESTATEMENT OF TORTS § 908 comment c (1939) (noting the punitive element inherent in awards for emotional distress).

262. 29 U.S.C. §§ 621-634 (1982 & Supp. 1990).

263. The ADEA basically prohibits the same "unlawful employment practices" by employers, employment agencies, and labor organizations as Title VII. *Compare* ADEA, 29 U.S.C. § 623 *with* Title VII, 42 U.S.C. § 2000e-2 (1982). *See also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) (substantive provisions of ADEA were derived from Title VII).

264. The ADEA incorporates the remedies available in section 16 of the Fair Labor Standard Act, 29 U.S.C. § 626(b) (1982) (FLSA). Until recently, the FLSA included a mandatory award of liquidated damages equal to the amount of unpaid wages. *Id.* at § 216 (b)-(c). The ADEA limited such awards to cases of "willful violation," a term the Supreme Court has interpreted to mean that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited." *Thurston*, 469 U.S. at 126.

Even though the ADEA speaks of "legal or equitable" relief, in addition to specifically authorizing liquidated damages, the courts of appeals are unanimous in denying "pain and suffering" and punitive damages, reasoning that the double recovery fulfills the "legal" relief purposes. *See, e.g.*, Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir.), *cert. denied*, 459 U.S.

tended by Congress to be punitive in nature, and to furnish an effective deterrent to employer violations of the Act.[265] The problem with this remedy, however, is the same as that created by an award of only back pay. It neither compensates an employee for non-wage-related discrimination, nor provides incentives for the discharged employee who does not suffer substantial financial harm. The potential for doubling a $1,000 back pay liability, for example, will not substantially encourage the enforcement of Title VII rights.

The punitive aims inherent in both a "mental distress" or liquidated damages scheme are better addressed directly. Allowance of punitive damages, even if the back pay provision were left intact, would meet both the incentive and deterrent aims of Title VII's private enforcement mechanism. It would allow the fact finder flexibility in determining whether the back pay award sufficiently compensates the victim of the discriminatory act for the harm suffered and sufficiently deters the illegal conduct. In addition, it would eliminate the need for plaintiffs to further complicate the proof of Title VII claims through the introduction of evidence relating to intangible harm.

Congress adopted this route in amending Title VIII of the Civil Rights Act, which bars discrimination in the sale or rental of housing.[266] The original statute, enacted in 1968, provided for a private right of action for discrimination, as well as equitable relief, compensatory dam-

1039 (1982); Naton v. Bank of Cal., 649 F.2d 691 (9th Cir. 1981); Rogers v. Exxon Research & Eng'g Co., 550 F.2d. 834 (3d Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978).

The Equal Pay Act also allows for liquidated damages. 29 U.S.C. § 206(d) (1982). The statute, enacted in 1963 as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1978 & Supp. 1990), has a limited scope, however, compared to Title VII. It requires "equal pay" in certain situation where men and women perform "equal work," but it excludes numerous categories of employment and employers. *See* 29 U.S.C. § 213. Since the Equal Pay Act is part of the FLSA, which is also incorporated into the ADEA, the same double back pay provisions apply. Until the passage of the Portal-to-Portal Act (PPA), 29 U.S.C. § 260, in 1985, liquidated damages awards were mandatory under the FSLA, and therefore under the Equal Pay Act. The PPA established an exception if the employer proves its actions were made in good faith and it had reasonable grounds for believing that it was not violating the Act. Although liquidated damages are still mandatory for willful violations, the exception under the PPA seems to leave claims under the Equal Pay Act and the ADEA on the same footing with regard to the discretionary nature of damages when good faith on the part of the employer can be established.

265. *See Thurston,* 469 U.S. at 125-26. In *Thurston,* Justice Powell looked at the ADEA's legislative history, noting that the original bill proposed criminal liability, but an amendment permitting double damages was substituted to eliminate problems of investigation and proof. The intent, however, was to "furnish an effective deterrent" against violations. *See* 113 CONG. REC. 2199 (1967) (remarks of Senator Javits).

266. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3620, 3631 (Supp. 1989)). *See also infra* note 277.

ages, and punitive damages limited to $1,000.[267] The Fair Housing Amendments Act of 1988 removed the $1,000 cap;[268] Congress considered the limitation "a major impediment to imposing an effective deterrent on violators and a disincentive" to the bringing of actions.[269]

Even an amendment permitting punitive awards under Title VII, however, will not completely address the problem of limits on monetary relief unless the purpose of such awards is broadly construed. Under section 1981, for example, some courts have required that punitive awards be premised on a showing that defendant's conduct was prompted by an evil motive.[270] The fact that compensatory damages may be nominal, and therefore provide no punishment or deterrent for illegal behavior, does not in itself justify a punitive award.[271] A similar definition of "willfulness" has been adopted under the ADEA to justify liquidated damages: it must be shown that an employer "knew or showed reckless disregard" of whether the conduct was prohibited by the statute.[272] If an amended Title VII requires a showing of malice or actual intent as a pre-condition to a punitive damage award, the employer who fails to monitor employment decisions appropriately for indications of discrimination may escape monetary liability.[273] A better view would be to recognize to a greater extent the pure deterrent function of punitive damages, permitting awards in cases of "negligent" employment practices, when an employer acts with "callous indifference" to protected rights.[274] Alternatively, the allowance of both compensatory and puni-

267. Act of April 11, 1968, Pub. L. No. 90-284, § 812, 82 Stat. 73, 88.

268. *See* 42 U.S.C. § 3613 (1982).

269. H.R. REP. No. 711, 100th Cong., 2d Sess. 40 (House Judiciary Committee Report).

270. *See, e.g.,* Beauford v. Sisters of Mercy-Province of Detroit, Inc., 816 F.2d 1104 (6th Cir.), *cert. denied,* 484 U.S. 913 (1987); Jones v. Western Geophysical Co., 761 F.2d 1158 (5th Cir. 1985).

271. *Jones,* 761 F.2d at 1162.

272. *See supra* notes 263-65 and accompanying text.

273. *See, e.g.,* Foster v. MCI Telecommunications, 555 F. Supp. 330, 337 (D. Colo. 1983), *aff'd,* 773 F.2d 1116 (10th Cir. 1985). In *Foster,* a black salesman established discriminatory termination, but because there was no evidence to implicate official company policy, punitive damages under section 1981 were denied.

274. The support for a more liberal view of punitive damages can be found in Smith v. Wade, 461 U.S. 30 (1983), in which the Court determined the punitive damages standard under another Reconstruction Era civil rights statute, 42 U.S.C. § 1983. The Court approved a "callous indifference" formula, rejecting the argument that actual malicious intent was required, and emphasized the deterrent aspect of such awards. *Wade,* 461 U.S. at 51. Four justices dissented, however, and were this issue before the Court today the dissenting viewpoint might well garner a majority. Therefore, in the case of legislative action, Congress should set an explicit standard consistent with *Smith.* The *Smith* standard was applied in section 1981 actions. *See* Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983); *see also* Rowlett v. Anheuser-Bush, Inc., 832 F.2d 194 (1st Cir. 1987) (jury instruction that punitive damages

tive damages would circumscribe the universe of cases in which the possibility of real monetary recovery was remote. Problems of proving emotional harm are no less difficult than problems of proving reckless conduct.

If Title VII were amended to provide "legal" remedies, jury trials undoubtedly would be mandated;[275] and the proposed bill so provides.[276] The Supreme Court has required jury trials in damage claims asserted under Title VIII[277] and the ADEA;[278] and the right to a jury trial has been recognized uniformly under section 1981.[279] During Title VII's early history, there was a sense that the allowance of a jury trial would work against the remedial aims of the statute.[280] Juries were viewed as less sympathetic than the courts to claims of discrimination; indeed, re-

could be awarded for purposes of punishment and as a deterrent to others was sufficient to guide the jury).

275. The Supreme Court never has held directly that a jury trial is not required under Title VII. In Curtis v. Loether, 415 U.S. 189 (1974), and Lorillard v. Pons, 434 U.S. 575 (1978), both addressing trial by jury under other civil rights statutes, *see infra* notes 277-78, the Court expressly refused to address the issue. Justice Marshall wrote in *Lorillard,* "we, of course, intimate no view as to whether a jury trial is awardable under Title VII." *Id.* at 583-84. In Lehman v. Nakshian, 453 U.S. 156, 164 (1981), however, Justice Stewart wrote in dicta that "there is no right to a trial by jury in cases arising under Title VII."

276. S. 2104, 101st Cong., 2d Sess. § 8 (1990).

277. In *Curtis,* the Court held that the seventh amendment applies to claims based on a statute if the statute creates "legal" rights and remedies enforceable by damage awards. *Curtis,* 415 U.S. at 195. The Court found that a jury trial may be demanded by either party seeking punitive damages under a Title VIII housing discrimination claim.

278. Lorillard v. Pons, 434 U.S. 580 (1978). In *Lorillard,* the Court considered the seventh amendment's impact on the ADEA. Relying largely on the reasoning in *Curtis,* the Court held that a jury trial is available because the statute specifically refers to "legal" relief and incorporates FLSA remedies, for which jury trials are permitted.

279. *See, e.g.,* Williamson v. Handy Button Mach. Co., 817 F.2d 1290 (7th Cir. 1987) (jury's verdict governs factual claims common to both section 1981 and Title VII causes of action); Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir.), *cert. denied,* 454 U.S. 1064 (1981); *cf.* Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316, 318 (8th Cir. 1981) (parties entitled to jury trial under the Civil Rights Act of 1964). If only equitable relief was sought in a section 1981 action, however, no entitlement to a jury trial would attach. When a party seeks both damages and reinstatement with back pay, most courts have concluded that the back pay award is for the judge to determine as an equitable remedy. *See, e.g.,* Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980); Burt v. Edgefield County School, 521 F.2d 1201 (4th Cir. 1975). *But see Bibbs,* 653 F.2d at 318 (jury determines "all legal contentions").

280. Several articles have addressed the question of the availability of jury trials under Title VII. *See* Sape & Hart, *supra* note 79; Note, *Jury Trial Right Under Title VII: The Need for Judicial Reinterpretation,* 6 CARDOZO L. REV. 613 (1985) (authored by Vincenza G. Aversano, Karen M. Kalikow & Lisa S. Presser) [hereinafter *Judicial Reinterpretation*]; Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964,* 37 U. CHI. L. REV. 167 (1969) (authored by Mark R. Pettit). The early articles seem to presume that jury trials would prejudice plaintiff's claim. *But see* Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies,* 7 B.C. INDUS. & COM. L. REV. 495, 508-09 (1966).

quests for jury trials came largely from southern defendants because of the perception that southern juries would not be sympathetic to civil rights violations.[281] The rejection in 1972 of an amendment allowing jury trials under Title VII stemmed from this view.[282] Today, however, the balance of sympathies for claims of discrimination may well be reversed, given that the federal judiciary now reflects almost ten years of conservative Republican appointments.[283] Moreover, jury trials for claims of racial and age discrimination in employment have become the norm. In fact, the common assertion of dual section 1981 and Title VII claims has created an unwieldy problem of division of fact finding between the judge and the jury. The typical solution has been to permit a jury trial on claims for legal relief under section 1981, while leaving questions of equitable relief to the courts.[284] The jury's findings on common factual questions, however, are binding for Title VII purposes.[285] Thus, given that factual issues of racial discrimination are largely jury determined, the concerns of Congress in the early 1970s—indeed, the same

281. *Judicial Reinterpretation, supra* note 280, at 168.

282. *See supra* notes 104-106 and accompanying text.

283. The changed understanding of the role of jury trials is illustrated by the recent opinion in Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781 (N.D. Ala. 1989). The plaintiff brought a Title VII action for sexual harassment, seeking compensatory and punitive damages and a jury trial, the legal basis for which is not stated. The defendant moved to strike the jury, which was comprised of residents of the deep South. The court denied the motion, "[b]ecause the unwritten rationale for non-jury trials in Title VII cases no longer appertains," and because recent Supreme Court decisions in other contexts show that "new life has suddenly been breathed into the Seventh Amendment." *Id.* at 783-84 (citing Tull v. United States, 481 U.S. 412 (1987), and Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989)). As to the "unwritten rationale," the *Beesley* court noted: "The days when Southern juries could not be trusted to follow the laws enacted to guarantee civil rights . . . are long gone." *Id.* at 782 The court further commented that the importance of jury trials to plaintiffs is demonstrated by the simultaneous invocation of the Title VII and Section 1981 clauses: "many blacks and women now trust jurors more than they trust judges." *Id.*

The reasoning of *Beesley* may not withstand appellate scrutiny, primarily because the Supreme Court decisions relied upon the availability of punitive damages, and the *Beesley* court did not analyze plaintiff's entitlement to such relief under Title VII. Nevertheless, the sentiments expressed in the opinion concerning jury trials seem to reflect current reality accurately.

On a motion for reconsideration, the court stuck by its decision. It did not expound on the basis for a potential award of compensatory damages, other than to note that "front pay" is not "equitable" relief in any real sense but is routinely granted, and to suggest that juries should be entitled to compensate victims of harassment when there is no economic harm. In addition, the court adopted a novel view of *Patterson,* suggesting that the Supreme Court "must have meant" that the remedial structure previously available under section 1981 is shifted to Title VII. *Beesley,* 723 F. Supp. at 646.

284. *See supra* note 280.

285. *Cf.* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (merging of law and equity); Beacon Theatres v. Westover, 359 U.S. 500 (1959) (same).

concerns being voiced today by opponents of the 1990 Act[286]—would appear to be unfounded.

B. Judicial Rethinking

Even without statutory modification, the Title VII remedial scheme could be applied more flexibly by the courts to permit compensation for economic harm that does not take the form of lost pay. Such relief could be viewed as equitable restitution for the loss of employment opportunity. It would be particularly appropriate in the following circumstances, assuming a finding of discrimination: the employee who is rejected for a position, but accepts another job with an equivalent salary and does not wish to return to the original position; the employee who is denied a promotion for which the pay differential is not great; the employee who is harassed but suffers no monetary consequences; and the employee who is terminated, shortly thereafter obtains comparable work, and does not wish reinstatement.[287] Take, for example, the last situation. The worker soon reemployed after a discriminatory discharge has no substantial lost wages claim. Unless she is willing to accept reinstatement, however, she forgoes the benefits of seniority that would have accrued to her but for the discharge. These benefits may take the form of eligibility for promotion or choice assignment, increased overtime, or greater benefits such as vacation time or profit sharing. In addition, the replacement position may be generally equivalent in terms of salary and benefits, but not in opportunity for advancement, or in other less measurable terms such as working conditions. Finally, the terminated employee may be suffering or may suffer in the future economic consequences as a result of a job change stemming from a discharge. Similarly, the employee denied a promotion who files suit, but remains in her position, probably has jeopardized her advancement and lost opportunity far beyond that compensable by the pay differential between the two positions.[288]

286. *See* 1990 ACT LEGISLATIVE HISTORY, *supra* note 38.

287. Since *Patterson,* section 1981 permits compensatory and punitive damages only in the first of these situations and only in case of race discrimination or its equivalent in terms of national origin. *See supra* notes 239-50 and accompanying text.

288. An extreme example of this problem is described in Cowan v. Prudential Insurance Co., 852 F.2d. 688 (2d Cir. 1988). A black sales agent prevailed on his section 1981 and Title VII failure to promote claims. The district court awarded $15,000 in compensatory damages under section 1981 for emotional distress but refused to award back pay, finding that the plaintiff would have earned less during the liability period as a sales manager than as a sales agent. *Id.* at 690-91. Of course, had this case been decided post-*Patterson,* the plaintiff would have recovered nothing.

Characterizing a monetary award for lost employment opportunity as equitable relief is no more or less appropriate than categorizing back pay as equitable relief. The basis courts have adopted for justifying this theoretical framework is that back pay is a form of equitable restitution and is awarded at the trial judge's discretion.[289] Neither of these rationales, however, rests on a particularly firm foundation.

Traditionally, the concept of equitable restitution turns on the status of the defendant, not on that of the plaintiff. The defendant "restores" to the plaintiff either the property wrongfully taken or the money gained as a result of the taking: his unjust enrichment. Damages, on the other hand, compensate the plaintiff for his losses, which may or may not equal the defendant's gain. Equity deprives the defendant of money to which he is not entitled in good conscience.[290] Back pay, in the employment discrimination context, does not represent defendant's gain; a real restitutionary award would deprive the defendant of the profit he accumulated as a result of the discriminatory act, a measure of relief difficult to contemplate.[291] Indeed, the "restoration" concept under Title VII

289. *See e.g.,* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); *see also supra* notes 40-41 and accompanying text. *But see* Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981); Ochoa v. American Oil Co., 338 F. Supp. 914, 917-18 (S.D. Tex. 1972) (remedy of back pay is more appropriately characterized as legal damages and therefore there is a right to a jury determination).

290. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 222-26 (1973); RESTATEMENT OF RESTITUTION §§ 128, 150, 159, 202 (1937).

291. *See generally,* D. DOBBS, *supra* note 290, at 222-78.

In a very recently decided case, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 110 S. Ct. 1339 (1990), the Supreme Court in essence acknowledged that the characterization of back pay as equitable relief is a fiction. *Terry* held that plaintiff-employees who seek back pay from their union for a breach of fair representation duty are entitled to a jury trial. The Court found that back pay is legal not equitable relief in the fair representation context because the relief is not restitutionary. Back pay, the Court noted, is not a disgorgement of ill-gotten profits in the form of monies wrongfully held by the union. Rather, back pay represents wages and benefits that the employees would have received had their grievances been processed properly, which is a damages-type remedy. *Id.* at 1347-48.

The union argued, and the Court recognized, that this understanding of back pay directly conflicts with uniform Title VII case law. Justice Marshall noted that the denial of jury trials under Title VII never has been considered by the Court directly, but went on to state: "Assuming, without deciding, that such a Title VII plaintiff has no right to a jury trial, the Union's argument [drawing an analogy to Title VII] does not persuade that the respondents are not entitled to a jury trial here." *Id.* at 1348.

To distinguish earlier Title VII cases, the Court first cited the reference to "equitable relief" in Title VII itself, and suggested that back pay sought from an employer is more restitutionary in nature than back pay sought from a union. The Court also was unpersuaded by the fact that back pay for unfair labor practices is considered equitable relief under the NLRA, noting that unfair labor practice violations concern the "public interest," but fair representation violations "target[ ] 'the wrong done the individual employee.' " Therefore, appropriate

hinges on the plaintiff's injury and involves restoring the injured party to the position she would have been in, monetarily and temporally, had it not been for the discriminatory act.[292] "Restitution" is used not as a term of art peculiar to equity jurisprudence, but is given its ordinary, everyday meaning as compensation.[293] Back pay stands in closer proximity to "legal" than to "equitable" relief. As long as Title VII specifically refers to back pay as "equitable" and authorizes only "any other equitable relief," however, the courts will be hard pressed to simply permit compensatory damages. Nonetheless, the same loose construction of equitable remedies that supports back pay's classification as such can, by the same measure, support restitution for loss of employment opportunity.

A similar quasi-fictional approach to the categorization of back pay as an equitable remedy is evident with regard to its discretionary nature. Equity presumes certain limits and defenses based on concerns of ethics and public policy.[294] Relief may depend on the defendant's good faith and the degree of hardship imposed.[295] With regard to back pay, however, these equitable notions largely ceased to play a meaningful role after *Albemarle Paper Co. v. Moody*,[296] the only Supreme Court decision that directly addresses the intent and scope of monetary relief under Title VII. *Albemarle* dealt with limits on a lower court's discretion to award or deny back pay.[297] Like most of the early Title VII cases that reached the Supreme Court, *Albemarle* was a class action challenging a Southern manufacturers's racially discriminatory employment practices. After Title VII's enactment, the employer eliminated its segregated job classifications, but put black workers at the end of the seniority line, thereby effectively keeping them out of higher paying skilled positions.[298] The

remedies may differ. *Id.* at 1349 (quoting Electrical Workers v. Foust, 442 U.S. 42, 49 n.12 (1979)).

This convoluted attempt to distinguish Title VII, along with the Court's refusal to embrace completely the settled view of Title VII remedies, suggests some receptiveness to reconsideration of Title VII remedial principles.

292. *Id.*

293. *Id.*

294. *See, e.g.*, D. DOBBS, *supra* note 290, at 45, 55-57.

295. *See generally*, Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940) (when determining relief the court should not consider only the parties' interests but should weigh other interests, such as those of the community).

296. 422 U.S. 405 (1975). *Albemarle* was decided almost exactly ten years, to the day, after Title VII went into effect.

297. *Albemarle* also addressed a second very important substantive issue: the standard of proof to establish the "job relatedness" of a pre-employment test that has a racially discriminatory impact. *Id.* at 425-36.

298. *Id.* at 409.

district court ordered the implementation of a system of plant-wide seniority, but refused to award back pay for the difference in compensation that black workers would have received but for the discriminatory seniority system. The court relied on a finding that the employer had not acted in bad faith: the employer had integrated its plants at about the time that the Act was passed, and had at least partially modified its seniority system as the judicial decisions made clear what was required.[299] The court of appeals reversed the denial of back pay, holding that a successful plaintiff class is "ordinarily" entitled to a monetary award and mere good faith is a not a defense.[300] The Supreme Court granted certiorari based on a conflict in the circuits as to the standards governing back pay awards. Thus, the basic question before the Court was whether a traditional concept of equitable relief, the words used in Title VII, would be applied literally in Title VII cases to give district courts largely unfettered discretion in back pay decisions.

Relying on labor law precedent and the "transcendent" legislative purposes of Title VII,[301] the Court in essence established a presumption in favor of back pay awards. It grounded this result first in what it described as the primary prophylactic objective of the Act to remove barriers and "achieve equality of employment opportunities": if only injunctive relief were routinely awarded, there would be little incentive to reform employment practices. The reasonably certain prospect of back pay liability, the Court reasoned, would serve as a "spur or catalyst" to cause self-evaluation and correction of discriminatory practices.[302]

The second rationale for the presumption, according to the Court, stems from the need for victims to be "made whole." Remedies must repair past injustice as well as correct for the future. The Court saw this "make whole" concept as derived from Title VII's precursor, the NLRA, which had been interpreted as requiring back pay awards as a matter of course, and from the legislative history of the 1972 Title VII amendments which used this language.[303] Reviewing the denial of back pay against these principles, the Court found that absence of bad faith does

299. *Id.* at 410. The Court also was influenced by the fact that a back pay claim was not asserted until five years after the institution of the action.

300. Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973), *vacated* 422 U.S. 405 (1975). The court of appeals analogized to the standards set forth in Newman v. Piggie Park Enters., 390 U.S. 400 (1968), which held that civil rights attorneys' fees can be denied only in "special circumstances." The Supreme Court, however, rejected this reasoning, coming to the same conclusion by different means. *Moody*, 422 U.S. at 415.

301. *Id.* at 417-22.

302. *Id.* at 417-18.

303. *Id.* at 418-21. *See supra* notes 52-64 and accompanying text (background of the amendments).

not insulate an employer from monetary liability, since Title VII looks to the consequences of discriminatory practices not to an employer's intent. To hold otherwise would "open an enormous chasm between injunctive and back pay relief."[304]

Throughout the opinion, the Court evidenced a concern with the possibility of inconsistent awards resulting from an application of equitable principles, particularly through the concept of good faith. The fear expressed was that the national policy goals inherent in the enactment of the statute will be vitiated unless clear guidelines are established: Congress' intent in using equitable language was not to provide discretion in granting or denying relief, but rather to insure that the lower courts were given flexibility in according complete relief. Thus, the Supreme Court stated the oft-cited rule: "Backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[305]

Albemarle clarifies the idea that equitable remedies in the Title VII context mean something quite different than traditional notions of equity. The courts' discretion to award monetary relief is at once narrower and broader. "Good faith" does not immunize an employer because monetary relief serves a compensatory purpose—to make the victim whole[306]—and in essence, a punitive purpose—to ensure future compli-

304. *Id.* at 422-23. The Court remanded the case to determine whether the employer suffered prejudice "in fact" as a result of the plaintiffs' delay in asserting the back pay claim. *Id.* at 423-25.

305. *Id.* at 421. The minority concurring opinions in *Albemarle* reflect a serious concern over the limiting of the lower courts' discretion through the creation of a presumptive entitlement to back pay. Justice Rehnquist made a valiant attempt to control the scope of the majority opinion, suggesting that the Court could not mean quite what it said. If back pay "is thought to flow as a matter of course from a finding of wrongdoing," *id.* at 442 (Rehnquist, J., concurring), then the remedy is indistinguishable from damages and a jury trial would be required—a result clearly contrary to the statute's explicit recognition of the need for expediency in the resolution of these claims. Thus, the majority's "real" holding confirms the district court's "broad latitude" and "substantial discretion" as to whether to award back pay. *Id.* at 443. All the Court "really" held, according to Rehnquist, was that a "good faith defense" is available only through the statutory exception for reliance on a written opinion of the EEOC. *Id.* at 444. A district court, however, still may conclude that an employer's actions were reasonable under the circumstances and in good faith, and thus form a basis to deny back pay. *Id.* at 444-45. Justices Blackmun and Burger confronted the majority more directly, both arguing that good faith may sometimes serve as a defense to a back pay award, although differing as to whether the facts before the Court rise to the defense's threshold.

306. One explanation for this departure from traditional equitable principles can be traced to the relationship between equity and statutory violations. As Professor Plater has noted in his discussion of this subject, the flexibility and balancing that are the cornerstones of the judicial role in common law equity jurisprudence do not have applicability in the face of statutory violations. *See* Plater, *Statutory Violations and Equitable Discretion,* 70 CALIF. L. REV.

ance with the law. Thus, discretion is narrowed because the traditional good faith defense is eliminated[307] and broadened because compensatory and punitive elements, not just defendant's wrongful gain, are part of the calculus. Compensation for lost employment opportunity responds to the goals of equitable relief under Title VII as construed by the Court in *Albemarle.* It achieves a more complete "make whole" function and, by maximizing monetary recovery, serves the "catalyst" function deemed of primary importance in the formulation of remedy.

Although the Supreme Court never directly addressed the availability of monetary relief beyond back pay, lower courts have devised one way around the narrow confines of "back pay" relief: the allowance of what has been termed "front pay."[308] "Front pay" relief is not referred to in the statutory language or in Title VII's legislative history. It has been adopted to address one very specific circumstance when back pay relief is clearly inadequate. The rationale for its use as a remedy is the same as the rationale employed to compensate lost employment opportunity.

Generally, the courts award "front pay" when, after a discriminatory discharge, reinstatement is not feasible and the plaintiff has not found comparable work.[309] The courts also award front pay to substitute for an illegally denied promotion when the position to which the plaintiff is entitled is filled and not available. In either case, front pay is not statutorily authorized other than to the extent it falls within "other equitable relief."[310] It represents an estimation of future lost earnings. Compensation for lost employment opportunity would reflect the same concern

524 (1982). Plater sees the traditional balancing of equities as actually involving three components: the threshold balancing that determines if a cause of action my be heard (*i.e.*, laches, irreparable harm, estoppel); the determination whether the offending conduct will be permitted to continue; and the tailoring of remedies to implement the elimination of the conduct. In the statutory context, the first and third elements remain arenas for judicial discretion. As to the second component, the legislature has already resolved the balance as requiring the abatement of the conduct. The court's role is only to determine whether particular injunctive remedies are necessary to achieve the abatement. Plater views the courts as having generally applied this analysis without articulating it.

307. Indeed, in supporting the "make whole" rationale for back pay awards, the Court relies heavily on the "legal" notion of relief: "when a wrong has been done . . . the compensation shall be equal to the injury [and t]he latter is the standard by which the former is to be measured." *Albermarle,* 422 U.S. at 418-19 (citing Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867) (a breach of contract case stating the general principles of damages at law)).

308. SCHLEI & GROSSMAN, *supra* note 31, ch. 38 (III)(c) (rev. 2d ed. 1983, Supp. I 1987 & Supp. II 1989).

309. *See, e.g.,* Bruno v. Western Elec. Co., 829 F.2d 957, 966 (10th Cir. 1987); Nord v. United States Steel Corp., 758 F.2d 1462, 1473-74 (11th Cir. 1985); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984).

310. *See, e.g.,* Pitre v. Western Elec. Co., 843 F.2d 1262, 1278-80 (10th Cir. 1988); Pecker

with future loss in circumstances equivalent to those in which front pay has been deemed appropriate.

The courts have not engaged in any detailed analysis of the source of a right to front pay. Rather, to the extent any analysis is provided, the *Albemarle* enunciation of the "make whole" and "catalyst" functions of relief are cited.[311] Although recognizing the speculative nature of front pay awards, the courts largely have rejected this objection to relief on the grounds that any uncertainty should be resolved in favor of the injured party.[312] The same rationale would protect awards for loss of employment opportunity from the defense that the relief is overly speculative.

Front pay awards represent one ingenious solution for circumventing Title VII's restrictive approach to monetary relief. Awards for loss of employment opportunity would follow directly from this precedent and would comport with the principles of *Albemarle.* Without completely undermining Title VII's language and still preserving the equitable structure of the Act, this form of relief could solve the incentive and deterrent inadequacies of the remedial scheme.

Conclusion

Criticizing the recent reformulation of "disparate impact" analysis in *Ward's Cove,* Justice Blackmun suggested that the Supreme Court no longer views systemic discrimination as a serious concern: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."[313] Whether the decline in systemic discrimination actions has been caused by doctrinal changes, or whether the Court is taking its lead from what it perceives as societal changes as Justice Blackmun implies, is a question worthy of debate. But what is clear today, both from empirical evidence and from doctrinal trends, is that systemic class action litigation under Title VII is no longer a viable means of routing out the discrimination that remains in our soci-

v. Heckler, 801 F.2d 709 (4th Cir. 1986); Briseno v. Central Technical Community College, 739 F.2d 344, 348 (8th Cir. 1984).

311. The distinction between back pay and front pay has led some courts to hold that the *Albemarle* presumption in favor of relief does not apply to front pay. *See, e.g.,* Dillon v. Coles, 746 F.2d 998, 1006 (3d Cir. 1984). *But see* United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979).

312. *Cf.* Dominic v. Consolidated Edison Co., 822 F.2d 1249 (2d Cir. 1987) (judge has discretion to award front pay, but may consider circumstances of future damages as too speculative); Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) (same).

313. Ward's Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989).

ety. Absent legislative change, the future of Title VII litigation lies with individual claims of disparate treatment.

Given the new primacy of the "private" action, remedies must be developed that provide incentives for victims and for attorneys to pursue claims in federal court. The back pay remedy provides monetary relief and incentives in a subset of Title VII actions. In many circumstances, however, it is not loss of wages, but other forms of economic harm that a victim suffers. To leave whole groups of employees—those, for example, who are harassed or who find new positions soon after discharge—without any monetary remedies does not comport with the dual principles that underlie Title VII relief: to deter future violations and to make victims whole.[314] Now that congressional attention once again is focused on Title VII, the remedial scheme should not suffer the same lack of consideration that it received in 1964 and 1972. The obvious incompatibility between Title VII's private enforcement scheme and limited monetary relief should be reconciled. Even without legislative change, however, the courts should reconsider the unexamined premises that have supported the limitations on Title VII monetary relief. Just as the courts have fashioned a "front pay" remedy out of general principles rather than from statutory direction, the adoption of a remedy for loss of employment opportunity could achieve the same end for other groups of employees who now find themselves without a monetary incentive for pursuing meritorious claims of discrimination.

314. *Albemarle*, 422 U.S. 405 (1975).

Appendix I

Percentage of Class Actions in Federal Court Employment Discrimination Filings — 1973-1988

Year	Total Civil Filings	Employment Discrimination Filings	Employment Class Filings	% Class Employment Filings of Total Employment Filings
1965	67,678			
1966	70,906			
1967	70,961	326		
1968	71,449			
1969	77,193			
1970	87,321	346		
1971	93,396	760		
1972	96,173	1022		
1973	98,560	4271	827	19.36%
1974	103,530			
1975	117,320	3941	804	20.40%
1976	130,597	5325	1177	22.10%
1977	130,567	5931	1138	19.19%
1978	138,770	5504	739	13.43%
1979	154,666	5477	515	9.40%
1980	168,789	5017	326	6.50%
1981	180,576	6245	301	4.82%
1982	206,193	7689	224	2.91%
1983	241,842	9097	156	1.71%
1984	261,485	9748	135	1.38%
1985	273,670	8082	82	1.01%
1986	254,828	9174	86	0.94%
1987	238,982	8986	48	0.53%
1988	239,634	8563	46	0.54%

Information derived from Annual Report of the Director of the Administrative Office of the United States Courts (in volumes published from 1978 to 1988 at Table C-2 and Table X-5) and unpublished data from the Division of the Administrative Office of the United States Courts [copies on file at Hastings Law Journal].

Appendix II
EEOC Claims Filed, Race: 1967-1985

Claim	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1985 number as a percentage of 1974 number
Advertising																				
Benefits																				
Compensation	344		878	1070	558	1054	3314													
Demotion																				
Discharge	625		1510	1892	4215	7615	7174	9919	11,887	21,434	19,188	17,456	18,078	24,451	24,613	24,604	27,783	29,821	30,652	309.0%
Exclusion																				
Hiring	776		1272	1602	2884	5245	4349	5443	4324	7849	6282	3336	3049	3345	3995	3563	4129	4487	4974	91.4%
Intimidation & Repraisal																				
Involuntary Retirement																				
Job Classification	539		2181	2744	648	1462	1861	1976	1714	2642	1917	574	485	700	653	3347	58	521	343	17.4%
Layoff																				
Pregnancy																				
Promotion							3429	3832	3758	7077	5654	3727	3837	4897	4866	3831	4114	4933	5543	144.7%
Qualification & Testing							773	804	733	981	600	197	217	412	145	87	144	150	243	30.2%
Recall																				
Referral																				
Representation by Union																				
Segregated Facilities																				
Segregated Locals																				
Seniority																				
Sexual Harassment																				
Tenure																				
Terms & Conditions	1385		1251	1528	3499	6110	6141	7708	7904	14,920	11,362	5350	5307	8145	8995	8302	9725	11,570	13,223	171.5%
Training & Apprenticeship																				
Wages								3135	3278	6007	4611	2967	2742	3680	3882	3133	3721	4685	4809	153.4%
Unspecified																				
Total Issues	3732		8107	10,188	12,660	27,468	34,588	43,741	46,560	84,063	66,068	43,674	44,106	60,612	63,100	59,643	69,409	76,198	82,556	188.7%
In Charges																				
Total Claimants								37,445	42,357	69,538	58,780	50,683	57,463	76,925	77,802				97,757	261.1%

Information derived from Annual Report of the Director of the Administrative Office of the United States Courts (in volumes published from 1978 to 1988 at Table C-2 and Table X-5) and unpublished data from the Division of the Administrative Office of the United States Courts [copies on file at Hastings Law Journal].

Appendix III
EEOC Claims Filed, Sex: 1967-1985

Claim	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1985 number as a percentage of 1974 number
Advertising																				
Benefits																				
Compensation	262		485	668	866	1301	5188													
Demotion																				
Discharge	230		229	300	805	1451	2824	4078	4977	8784	7972	7694	8587	10,358	12,017	12,517	14,321	14,115	15,077	369.7%
Exclusion																				
Hiring	194		250	321	1188	2170	2699	3356	2821	4367	3370	2299	2173	1878	1907	1710	1915	1714	1742	51.9%
Intimidation & Repraisal								1304	1364	2483	1889	1003	1039	1244	905	854	1050	1033	1360	104.3%
Involuntary Retirement																				
Job Classification	323		603			587	1380	1744	1600	1728	1215	568	452	335	383	342	432	368	359	20.6%
Layoff																				
Pregnancy																				
Promotion							2034	2130	2275	3527	3132	2080	2159	1779	4866	1568	1825	2075	2259	106.1%
Qualification & Testing							565	452	656	614	321	110	115	119	48	92	47	70	82	18.1%
Recall																				
Referral																				
Representation by Union																				
Segregated Facilities																				
Segregated Locals																				
Seniority																				
Sexual Harassment															3091	3770	4052	4384	5231	
Tenure																				
Terms & Conditions	640		421	539	1722	3033	4206	5166	5077	7903	5842	2842	3270	3721	3757	3625	4503	4157	6364	123.2%
Training & Apprenticeship																				
Wages								3227	3629	5204	3940	2634	2588	2806	3974	3579	4692	4157	4906	152.0%
Unspecified																				
Total Issues In Charges	1674		2275	3039	5211	10,436	23,754	27,459	29,409	44,838	34,843	23,550	26,113	29,169	37,703	38,420	45,060	44,593	50,060	182.3%
Total Claimants								37,445	42,357	69,538	58,780	50,683	57,463	76,925	77,802				97,757	261.1%

Information derived from Annual Report of the Director of the Administrative Office of the United States Courts (in volumes published from 1978 to 1988 at Table C-2 and Table X-5) and unpublished data from the Division of the Administrative Office of the United States Courts [copies on file at Hastings Law Journal].