Notes

The Effect of Title VII on Black Participation in Urban Police Departments

I. INTRODUCTION

A major difficulty confronting urban police departments is the demands of blacks to be represented within police forces on more than a token basis.[1] Embedded within the issue of black representation is a concern for the advancement of blacks to decision-making positions within urban police departments. Both of these concerns, hiring and promotion, have produced a great amount of litigation.[2] The departure point of this Note is that given the high rate of black unemployment,[3] there is a need to view Title VII of the Civil Rights Act of 1964[4] as more than a way of extirpating employment discrimination. In particular, a broader interpretation of Title VII would view it as a basis for demanding proportional representation in many occupations for black people. During the era[5] in which Title VII evolved, it may have been necessary to perceive it merely as a mechanism to eradicate employment discrimination. Because the more overt legalized forms of racial discrimination have been eliminated, that perception of Title VII is no longer adequate to address the employment grievances of black people in general and black police officers in particular.

In 1968, the proportion of blacks within twenty-eight police departments returning information on black representation within their departments to the Kerner Commission[6] was far below the

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[1]*See* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER 165 (1968) [hereinafter "KERNER COMMISSION"].

[2]*See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[3]During the third quarter of 1979, the unemployment rate of black males 20 years old and over was 8.3% compared with the 3.3% rate of white males of similar age. The same age comparison for black females and white females was 11.4% for black females and 5.2% for white females. With respect to black males between the ages of 16 and 19, the unemployment rate in comparison to white males of similar age was 30.3% for blacks and 12.8% for whites. In addition, the unemployment rate comparison for black and white females within the 16 to 19 year old age bracket was 38.6% for black females and 14.2% for white females. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 10, EMPLOYMENT AND EARNINGS 79, 83 (1979).

[4]42 U.S.C. §§ 2000e to 2000e-17 (1976).

[5]During the 1960's, there were more overt forms of employment discrimination used against black people. However, the more subtle forms of employment discrimination will be the issue of the 1980's.

[6]KERNER COMMISSION, *supra* note 1, at 169. Some of the cities returning data

proportion of blacks in the population of the area in which the departments were located.[7] Although proportional representation is not mandated by Title VII, statistical information on black employment can be used to establish a *prima facie* case of discrimination.[8] Consideration must be given to evaluating the success of Title VII, with respect to urban police department employment practices, solely on the basis of its effect on increasing black representation within the departments. The need for this evaluative perspective is accentuated by the hostility between predominantly white police forces and black communities, which has been cited as a major cause of the urban riots that occurred between 1964 and 1968.[9] The perception of police by blacks is drastically different from the perception of police by whites.[10]

In summary, this Note will:

1. Set forth statutes under which actions challenging police employment practice were brought prior to Title VII's application to police departments;
2. Compare the pre-Title VII statutes with Title VII;
3. Analyze cases brought under the pre-Title VII statutes, because Title VII standards were often used in adjudicating these cases;
4. Analyze the legislative history of and cases brought under Title VII; and
5. Present ideas on how to utilize Title VII purely as a basis to increase black representation within urban police departments.

II. Statutes Prior to Title VII

Before discussing the effects of Title VII on the hiring and promotion of blacks within urban police departments, it is necessary to examine statutes that proscribed discriminatory police employment practices prior to Title VII. Although Title VII was inapplicable to police employment practices until 1972,[11] many actions before 1972

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were Boston, Atlanta, Detroit, Tampa, New Orleans, Newark, Chicago, and Memphis. *Id.*

[7]*Id.* at 165, 169.

[8]Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

[9]*See* Kerner Commission, *supra* note 1, at 157.

[10]In a 1968 survey, more blacks than whites reported the use of insulting language or disrespect by police. In addition, three times as many blacks as whites thought police searched people without good cause. National Advisory Commission on Civil Disorder, Racial Attitudes in Fifteen American Cities 42-43 (1968) (Supplemental Studies).

[11]*See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending Civil Rights Act of 1964).

challenging urban police department employment practices were analyzed under Title VII standards.[12] Thus, it is necessary to consider the effects of Title VII on black representation within urban police departments as far back as 1964.[13]

Five federal Civil Rights Acts[14] were adopted by Congress after the Civil War. There was not another comparable statute enacted until the passage of the Civil Rights Act of 1957.[15] In view of the importance of 42 U.S.C. sections 1981[16] and 1983[17] in the context of employment discrimination, these two sections will be analyzed to indicate how Title VII standards were applied to actions brought under them. In addition, the two sections will be studied to determine how they have been used to redress the employment grievances of black people interested in careers as police officers. Section 1981, which in its original form was part of section 1 of the Civil Rights Act of 1866,[18] provides that all persons in the United States "shall have the same right . . . 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 . . . ."[19] Unlike judicial relief available under section 1983, which makes actionable the deprivation of civil

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[12]*See, e.g.*, Afro American Patrolmans League v. Duck, 503 F.2d 294 (6th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[13]Title VII of the Civil Rights Act of 1964 was originally only applicable to public employment practice. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (amended 1972).

[14]Act of March 1, 1875, ch. 114, 18 (pt. 3) Stat. 335 (1875); Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871); Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870); Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866).

[15]Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (current version at 42 U.S.C. §§ 1975-1975e (1976)).

[16]42 U.S.C. § 1981 (1976) provides:

> 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.

[17]42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[18]Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866). This statute was the major statute used to challenge discriminatory employment practices prior to the Civil Rights Act of 1964. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, ch. 17 (1978).

[19]42 U.S.C. § 1981 (1976).

rights under color of state law,[20] the judicial relief available under section 1981 is not dependent on a showing of state action.[21] Section 1981 is applicable to public and private employment discrimination.[22] Under section 1983 there are several kinds of relief available, including compensatory damages,[23] punitive damages,[24] and injunctive relief.[25]

III. Comparison of Sections 1981 and 1983 with Title VII

Because sections 1981 and 1983 were not repealed by the Civil Rights Act of 1964, there is a choice between pursuing the administrative remedy under Title VII or the judicial remedy under sections 1981 and 1983 or both.[26] The Supreme Court has held that remedies available under Title VII and section 1981 are independent of each other.[27] Moreover, unlike Title VII,[28] section 1981 does not state a time limitation for a cause of action, and thus the period provided by the state statute of limitations for a comparable action is applicable.[29] Generally, section 1981 is limited in the extent to which it can be used to justify affirmative action programs. Section 1981 has not been interpreted to require employers to adopt affirmative action programs, but it does not preclude affirmative action programs instituted by courts.[30] Section 1983 has been interpreted as a basis to enforce section one[31] of the fourteenth amendment.[32] In addition, section 1983 makes the deprivation of civil rights under color of state statute actionable.[33]

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[20]*Id.* § 1983.

[21]Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 289 (E.D. Pa. 1972); Rice v. Chrysler Corp., 327 F. Supp. 80, 86 (E.D. Mich. 1971).

[22]Guerra v. Manchester Terminal Corp., 498 F.2d 641, 645 (5th Cir. 1974).

[23]Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958).

[24]Donaldson v. O'Connor, 493 F.2d 507, 531 (5th Cir. 1974) *vacated on other grounds*, 422 U.S. 563 (1975).

[25]Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961).

[26]Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

[27]*Id.*

[28]42 U.S.C. § 2000e-5(e) (1976).

[29]421 U.S. at 462.

[30]*See* Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974).

[31]U.S. Const. amend. XIV, § 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[32]*See, e.g.*, Beauregard v. Wingard, 230 F. Supp. 167, 177 (S.D. Cal. 1964).

[33]*Id.*

There are differences between section 1981 and Title VII which, depending upon one's strategy, make one or the other more useful as a means of redressing employment discrimination grievances. An individual who establishes a right to relief under section 1981 is entitled not only to equitable relief but also to legal relief, "including compensatory, and, under certain circumstances, punitive damages."[34] It has generally been held that under Title VII compensatory and punitive damages are not available.[35] In addition, back pay under section 1981 is not restricted to the two years specified under Title VII for back pay recovery.[36] Section 1981 does not, however, provide the coverage that Title VII does, even though Title VII is inapplicable to certain employers.[37] Title VII offers assistance in investigation,[38] conciliation,[39] counsel,[40] waiver of court costs,[41] and attorney fees,[42] items that are not specifically provided for under section 1981. Furthermore, the administrative procedure of filing a "Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action."[43]

It has been argued that Title VII repealed section 1981.[44] There is, however, no language in Title VII directly repealing section 1981. Therefore, if such a repeal has taken place, it would have to have been by implication.[45] The test for repeal by implication was established in *Posadas v. National City Bank*:[46]

> There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . .[47]

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[34]421 U.S. at 460.

[35]Loo v. Gerarge, 374 F. Supp. 1338, 1341-42 (D. Hawaii 1974).

[36]42 U.S.C. § 2000e-5(g) provides in part: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

[37]*Id.* § 2000e(b).

[38]*Id.* § 2000e-5(b).

[39]*Id.*

[40]*Id.* § 2000e-6.

[41]*Id.* § 2000e-5(k).

[42]*Id.*

[43]421 U.S. at 460.

[44]*See, e.g.*, Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

[45]*See* Posadas v. National City Bank, 296 U.S. 497 (1936).

[46]296 U.S. 497.

[47]*Id.* at 503.

In *Waters v. Wisconsin Steel Works of International Harvester Co.*,[48] the court held that the right to sue under section 1981 for racial discrimination in private employment existed prior to 1964 and that Congress did not repeal this right by enacting Title VII.[49] Congressional discussions of Title VII support the conclusion that it was not intended to supersede existing remedies.[50] In the Senate debates on Title VII, Senator Clark inserted into the Congressional Record three letters from jurists in support of Title VII, which thoroughly examined the existing federal remedies for discriminatory employment practices.[51] Congress must have intended to preserve other federal remedies, because the legislative history clearly reveals that it was aware of other remedies and did not repeal them.[52]

In *Alexander v. Gardner-Denver Co.*,[53] the Supreme Court emphasized that Title VII was designed to supplement existing laws pertaining to employment discrimination, rather than supplant them. The Court observed that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[54] The Seventh Circuit in *Waters v. Wisconsin Steel Works of International Harvester Co.*,[55] followed the same logic by finding that an employment practice that passed the scrutiny of Title VII was not immune from attack under section 1981.[56] Thus, Title VII clearly does not cover the whole subject matter of section 1981, because Title VII's coverage of employers[57] is narrower than section 1981, which covers other contract rights besides employment.

Although courts may still have some apprehension about the impact of section 1981 on Title VII, any possible legal reasons for placing Title VII's procedural restrictions on actions brought under section 1981 are unsupportable in light of *Alexander*. In addition, any speculation regarding what Congress would have done if it had been

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[48]427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

[49]*Id.* at 485.

[50]110 CONG. REC. 13650-52 (1964). Senator Tower's suggestion that Title VII be made the exclusive federal remedy for employment discrimination was soundly defeated.

[51]*Id.* at 7207-12.

[52]*Id.* at 13650-52.

[53]415 U.S. 36 (1974).

[54]*Id.* at 48.

[55]502 F.2d 1309 (7th Cir. 1974) (appealing decision on remand from 427 F.2d 476), *cert. denied*, 425 U.S. 997 (1976).

[56]502 F.2d at 1317-20.

[57]42 U.S.C. § 2000e(b) (1976). This section excludes certain employers from the requirements of Title VII.

aware of section 1981 rights deviates from the "clear and manifest intent to repeal" test of repeal by implication stated in *Posadas*.[58]

IV. Cases Brought Under Sections 1981 and 1983

The following discussion indicates that between 1964 and 1972 courts in actions in which plaintiffs claimed employment-based civil rights violations under sections 1981 and 1983 used Title VII standards to adjudicate the claims. Title VII standards allowed a plaintiff to establish a *prima facie* case of employment discrimination by showing that an employment procedure excluded blacks from hiring or promotional opportunities at a higher rate than it did whites.[59] Although this *prima facie* case could be rebutted by an employer establishing that an employment procedure was related to the skills required for the job,[60] it is important to remember that Title VII requires no discriminatory intent on the part of the employer in order for the employer to be liable for employment discrimination.[61] The courts in the cases that follow, with the exception of the Supreme Court case of *Washington v. Davis*,[62] never address the constitutional issue of whether the employment practices challenged violated the equal protection clause of the fourteenth amendment, which reuqires a showing of discriminatory intent.[63] The use of Title VII standards in adjudicating section 1981 and 1983 actions were effective in curtailing the effect of discriminatory employment practices.[64]

In *Commonwealth of Pennsylvania v. O'Neill*,[65] several black prospective and incumbent police officers brought a suit alleging that the Philadelphia Police Department's hiring and promotion practices discriminated against blacks.[66] The police department required applicants to undergo a written examination, a physical and psychiatric examination, a background investigation, and an oral evaluation.[67] The three elements considered for promotion to lieutenant were a written examination, seniroity, and the supervisor's performance rating. The criteria for promotion to ranks higher than

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[56]*See* 296 U.S. at 503.

[59]Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[60]Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[61]*Id.* at 432.

[62]426 U.S. 229 (1976).

[63]*Id.* at 239-40.

[64]*See, e.g.*, Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). However, in any class action suit challenging racially discriminatory employment practices the latent issue is the need for black representation. It is this latent issue that the courts in section 1981 and 1983 actions did not adequately address or were incapable of addressing.

[65]348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973).

[66]348 F. Supp. at 1086.

[67]*Id.* at 1087.

lieutenant included these elements and an oral examination.[68] The black prospective and incumbent police officers alleged that the written examinations and the entry-level background investigation violated their civil rights under sections 1981 and 1983.[69]

The defendants in *O'Neill* presented evidence that the entrance examination was predictive of performance in the training program for police officers.[70] The court rejected such evidence under the premise that in order for an examination to justify a discriminatory effect it had to be related to the skills required for the occupation.[71] Although *O'Neill* was not brought under Title VII and *Griggs v. Duke Power Co.*[72] was decided prior to Title VII's application to public employment, the district court in *O'Neill* held that the standards of Title VII and the Equal Employment Opportunity Commission's (E.E.O.C.) guidelines used by the Supreme Court in *Griggs* "provided 'persuasive analogy' for the decision of similar questions involving public employment."[73] In essence, the district court used the job-relatedness standard that *Griggs* held was to be applied under Title VII[74] as the standard in actions brought under sections 1981 and 1983. Using the standards approved by *Griggs*, the district court allowed the aggrieved blacks to make a *prima facie* case of discrimination by establishing the discriminatory impact[75] of the examination, regardless of an employer's intent.[76]

Although the job-relatedness of an employement test was the standard, the district court in *O'Neill* stated that if the entrance examination was job-related and yet a poor examination in that it rewarded test-taking ability and examined inappropriate subject matter, the court could require the "defendants to devise the least discriminatory test possible."[77] A similar conclusion with respect to the use of less discriminatory alternatives was reached in *Castro v. Beecher*,[78] another police department employment discrimination action in which the plaintiffs alleged violation of civil rights under sections 1981 and 1983.

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[68]*Id.*

[69]Pennsylvania v. O'Neill, 473 F.2d 1029, 1030 (3d Cir. 1973).

[70]348 F. Supp. at 1090.

[71]*Id.* at 1090-91. The court held that the examination was not job-related in that it was not related to the skill necessary for adequate job performance. *Id.*

[72]401 U.S. 424 (1971). This case interpreting Title VII was decided before Title VII's application to public employment.

[73]348 F. Supp. at 1103.

[74]401 U.S. at 432.

[75]Discriminatory impact is established when an employment qualification excludes blacks at a higher rate than whites. *Id.* at 431-32.

[76]348 F. Supp. at 1102-05.

[77]*Id.* at 1091.

[78]459 F.2d 725, 733 (1st Cir. 1972).

With respect to the background check, the district court in *O'Neill* admitted evidence that established that the check excluded a greater percentage of black applicants than white applicants.[79] The court stated that even if the background check was administered in an unbiased manner the factors relied upon had the effect of disproportionately eliminating black applicants. For example "[i]llicit or [i]mmoral [c]onduct" was attributed to 29.4% of the black applicants while it was attributed to only 9.7% of the white applicants.[80] Again, the district court used the *Griggs* standards of analyzing employment practices by concentrating on the adverse racial impact of an employment practice, instead of the discriminatory intent of an employer.[81] By requiring that employment practices be job-related in actions alleging civil rights violations under sections 1981 and 1983, the *O'Neill* court at least enhanced the possibility of increased black representation by eliminating procedures that unfairly excluded blacks.

Although the district court's opinion in *O'Neill* was eventually modified,[82] the district court made an interesting observation that is often overlooked in cases involving employment discrimination against blacks. The district court stated that "[c]ontinued use of hiring and promotion practices which discriminate against blacks necessarily causes irreparable injury to those discriminated against, as well as to the public at large."[83] In addition, the district court stated:

> Requiring that hiring and promotion in the Police Department be done on a basis which does not discriminate against blacks except for reasons related to job performance does not imply a "lowering of standards," but rather an improvement of standards to make certain that they accurately determine, on a non-discriminatory basis, who is and who is not qualified.[84]

Unfortunately, the truth of these two observations is often overlooked when hiring and promotion practices that have been used by police departments for a period of time are ordered to be changed.

In *Castro v. Beecher*, a 1971 employment discrimination action

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[79]348 F. Supp. at 1095. After the background check, similarly-situated applicants were not treated the same in that white applicants were rejected at a rate of 26.8% while black applicants were rejected at the rate of 53.7%. *Id.* at 1096.

[80]*Id.* at 1100.

[81]*Id.* at 1102.

[82]473 F.2d at 1031. The court of appeals affirmed the portion of the district court's opinion pertaining to hiring procedures. *Id.*

[83]348 F. Supp. at 1102.

[84]*Id.* at 1103.

in which the plaintiffs claimed violations of their civil rights under sections 1981 and 1983,[85] the Boston Police Department's recruiting and hiring practices were alleged to be discriminatory against Spanish-surnamed and black applicants.[86] In particular, the grievances pertained to the discrimination in disseminating information concerning employment opportunities,[87] a discriminatory educational requirement,[88] a discriminatory written examination,[89] a discriminatory height requirement, and a discriminatory swimming test.[90] The court in *Castro* followed *Griggs* and *O'Neill* by requiring a showing of substantial relation to job performance in order to justify an employment practice that had a *racially disproportionate impact*.[91] By accepting the standards set forth in *Griggs*, the *Castro* court, like the *O'Neill* court, required no showing of discriminatory intent on the part of the employer for persons seeking redress for employment discrimination under sections 1981 and 1983.

The plaintiffs in *Castro* did not, however, show that the minimum height requirement had a disproportionate impact on Spanish-surnamed persons. Thus, the court held it was permissible.[92] The court stated that absent "a showing of prima facie discriminatory impact, the standard of review is . . . a relaxed one, which a minimum height requirement for policemen clearly meets."[93] Under the standards set forth in *Castro*, if the plaintiffs had shown that the minimum height requirement had a discriminatory effect, the defendant could then have rebutted this evidence by establishing that the height requirement was job-related.[94] The plaintiffs then would have had the burden of showing that there was another screening device or standard that was adequate and less discriminatory.[95] Although *Castro* provided no basis to argue for the elimination of height requirements for police departments altogether, it appears that the court would have been willing to require height requirements to be job-related in actions brought under sections 1981 and 1983, once adverse racial impact was ascertained.

In *Castro* it was not established that the swimming test had a disproportionate impact upon black applicants, but the court stated

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[85]459 F.2d at 728.
[86]*Id.*
[87]*Id.*
[88]*Id.* at 735.
[89]*Id.* 728.
[90]*Id.*
[91]*Id.* at 732 (emphasis added).
[92]*Id.* at 734.
[93]*Id.*
[94]*Id.* at 732.
[95]*Id.* at 733.

that if such impact had been shown a "heavy burden" would have been placed on the defendants to justify the test.[96] This language would indicate that even the requirement of a swimming test in an action brought under sections 1981 and 1983 would be evaluated by the job-relatedness standard of Title VII.

In reference to the educational requirement in *Castro* that applicants possess either a degree from high school, a certificate of equivalency, or an honorable discharge after three years of military service, the court stated that it lacked evidence indicating the extent to which blacks met one of the alternative requirements.[97] The court stated that the educational requirement was supported by job-relatedness standards, but it referred not to any validation study performed by the defendant but to reports by national commissions on law enforcement or civil disorders.[98] This type of validation of educational requirements is not supported by *Griggs*.[99] "Congress has placed on the *employer* the burden of showing that any . . . requirement must have a manifest relationship to the employment in question."[100] The court in *Castro* concealed its public policy determination that educational requirements would not be tampered with, by holding that the educational requirement was job-related. A policy determination such as the one made by the *Castro* court undermines any adverse racial impact analysis, because it exempts from proper scrutiny a requirement that may exclude a large percentage of blacks, without the police department having to justify that requirement. At least with respect to educational requirements, the *Castro* court, in an action claiming civil rights violations under sections 1981 and 1983, departed from the job-relatedness requirement of Title VII.

Even though the promotion examination in *Castro* was shown to have an adverse impact on blacks, the court stated that the plaintiffs did not prove that all the factors on the examination were not job-related.[101] Consequently, the court held that the eligibility lists based on the examination were valid, even if the examination discriminated against blacks.[102] It is odd that the court would hold the examination to be valid and yet agree with the district court

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[96]*Id.* at 734.

[97]*Id.* at 735.

[98]*Id.* The reports emphasized the need for police officers to have at least some college experience.

[99]401 U.S. at 433-34. The Supreme Court required that an employment qualification be validated by E.E.O.C. standards. *Id.*

[100]*Id.* at 432 (emphasis added).

[101]459 F.2d at 736.

[102]*Id.*

that new examinations had to be developed.[103] In other words, the *Castro* court decided that it would not require those made eligible by an examination that was partially valid and partially invalid under job-relatedness standards to take a new examination. A decision such as this seems to be more concerned with the status of whites whose promotional opportunities have been increased by a biased examination instead of those whose opportunities have been denied by the examination. Again, the requirement that a new examination be developed does eliminate or at least minimize discriminatory practices. However, it is neither a long-term nor short-term guarantee for black representation. It increases the possibility for black representation, but it is an inadequate solution to a very complex problem.

Allen v. City of Mobile,[104] a 1971 case pertaining to discriminatory police employment practices, addressed many of the issues presented in *Castro*. The sergeant's promotion test was held to be *reasonably* job-related after evidence of adverse racial impact was submitted.[105] Only 14.3% of the blacks passed the sergeant's examination while 60.6% of the whites passed the same examination.[106] The three other factors considered for promotion besides the written examination were seniority, regular service ratings, and special service ratings.[107] The police department's seniority system, which was based on total years in grade rather than years in service,[108] was held to be racially discriminatory against blacks,[109] because blacks were not hired into the police department until 1954 and thus could not have earned the points necessary to assist in promotion.[110] In determining whether an employment practice was discriminatory, the court considered the past behavior of the police department that perpetuated the effect of past discriminatory practices.[111] As for the regular service ratings and the special service ratings, the court held the first to be non-discriminatory but indicated that the latter may have had a racially discriminatory effect.[112]

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[103]*Id.* at 737.

[104]331 F. Supp. 1134 (S.D. Ala. 1971), *aff'd*, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973), *modified*, 464 F. Supp. 433 (S.D. Ala. 1978) (The court evaluated issues presented under Title VII instead of under sections 1981 and 1983).

[105]331 F. Supp. at 1146.

[106]*Id.* at 1141.

[107]*Id.* at 1139.

[108]*Id.* at 1142.

[109]*Id.* at 1143.

[110]*Id.* at 1142.

[111]*Id.*

[112]*Id.* at 1148.

On appeal, the Fifth Circuit affirmed the district court opinion in *Allen*,[113] but the dissent by Judge Goldberg pertaining to the evaluation of examinations deserves comment. Judge Goldberg stated that objective examinations, which were to replace subjective discriminatory practices, often contain more subtle forms of discrimination.[114] "[A] test can be impeccably 'objective' in the manner in which the questions are asked, the test administered, and the answers graded, and still be grossly 'subjective' in the educational or social milieu in which the test is set."[115] Often this is overlooked by the judiciary when analyzing racial discrimination. Examinations that are job-related may nevertheless be culturally biased and may deny black applicants equal opportunity. Judge Goldberg indirectly presented the problem that the requirement of job-related examinations may still be insufficient to guarantee equal opportunity. In addition, Judge Goldberg stated that to merely require a test to be rationally job-related was inappropriate, because there had been a long standing practice of giving preference to whites.[116] The police department should have been required to prove that the test bore *a manifest relationship* to the police sergeant position,[117] because virtually any test could somehow be rationally related to a police sergeant's functions.[118] Judge Goldberg's position regarding the degree of proof necessary to justify the continuation of a test that has a discriminatory impact is consistent with the position taken by the First Circuit in *Castro*[119] and the Supreme Court in *Griggs*.[120]

The *Castro* court and the *Allen* court have imposed two different burdens of proof for validating an examination when an employment discrimination action is brought under sections 1981 and 1983. Although the *Castro* court required a demonstration of a "compelling interest" by police departments to continue an employment practice that had a discriminatory effect,[121] the *Allen* court required only rational job-relatedness of a test that had a discriminatory effect.[122] From the standpoint of blacks seeking to redress employment grieveances, the *Castro* precedent offers greater

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[113]466 F.2d at 122.

[114]*Id.* at 123 (Goldberg, J., dissenting).

[115]*Id.*

[116]*Id.* at 126.

[117]*Id.*

[118]*Id.*

[119]459 F.2d at 733.

[120]401 U.S. at 431. *Griggs* was brought under Title VII rather than sections 1981 and 1983. *See* text accompanying notes 179-85 *infra*.

[121]459 F.2d at 733.

[122]331 F. Supp. at 1146.

opportunity to eliminate discriminatory institutional barriers. For public policy reasons, such as the recognition by the judicial branch of the difficulty for parties to prove intentional discrimination[123] and the need to redress the grievances of a people entrenched in a history of racial subordination, the *Castro* court placed a justified burden on police departments to produce compelling reason for the continuation of a practice that has a discriminatory effect.

In 1976 the Supreme Court seemingly resolved the question of whether an aggrieved party merely had to prove adverse racial impact instead of intentional discrimination to establish employer liability under section 1981.[124] In *Washington v. Davis*,[125] black police officers filed an action claiming that the employment and promotional policies of the District of Columbia Metropolitan Police Department were racially discriminatory and thus violated both section 1981 and the due process clause of the fifth amendment.[126] At issue was Test 21, a test developed by the Civil Service Commission. Police department applicants were required to score at least forty points out of eighty on Test 21 in order to be accepted into the District of Columbia Police Department.[127] Test 21 excluded a greater percentage of blacks than whites from the employment process.[128] The Court held that the constitutional standard for adjudicating claims of invidious racial discrimination is not identical to the standards applicable under Title VII and that employment practices are not unconstitutional because they have a racially adverse impact.[129] In essence, "the invidious quality of a law claimed to be racially discriminatory must . . . be traced to a racially discriminatory purpose."[130] Furthermore, the Court stated that "we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of laws' simply because a greater proportion of [blacks] fail to qualify than members of other racial or ethnic groups."[131] The Supreme Court ultimately found that Test 21 was job-related under Title VII.[132]

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[123]*See* Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (under Title VII an aggrieved party must merely show discriminatory impact of an employment procedure, not the discriminatory intent of an employer).

[124]*See* Washington v. Davis, 426 U.S. 229 (1976).

[125]*See id.*

[126]*Id.* at 232-33.

[127]*Id.* at 234.

[128]*Id.* at 235-37. Four times as many blacks as whites failed the examination. *Id.*

[129]*Id.* at 239.

[130]*Id.* at 240.

[131]*Id.* at 245.

[132]*Id.* at 249-50.

The Supreme Court in *Washington* analyzed Test 21 under 5 U.S.C. section 3304,[133] which provides that "examinations for testing applicants for appointment . . . [must] . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought."[134] In interpreting the Civil Service Commission regulations, the Court further stated that "Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the [test], wholly aside from its possible relationship to actual performance as a police officer."[135]

Justice Brennan's dissent in *Washington* presented several points that questioned the wisdom of the majority's opinion. For one, the majority's focus on 5 U.S.C. section 3304 standards to the exclusion of Title VII standards with respect to the job-relatedness of an employment test was incorrect, because the Civil Service Commission considered both standards identical.[136] According to Justice Brennan, even if Test 21 was predictive of recruit school final averages, the final averages were not appropriate to use in evaluating the training program or establishing a relationship between the recruit school program and the job of a police officer.[137] Under Justice Brennan's analysis, a test that has a discriminatory impact must be job-related irrespective of the intent of the employer.[138]

The Supreme Court's decision in *Washington* should not be viewed as a preclusion of the application of Title VII standards, including the discriminatory impact analysis, to actions brought under section 1981. *Washington* addressed the constitutional issue of whether discriminatory impact was sufficient to create a *prima facie* case of employer discrimination under the fifth and fourteenth amendments. The Supreme Court in *Washington* did not address the statutory issue of whether discriminatory impact analysis could be used under section 1981.

Davis v. County of Los Angeles[139] was a 1977 class action suit by black and Mexican-American fire fighters alleging employment discrimination in violation of the fourteenth amendment, sections 1981 and 1983, and Title VII.[140] The Ninth Circuit in *Davis* stated that it

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[133]5 U.S.C. § 3304 (1976).

[134]*Id.* § 3304(a)(1).

[135]426 U.S. at 250.

[136]*Id.* at 258 & n.2 (Brennan, J., dissenting).

[137]*Id.* at 262-63.

[138]*Id.* at 270.

[139]566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

[140]566 F.2d at 1336.

had been an established practice to use Title VII standards for adjudicating claims of employment discrimination under section 1981.[141] The court stated "[i]n absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice."[142] Moreover, the *Davis* court saw "no operational distinction . . . between liability based under Title VII and section 1981."[143] Throughout the text of *Washington* the Court's discussion was of "constitutional standards" and "constitutional based" claims.[144] The Supreme Court in *Washington* never mentioned section 1981 as requiring discriminatory intent on the part of an employer. "Nor can it be said that in resolving the equal protection question before it, the [*Washington*] Court necessarily resolve the § 1981 claim on the same basis."[145] Although the Supreme Court eventually vacated the Ninth Circuit's decision in *Davis*,[146] the decision was vacated because the controversy in the case had become moot.[147] The Supreme Court in *Davis* did not address the issue of whether the discriminatory impact of an employment procedure created a *prima facie* case of discrimination under section 1981.[148] The Supreme Court did state, however, that the Ninth Circuit's decision, because it was vacated, had no precedential value.[149]

Although *Washington* suggested, because it was partly a section 1981 action, that the discriminatory impact analysis of Title VII may not be used for section 1981 actions, it did not specifically hold so. The latest word from the Supreme Court in *Davis* indicates that the court has not decided the issue. Thus, until the Supreme Court rules on the issue, authority exists for using Title VII standards, including the discriminatory impact analysis, to adjudicate actions brought pursuant to section 1981. There have been, however, cases since *Washington* that have held that discriminatory intent is required under section 1981.[150]

In summary, the burden of proof required to prove discrimination in actions brought under sections 1981 and 1983 is by no means

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[141]*Id.* at 1340.

[142]*Id.*

[143]*Id.*

[144]426 U.S. at 229-52.

[145]Davis v. County of Los Angeles, 566 F.2d at 1340.

[146]440 U.S. at 634.

[147]*Id.*

[148]*Id.* at 627, 634.

[149]*Id.* at 634 n.6.

[150]*See, e.g.*, City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976); Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977) (section 1981 requires a plaintiff to establish discriminatory intent); Johnson v. Hoffman, 424 F. Supp. 490 (E.D. Mo. 1977) (racially disparate impact does not violate § 1981).

light. Although the *Castro* court, the *O'Neill* court, and the *Allen* court allowed a *prima facie* case of discrimination to be established under section 1981 by a showing of adverse impact, the Supreme Court's decision in *Washington* may preclude such an analysis.[151] *Davis*, on the other hand, indicated that the Supreme Court has not decided whether Title VII standards may be used for adjudicating actions brought pursuant to section 1981.

V. Title VII: Legislative History and Case Law

A. Legislative History

In order for Title VII to be effective as a means to increase black representation within urban police departments, the use of race as part of the employment criteria is necessary. The legislative history of Title VII as amended indicates that Congress did not intend to prohibit the use of race by courts in fashioning remedies to redress employment grievances.[152]

When Title VII of the Civil Rights Act of 1964 was being proposed, some members of Congress feared that it would be interpreted to require quotas in order to maintain racial balance in a work force.[153] In response, sponsors of the Act stated that this was not the intent of the bill nor would it be the effect of the statute.[154] These assurances, however, should not be viewed as indicating that Title VII was intended to prohibit the use of race in making employment decisions. Rather, the assurances should merely be viewed as a clarification that employers would only be required to establish racial quotas when the type of discrimination prohibited by Title VII was established.[155]

Two provisions in Title VII exemplify the congressional concerns about its scope.[156] Section 706(g)[157] prevents courts from ordering relief under the authority of Title VII when the employer's

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[151]426 U.S. at 240.

[152]*See* 118 Cong. Rec. 1664-65, 1675-76 (1972); H.R. Rep. No. 238, 92d Cong., lst Sess. 16 (1971). Furthermore, the amendments that were introduced in both the House and the Senate that would have prohibited federal agencies from ordering the use of numerical ratios in hiring were defeated. 118 Cong. Rec. 1676, 4918 (1972); 117 Cong. Rec. 32111 (1971).

[153]*See, e.g.*, 110 Cong. Rec. 5877-78 (1964) (remarks of Sen. Byrd); *id.* at 7774, 7778 (remarks of Sen. Tower).

[154]*Id.* at 6549 (remarks of Sen. Humphrey); *id.* at 6563 (remarks of Sen. Kuchel).

[155]*Id.* at 6549, 7214.

[156]Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 447-57 (1966).

[157]42 U.S.C. § 2000e-5(g) (1976) (section 706(g) of the Civil Rights Act of 1964).

actions against employees or applicants were not in vilation ot Title VII. Section 703(j) states that preferential hiring cannot be required to attain a racial balance.[158] Section 703(j) does not, however, prevent the use of racial classification to rectify past discrimination.[159]

In spite of the Civil Rights Act of 1964, employment discrimination persisted. Therefore, Congress addressed the issue again in the 1972 amendments to Title VII.[160] The 1972 amendments clarified the issue of whether courts could use race-conscious remedies.[161] The amendments brought previously excluded employers within the scope of Title VII[162] and confirmed the authority of federal courts to order race-conscious numerical relief.[163]

Even before the 1972 amendments, federal courts had ordered race-conscious remedies for unlawful discrimination.[164] In *United States v. IBEW Local 38*,[165] the court stated that the preclusion of race-conscious remedies "would allow complete nullification of the stated purposes of the Civil Rights Act of 1964."[166] Congress was well aware of federal courts using numerical relief to enforce Title VII when the 1972 amendments were presented.[167] Both amendments introduced to restrict federal courts from instituting numerical ratios were defeated.[168] Senator Javits stated that the amendment

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[158]*Id.* Section 2000e-2(j) (section 703(j) of the Civil Rights Act of 1964) provides that an employer is not required by Title VII "to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by [the] employer."

[159]*See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 n.20, 374 n.61 (1977); Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[160]*See* S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137-79.

[161]*See* note 152 *supra*. Congress was aware that courts had ordered numerical relief under Title VII but it understood that if the 1972 amendments to the Civil Rights Act of 1964 did not change the law, "the present case law . . . would continue to govern the applicability and construction of Title VII." 118 CONG. REC. 7166 (1972). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 753 (1975).

[162]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(1)-(3), 86 Stat. 103 (1972) (amending 42 U.S.C. 2000e (1970)).

[163]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972) (amending 42 U.S.C. 2000e-5(a) to (g) (1970)).

[164]*See, e.g.*, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insul. Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[165]428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

[166]*Id.* at 149-50.

[167]*See* S. REP. NO. 92-415, *supra* note 160, at 21; H.R. REP. NO. 92-238, *supra* note 160, at 8, 13; 118 CONG. REC. 1664-76 (1972).

[168]*See* 117 CONG. REC. 32111 (1971); 118 CONG. REC. 1676, 4918 (1972).

restricting the use of numerical ratios would terminate "the whole concept of 'affirmative action' as it has been developed . . . as a remedial concept under Title VII."[169] In reference to courts allowing numerical relief under Title VII, Senator Javits stated:

> [T]he amendment[s] . . . would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices.[170]

In addition, Senator Williams stated that a preclusion of numerical relief "would strip Title VII . . . of all its basic fiber."[171]

Instead of placing restrictions on the remedial authority of the courts, Congress amended section 706(g) to add remedies and empower courts to order "any other equitable relief as [they] deem appropriate."[172] Thus, courts have a "wide discretion in exercising their equitable powers to fashion the most complete relief possible."[173] From the legislative history provided, Congress must have viewed race-conscious relief as an appropriate remedy under Title VII to redress employment discrimination grievances.

Congress displayed some apprehension that Title VII would prohibit the testing of employees and require employers to hire unqualified people who were in the past subject to discrimination.[174] This misapprehension was eliminated by Senators Case of New Jersey and Clark of Pennsylvania in a memorandum explaining that employees had to have the proper job qualifications and that Title VII was intended to promote hiring on job qualifications, not race or color.[175] Although an amendment was presented that required merely a professionally developed ability test, that amendment was defeated, because it left no room to evaluate the quality of such a test.[176] Section 703(h)[177] eventually became the testing provision, and it generally was considered to be in accord with the content and

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[169]118 CONG. REC. 1664 (1972).

[170]*Id.* at 1665.

[171]*Id.* at 1676.

[172]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a) (1972).

[173]118 CONG. REC. 7168 (1972).

[174]110 CONG. REC. 5614-16 (1964) (Sen. Ervin); *id.* at 5999-6000 (Sen. Smathers); *id.* at 9025-26 (Sen. Talmadge).

[175]*Id.* at 7247.

[176]*Id.* at 13504.

[177]42 U.S.C. § 2000e-2(h) (1976) provides: "[I]t [shall not] be an unlawful employment practice to give . . . [a] professionally developed ability test provided that such test . . . [is] not designed, intended or used to discriminate because of race, color, religion, . . . or national origin."

purpose of Title VII.[178] Thus, Congress was definitely concerned that employment tests be unbiased, even though it did not set forth detailed criteria for evaluating such tests.

B. Cases Brought Under Title VII

The standards to be used in litigation under Title VII were provided by the Supreme Court in *Griggs v. Duke Power Co.*[179] and *Albemarle Paper Co. v. Moody.*[180] *Griggs* held that an examination for employment or promotion that had an adverse racial impact on black applicants was a violation of Title VII, unless it was job-related. The Supreme Court stated that "[t]he Act [prohibits] not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited."[181]

A *prima facie* case of discrimination is established if evidence indicates that an examination "select[s] applicants for hire or promotion in a racial pattern . . . different from that of the pool of applicants."[182] Once a *prima facie* case is established, the employer must show that the employment requirement is job-related and that the disparity is not the result of discrimination.[183] Employers are required to prove the job-relatedness of an examination by validation in accordance with E.E.O.C. guidelines and the professional standards of the American Psychological Association.[184] The Supreme Court in *Griggs* stated that the E.E.O.C. guidelines are entitled to great deference when evaluating the job-relatedness of an examination.[185] Even if the employer establishes that an examination is job-related, the examination may be found to violate Title VII, if the grievant can show that the employer's purposes would be equally served by an examination that would not have a disparate racial impact.[186] These standards are the ones used in police employment discrimination actions brought under Title VII.

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[178]110 CONG. REC. 13724 (1964).

[179]401 U.S. 424 (1971).

[180]422 U.S. 405 (1975).

[181]401 U.S. at 431.

[182]422 U.S. at 425.

[183]401 U.S. at 432.

[184]*See, e.g.*, Douglas v. Hampton, 512 F.2d 976, 986 (D.C. Cir. 1975); United States v. Georgia Power Co., 474 F.2d 906, 913 (5th Cir. 1973).

[185]401 U.S. at 433-34.

[186]422 U.S. at 425.

Title VII has only minimally increased the number of blacks in urban police departments.[187] Court actions and the remedies that follow are often short-term solutions to long-term problems.[188] The judiciary is limited to the extent it can continually oversee police employment practices. In *United States v. City of Buffalo*,[189] an action was brought under Title VII challenging the city's written examination, height requirement, high school diploma requirement and several other hiring requirements.[190] Applicants were required to score seventy percent on the patrolman's examination in order to pass. Forty-three percent of the white applicants received a passing score, while eight percent of the black applicants received a passing score.[191]

Title VII has been interpreted to require an examination to withstand either criteria validation, a statistical comparison between the test performance and job performance, or content validation, which requires that the content of the test represent important aspects of the job.[192] However, Title VII does not prevent an examination that is job-related from being held to be an inappropriate employment practice, if the examination eliminates a great percentage of blacks from the employment pool. Although the examination in *City of Buffalo* was held to be in violation of Title VII,[193] the requirement of a new job-related examination was directed toward eliminating biased practices, and not increasing black participation.[194]

Because an examination can be challenged and held invalid on the basis of adverse racial impact, the minimization of adverse impact should be part of the criteria that validates an examination. The requirement of a new examination in *City of Buffalo* was truly

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[187]*See, e.g.*, Pennsylvania v. O'Neill, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973). The percentage of blacks hired by the Philadelphia Police Department from 1966 to 1970 decreased each year, from a high of 27.5% in 1966 to a low of 7.7% in 1970. In addition, the proportion of black police officers on the Philadelphia police force decreased each year during the period of 1967 to 1971, from a high of 20.8% in 1967 to a low of 18.0% in 1971. 348 F. Supp. at 1087.

[188]*See, e.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977). The racial quotas that the lower court established for hiring were in a short time suspended to allow the appointment of officers from a new roster of candidates which had been derived from a restructured examination. 549 F.2d at 436 n.29. Quotas must be considered short term relief unless they are based on the percentage of blacks in the area population and are perpetual.

[189]457 F. Supp. 612 (W.D.N.Y. 1978).

[190]*Id.* at 617-18.

[191]*Id.* at 622.

[192]*Id.* at 622-23.

[193]*Id.* at 624.

[194]*Id.* at 623.

indicative of the inability of courts to secure employment changes that have a long-term effect. A requirement of a new examination does not directly address the basic need of increasing black representation.

The district court in *City of Buffalo* held that the high school diploma requirement was job-related.[195] Yet the court stated that the standard to be applied to a high school diploma requirement was not as stringent as the standard applied to an examination.[196] "[A] high school education is a bare minimum requirement for successful performance of the policeman's responsibilities."[197] The court's decision, with respect to the educational requirement, was embedded more in public policy than in Title VII standards of evaluation. *Griggs* did not allow a lesser standard for the evaluation of an educational requirement.[198] By not evaluating the educational requirement by the job-relatedness standard, the district court was in conflict with *Griggs*, which requires any employment requirement to bear a "*manifest* relationship to the employment in question."[199] The *Griggs* mandate was not limited to examinations. A failure to use the job-relatedness standard for all employment qualifications weakens Title VII to a great degree, because educational requirements may disproportionately exclude black applicants. To emphasize a need both for police officers with certain educational requirements and black police officers, without realizing that the educational requirement might restrict the possibility of increasing black participation, is to be insensitive to the character of racialism and the dependency relationships between the racialist denial of educational opportunity and occupational opportunity. Moreover, even if the *City of Buffalo* court truly applied the job-relatedness standard of *Griggs* to the educational requirement, the standard of job-relatedness is inadequate to evaluate employment qualifications.

The case that best exemplifies employment discrimination actions brought against urban police departments is *United States v. City of Chicago*,[200] a 1976 consolidated civil rights action challenging the employment procedures of the Chicago Police Department.[201] In *City of Chicago*, a patrolman's examination was invalidated after it

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[195]*Id.* at 624. Though the high school diploma requirement was found to be related to the job of patrolman, the court found that there was no relation between the high school diploma requirement and the job of firefighter. *Id.* (citing Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975)).

[196]457 F. Supp. at 629.

[197]*Id.*

[198]401 U.S. at 432.

[199]*Id.* at 432 (emphasis added).

[200]549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

[201]*Id.* at 420.

was found that blacks failed the examination at twice the rate of white applicants.[202] A background investigation, under which 25.7% of the black applicants since 1962 were disqualified while only 15.2% of the white applicants within the same time frame were disqualified,[203] was also invalidated.[204] In addition, the circuit court affirmed the district court's finding that the promotional examination for police sergeant had an adverse racial impact on minorities because only "2.23 percent of minority candidates taking the examination had a practical chance of being promoted compared to a 7.07 percent of the white candidates."[205]

The defendants in *City of Chicago* attempted to validate the patrolman's examination with criteria validation, which consisted of a comparison between success on the examination and patrolman efficiency ratings, departmental awards, disciplinary action, performance on the sergeant's promotion examination, and promotion to command ranks.[206] The court, however, affirmed the district court's holding that the evidence did not satisfy E.E.O.C. guidelines[207] for criteria validation.[208] Promotion can only be used as a criterion for validation of an employment test when a substantial number of employees can expect promotion within a reasonable time,[209] and in *City of Chicago*, a substantial number of employees could not expect promotion within a reasonable time.[210] Though requiring content or criteria validation assists in eliminating discriminatory employment practices, the fundamental problem of black unemployment or black underrepresentation is not directly addressed by these types of validation. Perhaps a requirement of statistical racial parity

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[202] *Id.* at 428. Black applicants failed the examination at a rate of 67% while only 33% of the white applicants failed. *Id.* at 428 n.11.

[203] *Id.* at 428.

[204] *Id.* at 427.

[205] *Id.* at 429.

[206] *Id.* at 430.

[207] 29 C.F.R. § 1607.5(C) (1980) provides:

> *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) . . . and standard textbooks and journals in the field of personnel selection.

[208] 549 F.2d at 430.

[209] *Id.* at 430-31; Albemarle Paper Co. v. Moody, 422 U.S. 405, 434 (1975); 29 C.F.R. § 1607.4(C) (1980).

[210] 549 F.2d at 431.

validation[211] may be necessary to promptly confront the issue of black underrepresentation within urban police departments. Although black underrepresentation may be the symptom of discriminatory employment practices, this is one occasion in which the symptom must be directly addressed if one is to redress employment discrimination grievances.

In *City of Chicago*, the 1973 sergeant's examination was held not to be job-related.[212] The circuit court stated that an examination had to be validated for both minorities and whites.[213] An employer who uses a test that has an adverse racial impact on blacks must show that the test is predictive of black and white job performance, and that the exclusion of blacks is because of deficiencies in their job qualifications.[214] The Supreme Court in *Albemarle Paper Co. v. Moody*[215] accepted the above E.E.O.C. standards[216] requiring black and white validation of an examination. These standards, however, are inadequate, because they do not necessarily provide redress for job-related or job predictive examinations that have an adverse racial impact.

The remedies that courts fashion under Title VII to redress the grievances of blacks within or attempting to enter the police field are grossly inadequate to increase or maintain black representation. Judicial quotas are often short-term or cosmetic solutions to black underrepresentation. Indeed, the judiciary may be the branch least capable of increasing black representation. In *City of Chicago*, the circuit court affirmed the district court's relief order that black or Spanish-surnamed people must fill forty-two percent of future patrol officer vacancies.[217] This hiring requirement cannot be viewed as a long-term method to increase black participation, because it was based on a finding of past discriminatory employment practices by the employer and was in a short time suspended.[218] In addition, the remedy was fashioned to eradicate the past efforts of discrimination and prevent discrimination in the future.[219] Perhaps the most

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[211]Statistical racial parity validation would require that an examination, even if job-related, must eliminate whites from the hiring or promotion process at the same rate in which it eliminates blacks in order for the examination to be maintained as an employment qualification.

[212]*Id.* at 433-34.

[213]*Id.* at 433.

[214]*Id.*

[215]422 U.S. 405, 435-36 (1975).

[216]29 C.F.R. § 1607.5(b) (1975) (now contained in scattered sections of E.E.O.C., Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1980)).

[217]549 F.2d at 436.

[218]*Id.* at 436 n.29.

[219]*Id.* at 436.

effective way to prevent future discrimination is a requirement of black representation.

The *City of Chicago* court also ordered that forty percent of the patrol officers promoted to the position of sergeant be black or Spanish-surnamed.[220] Several circuit courts have allowed the use of mandatory racial quotas as a proper exercise of a court's remedial powers under Title VII.[221] Though quotas such as the ones used in *City of Chicago* may have an immediate effect on the composition of a police department, judicial quotas do not provide a long-term means to guarantee black representation on police forces, because they are, in addition to other difficulties mentioned, dependent upon a judicial finding of discrimination.[222]

The withholding of federal revenue sharing funds may be one of the most effective means of preventing future discriminatory practices. In *City of Chicago*, the court affirmed the district court's decision to enjoin[223] the federal government from paying the city revenue sharing funds under the State and Local Fiscal Assistance Act of 1972.[224] Section 1242(a) of the Fiscal Assistance Act states:

> No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity [funded in whole or in part with funds made available under this Act].[225]

The standards to be used in determining if the Fiscal Assistance Act provision on discrimination has been violated in the employment arena are the E.E.O.C. standards used under Title VII.[226] The withholding of revenue sharing funds, however, only deters discriminatory practices, and the absence of discriminatory practices is not an assurance that the number of blacks will increase on urban police forces. The symptoms of a problem often persist after the problem has disappeared.[227]

The dilemma that courts face in providing an appropriate remedy after employment discrimination is found is immense, and

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[220]*Id.*

[221]*See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1973).

[222]*See* note 209 *supra*.

[223]549 F.2d at 439.

[224]31 U.S.C. §§ 1221-1265 (1976).

[225]*Id.* § 1242(a).

[226]549 F.2d at 440; 31 C.F.R. § 51.53(b) (1978).

[227]In the case of seniority systems that were originally instituted with a racialist intent, but subsequently administered without a racialist intent, the detrimental effect on black employees still persists.

thus there are often contradictory approaches in a single decision. In *Kirkland v. New York State Department of Correctional Services*,[228] the district court's decision that a promotional examination had a racially discriminatory impact and thus violated Title VII was affirmed on appeal.[229] With respect to an appropriate remedy, the *Kirkland* court stated:

> A hiring quota deals with the public at large, none of whose numbers can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination some of them may be bypassed for advancement solely because they are white.[230]

The court put itself in a contradictory position. By affirming the district court's decision that the examination was biased, the court indirectly declared the invalidity of the examination. Yet the court allowed whites whose positions on the eligibility list were established by a biased examination to maintain their positions.[231] If an examination had been declared invalid, it would seem to follow that whites who passed that examination could not use it as a basis for greater promotional opportunities, because the examination decreased the number of blacks in the competitive process. In essence, the decision in *Kirkland* implies that because white officers have passed a biased examination and thereby received greater promotional opportunities it would be unjust to negate such unfair advantage, irrespective of the effect on promotional opportunities for black officers.

Seniority requirements, which may be racially passive or active, often limit the number of blacks in the decision-making positions within urban police departments. In *Afro American Patrolmens League v. Duck*,[232] the Sixth Circuit Court of Appeals affirmed a district court's decision that two elements of the Toledo Police Department's promotion system perpetuated a racial imbalance on the police force.[233] These two elements were a requirement of five years of service as a patrolman in order to take the sergeant's examination and extra credit for length of service.[234] Both of these elements "tended to freeze the status quo of an almost exclusively white command corps which was established by prior discriminatory

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[228]520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

[229]*Id.* at 425.

[230]*Id.* at 429.

[231]*Id.* at 430.

[232]503 F.2d 294 (6th Cir. 1974).

[233]*Id.* at 300.

[234]*Id.*

practices."[235] A seniority system that is facially neutral, but in operation perpetuates past discrimination, has been held illegal under Title VII.[236] The court in *Duck*, though, reversed the district court's decision that in-service requirements for all promotions be reduced to one year.[237] The circuit court reasoned that:

> While seniority and experience should not be the sole . . . basis [for promotion], . . . the district court failed to strike a proper balance between the right of the people of Toledo to the protection of a police department where only seasoned and qualified officers are advanced to command positions and the necessity to obliterate as quickly as possible the present racial imbalance which exists in that Department.[238]

The balance the circuit court makes draws no distinction between *actual* harm to black patrolmen hoping to advance[239] and *possible* harm engendered by unseasoned officers in command positions. Harm that is actually injuring people should take precedence over no graver harm that is only theoretically possible. After a discriminatory seniority practice that violated Title VII was found, the remedy should have been to eliminate that discriminatory practice, not simply to curtail its effect so that the level of discrimination was reduced.

The concepts of shortening time-in-service requirements for examination eligibility and eliminating seniority points were not altogether new. In *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission*,[240] the Second Circuit suggested that the solution to the problem of too few black officers in command positions was to eliminate or reduce time-in-service requirements and seniority points.[241] *Bridgeport* exemplifies the different perspectives courts take with respect to entry level discrimination and promotional discriminations. The Second Circuit in *Bridgeport* affirmed the lower court's decision imposing entry level quotas but reversed the lower court's decision ordering quotas above the rank of patrolman.[242] The rationale for affirming the hiring quotas was that "the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a

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[235] *Id.*

[236] *Id.* at 301.

[237] *Id.* at 302.

[238] *Id.*

[239] *Id.* At the time of trial, only one black officer held a command position in the Toledo Police Department. *Id.* at 299.

[240] 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

[241] *Id.* at 1341.

[242] *Id.* at 1340-41.

time when racial divisiveness is plaguing law enforcement."[243] After making such a statement, the court dropped the logical extension of its statement, that being the need for blacks in decision-making positions. Thus, the court left the avenue open for the concentration of blacks in the lower echelon of the police hierarchy. Although the *Bridgeport* court stated that there was no finding that the promotion examination was not job-related, this was not required by *Griggs*. Once adverse racial impact is shown, the employer has the burden of proving job-relatedness. If no evidence is submitted by the employer on this issue, the plaintiffs should prevail.[244]

The *Bridgeport* court denied relief in the promotion arena under the rationale that whites whose careers were in law enforcement would be prevented from advancing solely because of color, and a quota system would increase rather than diminish racial conflict.[245] The court operated from the perspective that whites who embarked upon a police career were not aided in promotion by the fact that they did not have to compete against black personnel for promotion. It is odd that the court was concerned with whether a quota would increase rather than diminish racial animosity among whites, without considering whether an order limiting promotional opportunities for blacks would increase the conviction among blacks that such an order operates to subjugate black police officers and maintain the status quo.

VI. Methods of Increasing Black Representation

Title VII has been a judicial means to eliminate or curtail discriminatory employment practices. However, such results do not guarantee black representation on urban police departments. The value of Title VII must be measured in numerical increases and not by elimination or curtailment of discriminatory practices.

The alternatives that follow center on using Title VII as a judicial and non-judicial means to increase black representation within urban police departments. Given this focus, the judicial system is perhaps the body least able to directly increase or maintain adequate black representation within urban police departments on a long-term basis. However, because the judiciary has determined the standards to be used under Title VII, an alteration of those standards would increase black representation. The key to employing Title VII to increase black representation lies in there being no prohibition in Title VII against employers using voluntary race-conscious

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[243]*Id.* at 1341.

[244]Griggs v. Duke Power Co., 401 U.S. 424, 428-32 (1971).

[245]482 F.2d at 1341.

programs to correct a racial imbalance.[246] Thus, the power to increase black representation within urban police departments lies within individual police departments, and not the judiciary.

A. Job-Relatedness

Although Title VII contains an anti-preferential treatment provision,[247] a provision for professionally developed ability tests,[248] and a provision protecting *bona fide* seniority systems,[249] a standard of color blindness[250] for the achievement of employment objectives under Title VII is unrealistic. Employment tests that are predictive of job performance and valid under a color blindness standard may still eliminate a disproportionate number of blacks from the applicant

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[246]United Steelworkers of America v. Weber (Kaiser Aluminum), 443 U.S. 193, 207 (1979).

[247]42 U.S.C. § 2000e-2(j) (1976) provides in part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[248]42 U.S.C. § 2000e-2(h) (1976), provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such diffeerences [*sic*] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

[249]*Id.*

[250]Color Blindness is the absolute disregard of race in making employment decisions.

pool. Therefore, such a test, in conjunction with the effects of past discriminatory practices, would operate to maintain the status quo. Arguably, a standard of color blindness is an appropriate public policy objective; however, the means required to achieve such an objective mandates that race be used as a positive factor to include persons who have been excluded in the past from employment opportunities.

Even though a test that is job-related and has an adverse racial impact may still be restructured under the *Castro*[251] analysis, the restructured test would, nevertheless, be evaluated in a Title VII action under the job-relatedness standard. It is the standard of allowing occupational *requirements* to be validated solely by job-relatedness that must be examined.

The success of Title VII must be measured by reference to statistics indicating the relative rate of black unemployment and the level of black income.[252] The legislative history of Title VII fortifies this conclusion, and Title VII would be the legal method to promote greater racial economic parity.[253] In essence, for an employment qualification[254] to be valid, the qualification should be not only job-related but without an adverse racial impact.

It might be imagined that requiring an employer's qualifications to be job-related and to have no adverse racial impact would be an intolerable burden. However, given the intolerable character of overt and covert racialism such a burden would serve important public policy functions. First, it would continue to require employees to be "qualified" because hiring and promotion criteria would still have to be job-related. Second, it would be sensitive to the character of institutional racialism and the way in which such racialism takes the appearance of equal treatment. Third, a requirement of non-adverse racial impact would increase black representation in many fields, and thus effecting the underlying legislative intent of Title VII.[255] Finally, a requirement of non-racial impact for an employment qualification would not contradict any provision of Title VII, and it

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[251]459 F.2d at 733.

[252]*See, e.g.*, M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 140-42 (1966).

[253]*See* H.R. REP., No. 570 88th Cong., 1st Sess. 2-3 (1963); *Hearing on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. *passim* (1963).

[254]This includes examinations, height and weight requirements, background checks, educational requirements, and any other requirement for an occupation.

[255]Since the legislative intent underlying Title VII was the elimination of racial employment barriers, Congress must have thought that such elimination would increase the number of blacks in many occupations.

accomodates the need for qualified officers and the need for increased black representation in the police field.

B. Seniority

The use of seniority systems[256] presents a complicated problem, because a *bona fide* seniority system is protected under Title VII.[257] For years federal courts had held that seniority systems adopted without discriminatory intent did not qualify for the *bona fide* seniority systems exemption of section 703(h) of Title VII, if the effect of such systems was to perpetuate racial differences in employment status.[258] However, in *International Brotherhood of Teamsters v. United States*,[259] where a company's seniority system locked black employees into menial jobs,[260] the Supreme Court concluded that the seniority system clearly favored white employees and preserved the status quo of prior discriminatory employment practices.[261] The Court stated that "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."[262] Thus, *Teamsters* has effectively eliminated Title VII as a mechanism to invalidate seniority systems that are discriminatory because of past discriminatory practices, if the system is facially neutral and has been created and maintained without discriminatory intent. Obviously, *Teamsters* placed a great obstacle in the way of increasing the number of blacks in decision-making positions with urban police departments.

The Supreme Court in *Teamsters* could have interpreted the term *bona fide* in Title VII to include non-perpetuation of past discrimination, but it did not. Thus, if the goal is to eliminate seniority systems that perpetuate the effects of past discrimination, the Title VII solution seems inadequate. Because sections 1981[263] and 1983[264] have no seniority exemption, employment discrimination suits against police departments may be brought under sections 1981, 1983, and Title VII if a seniority system is called into question. An

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[256]Seniority does not necessarily reflect an individual's ability and is merely based on time served.

[257]42 U.S.C. § 2000e-2(h) (1976).

[258]*See, e.g.*, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 983 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968).

[259]431 U.S. 324 (1977).

[260]*Id.* at 343-44.

[261]*Id.* at 349-50.

[262]*Id.* at 350.

[263]42 U.S.C. § 1981 (1976).

[264]*Id.* § 1983.

employment practice that passes the scrutiny of Title VII is not immune from attack under section 1981.[265] In *Alexander v. Gardner-Denver Co.*,[266] the Supreme Court stated that Title VII was meant to supplement existing laws relating to employment discrimination, because Congress manifested a clear intent to allow an individual to pursue rights under Title VII and other federal statutes.[267] In addition, the doctrine of election of remedies is inapplicable, because statutory rights under Title VII are distinctly separate from an employee's contractual rights.[268] Thus, there is no legal barrier to bringing an action under sections 1981, 1983, and Title VII.

Two solutions that others have set forth for solving the seniority problem are requiring the displacement of white incumbents by blacks, who without discrimination in the past would have had the incumbents' places, or allowing a black to compete for a promotion on the basis of total company service rather than seniority in an old job.[269] The second approach[270] is the one that had been used under Title VII actions prior to the *Teamsters* decision. It seems likely that the second approach would also be taken by courts, if a seniority system were challenged successfully under sections 1981 and 1983. However, the first approach, which requires displacement of whites, goes directly to the heart of the seniority problem, because it could theoretically apply not only to blacks who applied and were refused employment or promotion because of discriminatory practices, but also to blacks who did not apply for employment or promotion because of the employer's discriminatory practices. In addition, the second approach, which appeases "reverse discrimination"[271] concerns, does not consider that total company service and seniority time in an old job may be equal, and thus the aggrieved party is left without a remedy.

In the final analysis, perhaps the most effective means to remove seniority as a barrier in efforts to increase the number of blacks in decision-making positions in police departments is to totally remove seniority from the promotional process. Seniority could be

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[265]Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d at 1309-13. (Several courts have held that bona fide seniority systems are immune from attack under § 1981. *See, e.g.*, Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)).

[266]415 U.S. 36 (1974).

[267]*Id.* at 47-49.

[268]*Id.* at 49-51.

[269]Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

[270]*See* 416 F.2d at 988; 279 F. Supp. at 510.

[271]The term "reverse discrimination" is inapposite; "discrimination" is more appropriate.

used as a variable for police officers making horizontal employment changes, which encompass no improvement in rank, salary, or decision-making power, but should not be used for police officers making vertical employment changes, which encompass an improvement in rank, salary, or decision-making authority. The removal of certain criteria from a process is not altogether new. The Voting Rights Act of 1965,[272] for example, removed educational and testing requirements from the right of an individual to vote.[273]

C. *Race-Awareness Hiring*

The most effective way to immediately increase the number of blacks on urban police departments is race-conscious hiring. Classifications based on race, however, are suspect under the equal protection clause and are subject to strict judicial scrutiny.[274] To satisfy the strict scrutiny standard of review a classification must fulfill a *compelling government interest* and be *necessary* to promote that interest.[275] If a classification by race solely to promote employment opportunities in the police field for blacks who have been denied such opportunities meets the above criteria, it may be used. A classification by race could be justified to remedy past discrimination,[276] distribute government benefits and burdens,[277] or provide adequate health care to an underserved community.[278] Because occupations within police departments could be considered benefits provided by a government entity, using race for the purpose suggested may be constitutional. Although the use of race as an employment qualification to meet a police department's operational needs has been examined,[279] the use of race purely to increase black representation prior to a judicial finding of racial discrimination is a new area.

The perspective of this Note is that a police department should be able to use race in its employment determinations by merely deciding that the number of blacks in the police department is incongruent with the percentage of blacks of appropriate age in the

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[272]42 U.S.C. §§ 1971-1974e (1976).

[273]*Id.* § 1971(a).

[274]*See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978); Loving v. Virginia, 388 U.S. 1, 11 (1967); Fullilove v. Kreps, 584 F.2d 600, 602-03 (2d Cir. 1978), *aff'd*, 448 U.S. 448 (1980).

[275]Dunn v. Blumstein, 405 U.S. 330, 342 (1973) (emphasis added); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

[276]*See* 438 U.S. at 320.

[277]*Id.*

[278]*Id.* at 310-11.

[279]*Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. Rev. 413 (1979).

employment selection area and that racialism has been a factor in contributing to the underrepresentation of blacks within the police force. In *United Steelworkers of America v. Weber (Kaiser Aluminum)*,[280] the Supreme Court held that Title VII's prohibition in section 703(a)[281] and (d)[282] against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.[283] Given the legislative history of Title VII and the reasons for Title VII,[284] an affirmative action program voluntarily adopted by private parties, before a judicial determination of racial discrimination, to eliminate traditional patterns of racial discrimination is not in violation of Title VII. The *Weber* court stated that the affirmative action plan in dispute did not curtail white advancement since *half* of those trained in the program would be white, the program was temporary, and the program was not intended to maintain a racial balance.[285] It appears that a long range race-conscious employment plan instituted to maintain a racial balance or correct a racial imbalance would not be viewed favorably by the Supreme Court. However, this is just the type of program that is needed to insure black representation. To not allow a program to be instituted soley to maintain a racial balance or correct a racial imbalance, when a racial imbalance establishes a *prima facie* case of discrimination, puts the employer in a precarious position. More importantly, avoidance of long-term race awareness solutions to long-term racial problems ensures the inadequacy of the attempted legal resolution.

Title VII does not prohibit race-conscious action to correct a racial imbalance.[286] Title VII prohibits requiring employers to perform race-awareness hiring to correct a racial imbalance,[287] but gives the authority to district courts to order any affirmative action which

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[280]443 U.S. 193 (1979).

[281]42 U.S.C. § 2000e-2(a) (1976) (section 703(a) of the Civil Rights Act of 1964). This section provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[282]42 U.S.C. § 2000e-2(d) (1976) (section 703(d) of the Civil Rights Act of 1964).

[283]443 U.S. at 201-09.

[284]*Id.* at 201-02.

[285]*Id.* at 208.

[286]*Id.* at 206.

[287]42 U.S.C. § 2000e-2(j) (1976).

may be appropriate to remedy past discrimination.[288] It has been suggested that Title VII be amended to address the issue of race-conscious hiring by non-judicial bodies.[289] The amendment would read:

> 42 U.S.C. § 2000e-2(k) Municipal Law Enforcement
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for a municipality to use race as an employment qualification to integrate its law enforcement agency so as to reflect the racial composition of the municipal population when such integration is necessary to ensure the agency's effective operation.[290]

This amendment, though, would be inadequate, because it is based on the concept of using race for integration purposes and is dependent on operational necessity. An amendment more attuned to the grievances of black police officers would read:

> 42 U.S.C. § 2000e-2(k) Municipal Law Enforcement
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for a municipality to use race as an integral part of its employment or promotion process to correct a racial imbalance or maintain a racial balance so as to reflect the racial composition of the municipality, if that municipality determines that the racial imbalance or threat of imbalance exists due to past or present discriminatory practices of the municipality.

Such an amendment would allow Title VII to be used as a tool to increase black representation within urban police departments without actions being brought in the judicial milieu.

In summary, to ensure employment and promotional opportunities for blacks within police departments, race-conscious hiring for the sole purpose of correcting a racial imbalance or maintaining a racial balance is necessary. Although the use of race in this manner could be used as a mechanism to limit the number of blacks in police departments, a safeguard against that problem may be a requirement that a municipality's affirmative action program instituted under the above proposed section be annually reviewed by a local multi-racial committee. In addition, if a municipality makes an

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[288] *Id.* § 2000e-5(g).

[289] *See* 54 N.Y.U. L. REV., *supra* note 279, at 442.

[290] *Id.*

in-house determination of past or present discrimination and implements adequate programs to correct the problem, the municipality could be granted a limited amount of immunity from discrimination actions that would seek to hold the municipality liable for its in-house determination of discrimination.

VII. Conclusion

The problems confronting urban police departments with respect to the issue of black representation are numerous, difficult, and subtle. Given the constraints of Title VII and the judicial interpretations of Title VII, the ability of police departments to directly increase or maintain black representation on a long-term basis is still minimal. Indeed, Title VII has been a legal instrument to eradicate obstacles that might deny black mobility, but such eradication does not necessarily increase the number of blacks within a field. In evaluating the success of Title VII, the percentage increase in black representation should be the sole criterion, because it is the best indicator of legislatively mandated black progress. This Note has suggested three ways to increase black representation within urban police departments: (1) requiring occupational qualifications to be job-related and have no adverse racial impact; (2) not allowing seniority per se to be considered in the promotion process; and (3) an amendment to Title VII allowing race-conscious hiring to maintain a racial balance or correct a racial imbalance. If these suggestions were implemented, Title VII would be an effective means to increase black representation within urban police departments.

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