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Two major vehicles for redressing private racial discrimination are Title VII and 42 U.S.C. § 1981. In 1968 the Supreme Court, in *Jones v. Alfred H. Mayer Co.*, ruled that section 1 of the Civil Rights Act of 1866 applied to private acts of discrimination. The plaintiff in *Jones* sought relief against a private real estate company under 42 U.S.C. § 1982. The Court found that the substance of sections 1981 and 1982 was to be found in its predecessor, section 1 of the Civil Rights Act of 1866, which was intended “to prohibit all racially motivated deprivations of the rights enumerated in the statute. . . .” This article will discuss the development of the latter statute and analyze its status in relation to Title VII, focusing on the problems posed by the conceptual and procedural independence of the two statutes.

The Court’s holding in *Jones* overruled *Hodges v. United States* in which the Court decided that white employees could prevent blacks from working at a sawmill without violating section 1977 of the Revised Statutes (presently section 1981). The direct address of the Court in *Jones* to the right to contract as provided by section 1981 opened the door for the circuits to apply section 1981 in a manner similar to section 1982. As a result, the circuits began uniformly holding section 1981 applicable to private employment discrimination, although such interpretation was

   All citizens of the United States shall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.
4. 392 U.S. at 426. In addition to the rights “to inherit, purchase, lease, sell, hold and convey real and personal property,” section 1 of the Civil Rights Act of 1866 protected the right to make and enforce contracts, to sue, be parties and give evidence, to be subject to like punishment, and to benefit from laws for the security of person and property.
5. 203 U.S. 1 (1906).
6. 392 U.S. at 441 n.78.
   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.
without the benefit of the Supreme Court's imprimatur until Johnson v. Railway Express Agency, Inc.\(^9\)

Having determined that section 1981 included no "state action" requirement, the relationship between section 1981 and the Civil Rights Act of 1964\(^10\) became the predominant issue. It was argued that the 1964 Act repealed by implication the 1866 Act\(^11\) and that Title VII was designed to be the sole statutory remedy for employment discrimination. This position was consistently rejected by the courts of appeals\(^12\) on the ground that the difference in their coverage rendered them complementary. Similarly, the Senate rejected the proposal of Title VII's singularity in considering the Equal Employment Opportunity Act of 1972.\(^13\) Finally, in Johnson v. Railway Express Agency, Inc., the Supreme Court acknowledged that Title VII and section 1981 stand side by side as statutes remedial of employment discrimination.\(^14\)

I. COVERAGE

Title VII of the Civil Rights Act of 1964\(^15\) prohibits disparate treatment in employment on the basis of race, color, religion, sex or national origin. It is a comprehensive act which specifically outlines various unlawful practices, provides measures for conciliation and negotiation, and designates strict guidelines for filing suit in federal court.\(^16\) In contrast to this pervasive language is section 1981,\(^17\) which protects the rights of all citizens "to make and enforce contracts" in the same manner "as is enjoyed by white citizens."\(^18\)

\(^9\) 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970).
\(^10\) 95 S. Ct. at 1716 (1975).
\(^12\) The Supreme Court in Pasados v. National City Bank, 296 U.S. 497, 503 (1936), discussed two categories of statutes sufficient for repeal by implication: (1) where the provisions of the two acts are in irreconcilable conflict; and (2) where the later act covers the whole subject of the former one. As will be discussed, neither of these categories are applicable to Title VII and its relationship to section 1981.
\(^13\) See Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1016-17 (5th Cir. 1971); Young v. International Tel. & Tel. Co., 438 F.2d 757, 761 (3d Cir. 1971); Waters v. Wisconsin Steel Works, 427 F.2d 476, 486 (7th Cir. 1969), cert. denied, 400 U.S. 911 (1970).
\(^14\) 118 CONG. REC. 3371-73 (1972).
\(^15\) 95 S. Ct. at 1719.
\(^17\) Id. § 2000e-5.
\(^19\) Id.
Due to the obvious inference gained by a reading of section 1981 coupled with the restrictive holding in the cornerstone Jones decision, the courts have extended the statute's non-racial discrimination coverage only to aliens and Hispanics. Unlike Title VII, section 1981 is not available as a remedy for sex discrimination. There is unanimous agreement in the courts, in part due to the fact that section 1981 uses white citizens as its standard, that white females are not exempt from sex discrimination. Conversely, where white discriminatees have sought refuge in section 1981 to redress reverse racial discrimination, as provided for by Title VII, the courts of appeals are in conflict. The Fifth Circuit, traditionally a leader in liberal interpretation of civil rights statutes, held in McDonald v. Santa Fe Trail Transportation Co. that section 1981 did not apply to whites, reasoning that section 1981 gives to others those rights enjoyed by white citizens. This holding has implied support from the Fourth Circuit.

21. Miranda v. Clothing Workers Local 208, 8 E.P.D. ¶ 9601 (N.J. 1974). While this exception can be justified as racial, the same is not true for aliens, a group which includes whites.
23. In Fitzgerald v. United Methodist Community Center, 335 F. Supp. 965, 966 (D. Neb. 1972) the court stated:
The statute by its language attempts to secure to all persons the rights 'enjoyed by white citizens.' Since white women are not exempt from sex discrimination, Congress could not by this statute attempt to eradicate such sex discrimination.
26. 513 F.2d 90 (5th Cir. 1975).
In *Agnew v. City of Compton* the Ninth Circuit left the door open when it determined that section 1981 should be applied when "appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race." The Eighth Circuit in *Carter v. Gallagher* supported the same principle in dicta when it stated: "[w]e believe that § 1981 and the 14th amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks."

A recent decision by the Second Circuit provides what appears to be legal reasoning consistent with the rationale that initially led to section 1981's application to private discrimination. In *Dematteis v. Eastman Kodak Co.*, a white plaintiff brought suit under section 1981 alleging that he was forced to retire prematurely solely because of his race. The appeals court, citing *Sullivan v. Little Hunting Park*, in which a white citizen was permitted to sue under section 1982, ruled that Dematteis had stated a cause of action under section 1981 due to the traditional policy of construing the two statutes similarly.

It is submitted that the analogy of section 1982 to section 1981 seems no less forceful when deciding the applicability of the section to whites. Furthermore, the common assumption implicit in the statute that all whites receive equal treatment has become doubtful due to various forms of affirmative action. Hiring and promotion quotas established to redress past discrimination often lead to the same type of racial preferences against whites that caused their original enactment for the benefit of the minorities.

II. PROCEDURAL REQUIREMENTS

In addition to the differences in coverage, Title VII provides certain procedural roadblocks to a complainant which have no parallel in civil
suits under section 1981. The necessity of filing a charge with the Equal Employment Opportunity Commission (EEOC or Commission) and the presence of strict time limitations within which certain actions must be taken are hurdles not found in section 1981. On the other hand, Title VII provides that either the Commission or the Attorney General\(^9\) can file suit for the complainant whereas a private citizen must initiate a section 1981 action.\(^{49}\)

Despite these specific procedural dissimilarities, it was once argued that a complainant must file a Title VII charge with the EEOC prior to initiating a 1981 suit; however, the courts of appeals\(^4\) and the Supreme Court\(^\text{41}\) have reinforced the independence of the two remedies by holding that the Title VII charge is *not* a prerequisite to filing a 1981 suit. The issue of procedural independence of the two acts has led to a broader and indeed more troublesome ruling. In *Alexander v. Gardner-Denver Co.*,\(^6\) the Supreme Court held that an individual may independently pursue his rights under Title VII and any other applicable statutes. Consequently, Title VII and section 1981 are theoretically to be considered totally independent avenues of redress for private employment discrimination.

### III. Statute of Limitations

It is well established that where a particular congressional act provides no statute of limitations and there exists no otherwise relevant federal statute of limitations, the most analogous statute of the state wherein the action is brought will ordinarily control.\(^{44}\) As section 1981 provides no

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\(^{41}\) See note 8 *supra* and the cases cited therein.


\(^{44}\) *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1965) (Labor Management Relations
limitation period, this principle has consistently been applied to actions brought under that section. In contrast Title VII provides that a complainant must file a charge with the EEOC within 180 days of the alleged discriminatory act and must file suit within 90 days of receipt of a "right to sue letter." If, however, the alleged discrimination is a continuing act constituting a pattern or practice type of violation, the charge or action may be brought any time during such violation.

The application of an analogous state statute of limitations to actions under section 1981 has proven a difficult task for courts. Great divergences of opinion arise regarding which statute is most analogous. For example, the "contract" nature of section 1981 has been held to mandate application of the state contract limitation. Other courts, feeling that section 1981 speaks more directly to discrimination, have applied statutes governing common law torts. Still others have thought limitation periods on actions governed by statute were suitable to apply to section 1981. Finally, a general state statute of limitations, applicable to civil actions not otherwise provided for, in the state wherein the suit is brought has been deemed the most analogous. The Supreme Court declined in Johnson v. Railway Express Agency, Inc. to settle this controversy.

By adopting the contract analogy as the Fifth Circuit did in Boudreaux v. Baton Rouge Marine Contracting Co., courts are viewing employment discrimination as a violation of the right to contract as provided in section 1981. This analogy, while perhaps the easiest solution to the problem, has drawn much dissent. The Fourth Circuit in Tillman v. Wheaton-Haven Recreation Association found guidance from the Supreme Court. In that

Act); O'Sullivan v. Felix, 233 U.S. 318 (1914) (Civil Rights Act of 1871).  
45. See note 8 supra and cases cited therein.  
53. 95 S. Ct. 1716, 1721 n.7 (1975).  
54. 473 F.2d 1011 (5th Cir. 1971).  
55. 517 F.2d 1141 (4th Cir. 1975).  
case the court in dictum likened an action for racial discrimination to an action for defamation or intentional infliction of mental distress. Therefore, in Tillman the Fourth Circuit applied the common law tort statute of limitations. While the analogy to defamation is perhaps overextended, an act of racial discrimination could very easily be likened to an intentional infliction of mental distress thus adding credence to the Fourth Circuit’s view.

Because a section 1981 violation has both tort and contract overtones, some courts have applied a state’s general statute of limitations to section 1981 actions. Although universal application of a general statute of limitations has the obvious virtue of providing uniformity, such statutes often prescribe ten and twenty year periods, thus potentially extending an employer’s monetary liability well beyond the point at which he was put on notice that his practices were illegal.

Perhaps the scope of this controversy can be somewhat curtailed by reference to Title VII which contains (1) a 180 day limitation in which to institute proceedings, and (2) a two year limitation on the extent of an employer’s back pay liability, commencing with the alleged act of discrimination. While these limitations are clearly not controlling in section 1981 suits, they are expressive of congressional intent that employment discrimination is not to remain actionable for as long as the sometimes suggested twenty, ten or arguably even five years.

An ancillary question raised by the supposed independence of Title VII and section 1981 is whether the statute of limitations found applicable to section 1981 is tolled when a complaint is filed with the EEOC. There was a split among the courts of appeals on this issue until it was resolved by the Supreme Court in Johnson v. Railway Express Agency, Inc. The Court therein found that it is not tolled by the complaint filing, citing the separateness of the two remedies. In light of the legal development of

58. Larson, supra note 48, at 81.
59. For example, in Lazaard v. Boeing Co., 322 F. Supp. 343 (E.D. La. 1971), the general statute provided for a 10-year limitation. This was one reason for the rejection by the court of the applicability of the general statute.
61. See note 38 supra.
63. 95 S. Ct. 1716 (1975).
64. In Johnson petitioner filed timely charges with the EEOC in May, 1967, claiming
section 1981, the court could have arrived at no other conclusion. Its reasoning is a logical extension of the independence arguments successfully raised by claimants seeking to initiate a federal court suit without having exhausted their EEOC administrative remedies. Justice Marshall in his dissent feared that by not tolling claimants would be forced into immediate litigation, bypassing the conciliation procedures of Title VII. The decision, however, will not necessarily bring about this severe consequence. It is submitted that, as the majority suggests, a claimant who has filed under section 1981 may request the court to stay the proceedings until his claim has been processed by the EEOC.

The paramount difficulties presented by the Court's ruling lies not in the fine legal points but in practicality. If a claimant could expect a satisfactory reply from the EEOC within, say, 180 days, such delay would have a minimal prejudicial effect on his then pursuing his section 1981 remedy. Such a result is, however, precluded by the crowded docket facing the EEOC. It is perhaps a better solution to modify the EEOC's administra-

discrimination against blacks with respect to seniority rules and job assignments. He was subsequently discharged in June, 1967. After amending his charge and after delay within the EEOC conciliation machinery, petitioner received a notice of right to sue in January, 1971, whereupon he filed this suit in February of the same year under the Civil Rights Act of 1964 and section 1981. The district court dismissed petitioner's section 1981 claim as barred by the applicable Tennessee statute of limitations of one year and the Sixth Circuit affirmed. 489 F.2d 525 (6th Cir. 1973). Taking note of the development of section 1981, the Supreme Court reasoned that section 1981 and Title VII were totally independent remedies. Therefore, the Court felt that Congress did not intend for a complainant to use section 1981 only after exhausting Title VII measures. In dissent, Justice Marshall argued that in order to effectuate fully the policy of equal employment, both remedies must be left open to a complaint. If not, argued Marshall, the legislative efforts to bring about equal employment would be frustrated. By failing to toll the statute, an aggrieved party is forced to choose between remedies. Marshall pointed out that this would de-emphasize conciliation which at times produces more sweeping changes than a narrower and more defined civil action. It would also have the effect of increasing litigation. 95 S. Ct. at 1724-28.

Justice Marshall also examined the question of whether a state limitation must control the application of section 1981. In Auto Workers v. Hoosier, 383 U.S. 696 (1965), the Court ruled that if the interests protected by the state law which is applicable to a federal statute are outweighed by a national policy consideration, the policy consideration must prevail. In this case the policy in question is the humane and remedial nature of civil rights statutes. The intent of Congress was to effectuate this policy through conciliation, thus avoiding litigation as provided under Title VII. However, by being able to demand a right to sue letter within 180 days a claimant can still allow, theoretically at least, for conciliation and a negotiated solution to the problem of discrimination.

65. In dissent, Justice Marshall argued that in order to effectuate fully the policy of equal employment, both remedies must be left open to a complaint. If not, argued Marshall, the legislative efforts to bring about equal employment would be frustrated. By failing to toll the statute, an aggrieved party is forced to choose between remedies. Marshall pointed out that this would de-emphasize conciliation which at times produces more sweeping changes than a narrower and more defined civil action. It would also have the effect of increasing litigation. 95 S. Ct. at 1724-28.

66. Id. at 1720.

tive procedures rather than to break with a rather consistent line of legal reasoning culminating in the Court's decision in Johnson.

IV. Remedies

Both Title VII and section 1981, despite their procedural independence, share the goal of eliminating employment discrimination. In order to establish a prima facie discrimination case in either form of action, the plaintiff must carry the same burden of proof. It is therefore not surprising that the remedies available to plaintiffs in Title VII and section 1981 actions are virtually the same.68

The Supreme Court in McDonnell Douglas Corp. v. Green69 outlined the plaintiff's burden of proof under Title VII when he attempts to establish a prima facie case:

\[\text{[t]his may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.}\]

These requirements have been applied by the Sixth Circuit to a section 1981 action. In Long v. Ford Motor Co.,71 that court required proof by the black complainant that his employment terms varied from those which his employer accorded to similarly situated white employees before a prima facie case was established.

While section 1981 plaintiffs have met their burdens by demonstrating, for example, adverse impacts of testing72 and seniority requirements,73 not all prima facie discrimination is actionable. As under Title VII,74 if an employment practice is demonstrably "job related" or in the nature of a safety requirement, the practice may be defensible as a "business neces-

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68. A complete discussion of the methods of proof and all of the various aspects of remedies available is beyond the scope of this comment. It will, however, focus on some of the issues raised by the various remedies and how the independence of the two statutes continues to pose problems for the judiciary. For a good procedural discussion see Labor Law—Civil Rights Act of 1964—Burdens of Proof in Employment Discrimination Cases, 15 B.C. IND. & Com. L.R. 654 (1974).
69. 411 U.S. 792 (1972).
70. Id. at 802.
71. 496 F.2d 500 (6th Cir. 1974). The court stated, "[a]lthough McDonnell Douglas was a Title VII case, the principles governing these procedural matters apply with equal force to a § 1981 action." Id. at 505 n.11.
73. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).
This is, however, a narrowly applied concept which requires substantial proof by the party charged with discrimination.

Once a plaintiff establishes his case and the business necessity exception is not proven, there are various remedies available to redress the discriminatory practice. Because civil rights actions are generally equitable in nature, successful claimants usually receive an "equitable" remedy such as injunctive relief, affirmative action programs and back pay. It is possible under section 1981 for a plaintiff to receive compensatory and punitive damages as well.

While enjoining a practice found to be discriminatory is commonplace, judicial emphasis has primarily been on correction. Title VII specifically provides for affirmative action to remedy employment discrimination. Although section 1981 has no such provision, courts have wide discretion under section 1981 in the fashioning of an equitable remedy. Judiciously guarding this discretion, several courts have specified that section 1981 is not an affirmative action statute as is Title VII. As part


77. Compensatory damages have been awarded under section 1981 in nonemployment discrimination cases. Contract Buyers League v. F. & F. Inv., 300 F. Supp. 210, 221 (N.D. Ill. 1969), aff'd sub nom. Baker v. F. & F. Inv., 420 F.2d 1191 (7th Cir.), cert. denied, 400 U.S. 821 (1970). Since compensatory damages are awarded to make discriminatees whole, this relief has taken the form of an equitable award of back pay in employment cases. Since relief in such cases is fashioned to restore complainants to their rightful positions, punitive damages have not been awarded as part of the remedy when discrimination has been found.

78. 42 U.S.C.A. § 2000e-5(g) (1974) provides in part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.


of an overall equitable remedy, however, affirmative action programs have played a significant role in redressing discriminatory practices under section 1981 as well as Title VII. 81

Affirmative action programs are intended to convert the discriminatory practices of an employer into lawful ones. For example, courts finding hiring or promotional discrimination have employed quotas requiring the hiring or promotion of a certain ratio of minority applicants. 82 Supplementary to hiring quotas are orders to recruit affirmatively minorities. 83 In order to facilitate promotional advancements, employers have been ordered to “step up” training for entrance into better jobs and apprenticeship programs. 84

While Second 85 and Eighth 86 Circuit decisions clearly establish the constitutionality of imposing such systems on defeated section 1981 respondents, it is equally clear that quotas are to be limited in duration and purpose. 87 Further, simply replacing discriminatory practices with nondiscriminatory programs is not enough to constitute compliance with the latter standard. Since the effects of past discrimination could linger in a

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82. In Carter v. Gallagher, 452 F.2d 315, 330-32 (8th Cir.), cert. denied, 406 U.S. 950 (1971), the Eighth Circuit ordered that one of every three new employees was to be a minority member until twenty members of minority groups became employees. The Second Circuit in Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm’n, 482 F.2d 1333 (2d Cir. 1973), ordered a similar hiring quota but refused to require promotional quotas. The court reasoned that a promotional quota would interfere with the aspirations and expectations of the incumbent officers.


87. The court in Carter took special care to explain why the affirmative action order was not a proscribed quota. Reasoning that some preference is permissible to erase the effects of past discrimination, the Eighth Circuit felt that limiting the time for which a “quota” system would be implemented would in fact redress past discrimination and lead to nondiscriminatory hirings. 452 F.2d at 330.
system revised to be non-discriminatory, it is required that the effects of such past discrimination be righted by affirmatively compensating on behalf of the aggrieved employees.

A third limitation on quota systems has been provided by statute in Title VII and by case law under section 1981. Under Title VII\textsuperscript{88} as well as section 1981\textsuperscript{89} preferential treatment on the basis of race is prohibited. The courts, however, have been adept at circumventing the rule when attempting through quotas to remedy past discrimination.\textsuperscript{90} It is submitted that it is impossible to reconcile a "no preference" rule with quotas. However, it is perhaps equally impossible to reconcile quota systems with constitutional guarantees, an anomaly with which the courts have chosen not to deal.

Apart from affirmative action exists the often requested remedy of back pay. The majority of courts consider this remedy an element of equitable relief rather than punishment in the form of punitive damages.\textsuperscript{91} The discretionary powers available to the court in a section 1981 action allow back pay as part of the overall equitable remedy.\textsuperscript{92} Under Title VII, back pay is specifically provided for by statute.\textsuperscript{93}

The statute of limitations on back pay liability is two years under Title VII,\textsuperscript{94} while under section 1981 the controlling period is the most analogous state statute of limitations.\textsuperscript{95} The absence in section 1981 of any back pay

\textsuperscript{89.} Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974).
\textsuperscript{90.} In United States v. IBEW, Local 212, 472 F.2d 634, 635-36 (6th Cir. 1973), the court reasoned that the anti-preference rule under Title VII meant simply that the mere fact of a racial imbalance was not cause for affirmative action but that once a discretionary practice had been shown as part of the cause of imbalance, quotas were permissible to carry out the overall policies of the Act. Plainly this does not address the fact that Title VII by its own language prohibits any preferential treatment on the basis of race. 42 U.S.C.A. § 2000e-2(j) (1974). More restraint was shown by the court in Carter v. Gallagher, 452 F.2d 315, (8th Cir.), \textit{cert. denied}, 406 U.S. 950 (1971) where the court stated: "[W]e hesitate to advocate implementation of one constitutional guarantee by the out-right denial of another." \textit{Id.} at 330. The court went on to modify the district court's ruling which had required the first twenty job openings be given to minority applicants.
\textsuperscript{91.} Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). \textit{But see} United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1974) where back pay was considered to be punitive. Under such a ruling problems such as the necessity of a jury trial present themselves. Most courts believe that back pay is merely returning to a plaintiff what he would have had absent discrimination.
\textsuperscript{92.} Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252 (5th Cir. 1974).
\textsuperscript{94.} \textit{Id.}
\textsuperscript{95.} Johnson v. Railway Express Agency, Inc., 95 S. Ct. 1716, 1720 (1975); Boudreaux v.
limitation renders this form of action particularly appealing to plaintiffs. This non-provision has precipitated a controversy over how far back an employer's liability under section 1981 should extend.

In Brown v. Gaston County Dyeing Machine Co. the Fourth Circuit permitted back pay for a one year period prior to the enactment of civil rights statutes. This decision was the first to allow pre-Title VII back pay liability, having the effect of holding an employer liable before notice of the Title VII prohibitions and well before section 1981 was held applicable to private discrimination. It does, however, rely on the procedural and substantive independence of Title VII and section 1981 requiring that the provisions of each be applied without regard to the other.

The Fifth Circuit has consistently found the rationale in Brown unpersuasive. Reasoning that the Constitution requires notice of a statutory prohibition before a person can be held liable thereunder, the court has restricted back pay under section 1981 to the effective date of Title VII. Notice of a statutory scheme prohibiting private employment discrimination was not provided until July, 1965, when the Civil Rights Act of 1964 became operative, and for purposes of section 1981 until 1968.

It is uncertain what effect Johnson v. Railway Express Agency, Inc. will have on the time limitations of back pay liability. The Court will undoubtedly encounter difficulty in reconciling the independence of Title VII and section 1981 with the Fifth Circuit's constitutional argument. A definitive ruling by the Court adopting for section 1981 purposes relatively short statute of limitation periods could virtually erase the problem.

Back pay awards have traditionally been a matter addressed to the trial court's discretion as part of a fashioning of its remedy. Recently, how-

Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1017 (5th Cir. 1971). See text accompanying notes 44-61 supra.

96. 457 F.2d 1372 (4th Cir. 1972). Brown was a black applicant in 1960 to respondent's business but was rejected because of his race. In 1961 he was hired, trained and promoted in such a manner that no back pay was ordered upon a finding of non-discriminatory practices for the period following his permanent hiring in 1961.

97. The Brown decision has drawn some support from the Sixth Circuit in Head v. Timkin Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973). The court stated that "back pay for pre-Title VII racially discriminatory acts in employment was potentially available under section 1981 before the Brown decision." Id. at 870.


100. 95 S. Ct. 1716 (1975).

101. United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973); United States
ever, several courts have attempted to narrow the discretion of the trial courts in Title VII actions. In particular the Supreme Court has virtually mandated a back pay award under Title VII once an injunction has been found necessary to end a discriminatory practice.

There is little agreement among the circuits on the discretionary nature of back pay awards in section 1981 actions. In Brown, the Fourth Circuit seems to have made back pay mandatory upon a finding of discrimination, although its rationale for limiting the trial court's traditional discretionary powers was unexpressed. In contrast, the court in Harper v. Mayor & City Council seemed content to defer to the unfettered discretion of the lower court which refused to order back pay.

The Fifth Circuit in Pettway v. American Cast Iron Pipe Co. indicated its intention to follow the Title VII courts:

Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present.

The "special circumstances" criterion has been held satisfied when a state statute was found to conflict with Title VII, when the law provided insufficient notice that a particular practice was illegal, and when the good faith of the employer was demonstrated. These exceptions are applied so narrowly that the Fifth Circuit seems to advocate that back pay should be considered mandatory in all but a few cases. Since back pay considerations under Title VII and section 1981 are virtually identical, the view of the court in Pettway should prevail for actions under section 1981.

One final remedial device for section 1981 violations has drawn little support in cases involving employment discrimination, although the Su-

105. 486 F.2d 1134 (4th Cir. 1973).
106. 494 F.2d 211 (5th Cir. 1974).
107. Id. at 253. It is arguable that the Sixth Circuit has also adopted this view differentiating Harper in Head v. Timkin Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).
110. This defense is now unavailable once plaintiffs have established a prima facie case of discrimination. Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 2374 (1975).
Supreme Court in *Sullivan v. Little Hunting Park*\(^{111}\) authorized the award of compensatory damages under section 1982. The refusal of courts hearing section 1981 employment complaints to award "compensatory damages" is based on two grounds. First, the purpose of compensatory damages is to place the plaintiff in the position that he would have been but for the discriminatory practice,\(^{112}\) which goal is being accomplished by the back pay device. Secondly, by labelling such an award equitable back pay instead of compensatory damages, the courts may bypass the strict legal requirements accompanying the latter, such as mandatory jury determinations.

Because the courts have sought to restore the plaintiff to his rightful place rather than to punish an employer, no award of punitive damages has been made under section 1981.\(^{113}\) Punitive damages, which serve as a warning to others, are allowed only with caution and within narrow limits.\(^{114}\) The award of punitive damages and the amount thereof is within the reasonable discretion of the trier of fact.\(^{115}\) Such discretion has been used to award damages for emotional distress and humiliation.\(^{116}\) By likening this distress to the common law tort of infliction of mental distress,\(^{117}\) the avenue of punitive damages is potentially open to plaintiffs. Though the possibility of such damages exists, an action for employment discrimination is essentially an equitable action. It seeks to halt discriminatory practices and redress plaintiffs for the loss that they have suffered. Because such actions are equitable, courts have generally agreed that only equitable relief will be afforded.

V. CONCLUSION

As a recourse to employment discrimination, section 1981 has been held to stand independent of Title VII. This view, while initially applauded by plaintiffs, has necessarily led to adverse consequences for complainants, e.g., in the Supreme Court's ruling on the tolling issue. As a consequence section 1981 will be an ever increasing subject of litigation. For this reason,

\(^{113}\) Punitive damages have been awarded under section 1983. Coperci v. Huntoon, 397 F.2d 799 (1st Cir. 1967), *cert. denied*, 393 U.S. 940 (1968); Basita v. Weir, 340 F.2d 74, 86-88 (3d Cir. 1965). Punitive damages are awarded for the willful disregard of another's rights. Roberts v. Pierce, 398 F.2d 954, 957 (5th Cir. 1968). Since in many cases, especially class actions, the practices complained of serve to perpetuate past discrimination they are neutral and not the result of a willful or malicious act.
\(^{114}\) Aladdin Mfg. v. Mantle Lamp Co., 116 F.2d 708, 716-17 (7th Cir. 1941).
\(^{115}\) Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941, 943 (5th Cir. 1948).
\(^{116}\) Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 351 (7th Cir. 1970); Donovan v. Reinbolt, 433 F.2d 738, 743 (9th Cir. 1970).
\(^{117}\) *See* note 56 *supra* and accompanying text.
the problems herein discussed must be solved. Whether section 1981 is a remedy available to whites and what monetary remedies are available to successful complainants will be litigated with increasing frequency. Therefore, consistency of application and treatment for plaintiffs efficiently to resolve their problems and for employers to defend their actions has become even more crucial.

G.B.R.