DISCRIMINATION—EMPLOYMENT—SECTION 1981 EMPLOYMENT DISCRIMINATION CLAIM REQUIRES PROOF OF DISCRIMINATORY INTENT—*Croker v. Boeing*, 662 F.2d 975 (3d Cir. 1981) (en banc).

An individual charging racial discrimination in employment may bring an action under Title VII of the Civil Rights Act of 1964[1] and section 1981 of Title 42 of the United States Code.[2] Courts have disputed the proper standard of proof required to sustain an employment discrimination claim based on section 1981.[3] In *Croker v. Boeing*,[4] the Court of Appeals for the Third Circuit, in a split decision, held that while a claimant under Title VII has the option of either proving a disproportionate impact[5] or of establishing a discrim-

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[1] 42 U.S.C. §§ 2000e-2000e-17 (1976). Title VII provides that employment discrimination based on race, color, religion, sex, or national origin is unlawful. The United States Supreme Court has determined that an individual alleging Title VII violations in hiring or promotion must show that he is a member of a racial minority (or similarly protected class) and that an employer has denied him an available job for which he applied and for which he was qualified. He must further show that he was rejected for the job and that the employer continued to seek applicants with the same qualifications for the same job. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[2] 42 U.S.C. § 1981 (1976). Section 1981 is a codification of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, which was reenacted in the Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 144. The post-Civil War Reconstruction Era Civil Rights Acts were the first comprehensive civil rights legislation. Employment discrimination is one area of protection that has developed from these enactments. Section 1981 provides that:

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

42 U.S.C. § 1981.

[3] This dispute can be traced to differing opinions on the interaction of section 1981 with constitutional and Title VII claims. *See* notes 65 & 66 *infra* and accompanying text.

[4] 662 F.2d 975 (3d Cir. 1981) (en banc).

[5] Disproportionate impact was established as the standard of proof for a prima facie Title VII claim in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In this case, the Supreme Court indicated that Title VII prohibited overt discrimination as well as employment procedures which were facially neutral but in application discriminated against one group more than another. *Id.* at 431. Statistics could be used to demonstrate that a challenged employment practice had an adverse impact on one group more than another and that impact could not be sanctioned as a business necessity. *Id.* at 431-32. Once a disproportionate impact was shown, the burden shifted to the employer to prove the challenged employment practice was a business necessity and was job related. In *Griggs*, the Court stated: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. One commentator has suggested the terms disparate impact, disparate effect, discriminatory impact, and discriminatory effect can be used interchangeably with disproportionate impact. Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*, 80 COLUM. L. REV. 137, 138 n.7 (1980). For a discussion of the dispro-

inatory intent,[6] a section 1981 plaintiff is restricted to the more onerous burden of proving a discriminatory intent.[7] The court further held that civil rights litigation is final, and thus reviewable, after the court has set the amount of attorney fees to be awarded to a prevailing plaintiff or created a fund from which these fees are to be drawn.[8]

Boeing Vertol is a manufacturer of helicopters[9] and sells most of its products to the United States Department of Defense.[10] Because it is a government contractor, the company is required to comply with non-discrimination and affirmative action regulations.[11] The Office of Federal Contract Compliance audited the company's employment practices and statistics and concluded that Boeing Vertol was in compliance with the regulations.[12] Despite this determination, Mamie Croker and other black employees of the Vertol Division individually[13] and as a class[14] charged the Boeing Company with racially discriminatory employment practices in violation of Title VII and section 1981.[15]

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portionate impact theory, see generally Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

[6] A discriminatory intent standard requires proof of an employer's purposeful discrimination. One commentator has suggested that a discriminatory intent standard promotes equal treatment, whereas the less stringent disproportionate impact standard promotes equal status. Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725, 727-30 (1977).

[7] 662 F.2d at 989.

[8] *Id.* at 984.

[9] Croker v. Boeing, 437 F. Supp. 1138, 1146 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981). Boeing Vertol asserted that the overall skill of its employees was critical. The quality of its product was of utmost concern because of the possibility of aircraft crashes resulting from faulty workmanship and the highly competitive nature of the aircraft industry. *Id.*

[10] *Id.*

[11] See 41 C.F.R. § 60-2.1 to 2.32 (1981) for details of these regulations.

[12] Croker v. Boeing, 437 F. Supp. 1138, 1146 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981).

[13] *See id.* at 1166. Boeing Vertol employed Mamie Croker, Eric P. Travis, Chivis Davis, Sr., Robert W. Debose and Leolin Dockins as production and maintenance workers. Collectively, they charged racial discrimination in hiring and promotion, discriminatory harassment, discipline and retaliation.

[14] *Id.* at 1145. The district court certified the class as follows:

> Under Title VII, all Negro persons who had applications pending for employment with Boeing Vertol on or after March 23, 1968, or who have been employed by Boeing Vertol at any time between March 23, 1968 and June 30, 1975, the date on which trial of this action commenced.
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> Under 42 U.S.C. §§ 1981, 1985 all Negro persons who had applications pending for employment with Boeing Vertol on or after September 2, 1965, or who had been employed by Boeing Vertol at any time between September 2, 1965 and June 30, 1975, the date on which trial of this action commenced.

Id. at 1198.

[15] The employees also raised a claim based on 42 U.S.C. § 1985 (1976). The relevant portion of section 1985 prohibits any conspiracy to deprive an individual of equal protection of the law.

An action was brought in the United States District Court for the Eastern District of Pennsylvania which bifurcated the liability and remedial issues.[16] During trial on the liability issue, the plaintiffs contended that black employees of Boeing Vertol were statistically under-represented in most positions because of the company's discriminatory policies in hiring and promotion.[17] Employees testified that they were subjected to derogatory remarks,[18] supervisory harassment,[19] racial bias in promotion,[20] and a work environment infused with racial prejudice.[21] Boeing Vertol contended, among other things, that it actively recruited black employees[22] and sought to

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Croker v. Boeing, 437 F. Supp. 1138, 1178(E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981). Local 1069 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) was initially named as a defendant. When the trial began, the employees and the union informed the district court that they had reached a tentative settlement. *Id.* at 1145. The union filed a motion to dismiss the claims based on section 1985. The court delayed judgment until the end of the trial when it granted the union's motion because the plaintiffs did not prove that the union and Boeing Vertol conspired against black employees. *Id.* at 1178. This dismissal was not challenged on appeal. *Croker*, 662 F.2d at 980 n.1.

[16] Croker v. Boeing, 437 F. Supp. 1138, 1145 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981). This action began when Mamie Croker filed a complaint with the Equal Employment Opportunity Commission (EEOC). After she was notified by the EEOC that she was entitled to bring suit, this action was filed with the district court on September 2, 1971. The remaining individually named plaintiffs filed charges with the EEOC alleging Title VII violations, were informed of their right to bring suit, and on January 11, 1972, intervened in the action brought by Croker. *Id.* at 1145-46. Discovery continued for almost four years. At trial over 1500 pages of deposition testimony was offered as well as 500 trial exhibits consisting mostly of statistical evidence. Appellant Boeing Vertol's brief at 3, Croker v. Boeing, 662 F.2d 975 (3d Cir. 1981). Litigation on the issue of liability commenced in 1975. Croker v. Boeing, 437 F. Supp. at 1145.

[17] Croker v. Boeing, 437 F. Supp. 1138, 1153-63 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981). Statistical evidence also demonstrated that blacks were disciplined and subject to reprisal more than whites. *Id.* at 1165.

[18] Dockins and Travis testified that they heard supervisors refer to black employees as "niggers," and Travis stated that his supervisor often expressed his intolerance for blacks. *Id.* at 1169, 1171. Croker testified that she and another black female employee were accused of wearing tight clothes and thus were subject to derogatory remarks. *Id.* at 1167.

[19] Croker claimed that her supervisor clocked her when she went to the ladies' room and at times stood next to her while she worked. At one time a supervisor told her to accept the fact that she was black and was therefore intellectually limited. *Id.*

[20] Dockins charged that he was denied promotions because of his race. *Id.* at 1169. A supervisor allegedly told Travis that there were no black supervisors due to company policy. *Id.* at 1171.

[21] Croker related to the court an incident in which a white employee showed a Ku Klux Klan card to a black employee and informed her that she would be taken care of if she got out of line. *Id.* at 1167. In 1968, a committee for progress was set up and a petition was circulated among black employees. The petition "protested harassment, name calling, unfair hiring and firing policies, the lack of advancement for blacks, and bigotry and prejudice on the part of foremen and supervisors." *Id.* at 1171.

[22] The company asserted that it contacted predominantly black organizations such as the Urban League and the Council for Equal Job Opportunity and informed them of its job openings. *Id.* at 1158. It further contended that the company made special efforts to recruit recent engineering graduates from several schools with a high concentration of black students. *Id.* at 1159.

obtain local housing opportunities for black employees seeking to relocate.[23] The company further claimed that statistical disparities in the initial placement of blacks and whites resulted from the black employees' expressed job preferences at the time of hiring.[24] The district court, noting that the disparities demonstrated by the employees were "insufficiently dramatic or unexplainable to justify an inference of purposeful racial discrimination,"[25] held that Boeing Vertol did not perpetuate a pattern or practice of racial discrimination.[26] Although the district court thus ruled that the class-wide claim failed,[27] the court found that Boeing Vertol was liable to four individually named plaintiffs and to two class members for violations of their Title VII and section 1981 rights.[28]

Litigation of the issue of damages commenced in 1977, and in October, 1979, the district court issued its findings.[29] The court

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[23] Boeing Vertol sought pledges from local realtors advertising in the company's communication media that they would not discriminate against blacks. *Id.*

[24] The company asserted that newly hired personnel were placed in jobs according to their choice. *Id.* at 1160.

[25] *Id.* at 1182. The district court clarified its position: "That is not to say, however, that Boeing Vertol has been completely free from discrimination. Rather, [this] holding is only that the plaintiffs have failed to prove Boeing Vertol engaged in a pattern or practice of discrimination." *Id.* at 1192.

[26] The language "pattern or practice" is used in 42 U.S.C. § 2000e-6(a) (1976). Senator Humphrey, during a discussion of this legislation stated: "[A] pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature." 110 CONG. REC. 14,270 (1964).

[27] Croker v. Boeing, 437 F. Supp. 1138, 1192 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981). District Judge Newcomer noted that this was a difficult decision because discriminatory employment practices have become more subtle. *Id.*

[28] Boeing Vertol's liability to Croker, Dockins, Davis, and Donald Ferrell, a class member, was based on discrimination in promotional opportunities. Horace Dixon, another class member, was discriminatorily denied a request for a transfer, Croker and Travis were the subject of harassment, and Travis the subject of discriminatory discipline and retaliation. *Id.* at 1198.

[29] 23 F.E.P. 1783 (E.D. Pa. 1979). The statute of limitations for Title VII and section 1981 was a consideration in awarding damages. The district court acknowledged that a Title VII claimant had ninety days from the date of the discriminatory action to file a complaint with the EEOC. *Id.* at 1785. In applying this ninety day statute of limitations, the court rejected the employees' argument that because there was a "continuing violation," they should be allowed to recover for damages suffered outside this time period. *Id.* at 1785-86. Because the statute of limitations for section 1981 is not expressly defined, the *Croker* court followed the guidance of the United States Supreme Court in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), indicating that the tribunal which hears a section 1981 claim must adopt the applicable state statute of limitations. Thus, the district court stated that the proffered evidence on the liability issue demonstrated intentional, non-physical harassment of the black employees which denied them the right to make and enforce employment contracts on the same terms and conditions as white employees. 23 F.E.P. at 1786. The court concluded that this type of conduct most closely approximated the common law tort of interference with contractual relations which carried a six year statute of limitations. *Id.* at 1785-86. The district court noted the right to freely enter contractual relationships is a commercial right and "among the Reconstruction era civil rights laws, [§ 1981 is] manifestly intended to protect commercial rights. . . ." *Id.* at 1787. A six-year statute of limitations was applied to section 1981 claims. *Id.* at 1786.

awarded three individually named plaintiffs who prevailed against Boeing Vertol nominal, compensatory, and punitive damages.[30]

Concurrent with the start of litigation on the damage issue in November, 1977, the district court awarded attorney fees and costs to the employees prevailing on the liability issue[31] and awarded to Boeing Vertol costs against the class and the individually named plaintiffs not prevailing on the issue of liability.[32] Although the company was not found liable to the class members, the court declined to award it attorney fees because the plaintiffs filed the action in good faith rather than to harass or embarrass company officials.[33] In March, 1980, the district court set the amount of attorney fees awarded to the prevailing plaintiffs.[34]

On appeal to the Third Circuit, the district court's decision was affirmed. The court of appeals held that Boeing Vertol was not liable to the class for racial discrimination against black employees in initial placement, promotion, discipline, and harassment,[35] that the company was not liable to certain individual class members,[36] and that the

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[30] During trial on the issue of liability Croker proved intentional and protracted harassment and prevailed on both her section 1981 claim and Title VII claim. She was awarded $14,000 for mental anguish suffered, $50 nominal damages for Boeing Vertol's discriminatory acts in violation of Title VII, and punitive damages of $1,000. Punitive damages were allowed to instruct the company that upper management could not ignore the intentional acts of lower management. *Id.* at 1789-90. Dockins proved he suffered discrimination because he was denied two promotions. He was not allowed to recover damages, however, because both acts took place earlier than 90 days before the filing of the complaint with the EEOC and they were thus time-barred. *Id.* at 1790-91. Travis proved unjustified disciplinary action and retaliation based on racial motives. He was awarded $2,500 compensatory damages for section 1981 violations, $50 nominal damages for harassment in violation of Title VII, and $1,000 punitive damages to deter retaliatory actions by lower management. *Id.* at 1791. Davis demonstrated that he was denied a promotion because of racial discrimination. He was allowed $891.13 in damages to compensate for his pecuniary loss by this Title VII violation. *Id.* at 1791-92.

[31] Croker v. Boeing, 444 F. Supp. 890, 894 (E.D. Pa. 1977). Awarding prevailing plaintiffs in civil rights litigation attorney fees was first recognized as the private attorney general theory and has been sanctioned by the United States Supreme Court. *See, e.g.*, Newman v. Piggie Park Enter., Inc., 390 U.S. 400 (1968). Under this theory an individual plaintiff prevailing in a class action civil rights suit can recover attorney fees even if the class fails to prove discrimination. Such litigation is considered in the public interest and individuals are encouraged to bring such actions to help eradicate discrimination. 444 F. Supp. at 893-94. Upon this theory, the district court declined to award attorney fees to two individual class members who prevailed on the issue of liability because "successful class members, who are not named plaintiffs do not initiate law suits and therefore do not have to make a choice, dependent upon the policy regarding attorneys fees, as to whether or not to bring a class action." *Id.* at 895. The Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)), is a codification of the private attorney general theory. This statute authorizes the district court to award attorney fees at its discretion.

[32] Croker v. Boeing, 444 F. Supp. 890, 895 (E.D. Pa. 1977).

[33] *Id.* at 894-95.

[34] *Croker*, 662 F.2d at 981.

[35] *Id.* at 997.

[36] *Id.* at 997-98.

employees did not prove that Boeing Vertol perpetuated a pattern or practice of racial discrimination in employment.[37] The court also decided two issues which will have ramifications beyond the facts presented in *Croker*. First, in denying Boeing Vertol's motion to dismiss for lack of subject matter jurisdiction, the court held that until the amount of attorney fees is determined or a fund set up from which these fees are to be drawn, the matter is not final for purposes of appeal.[38] Second, the appellate court held that plaintiffs must prove purposeful racial discrimination to prevail on a section 1981 claim.[39]

Boeing Vertol's motion to dismiss for lack of jurisdiction related to the November, 1977, order awarding attorney fees and costs and to the October, 1979, ruling on the issue of damages.[40] The company attempted to equate the setting of costs under rule 58 of the Federal Rules of Civil Procedure[41] with the awarding of attorney fees. In the language of this rule, "[e]ntry of the judgment shall not be delayed for the taxing of costs."[42] Thus, Boeing Vertol claimed that the final judgment was entered in October, 1979, when the court ruled on the issue of damages and that the plaintiffs should have filed an appeal within thirty days of that order.[43]

The employees argued that the March, 1980, order setting the amount of attorney fees was the final judgment and that their appeal was therefore timely filed within thirty days of it.[44] Chief Judge Seitz, writing for the majority, held in favor of the employees.[45] The court noted that resolution of this issue was significant because prior decisions from the Third Circuit were conflicting.[46]

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[37] *Id.* at 997. The appellate court also affirmed the district court's ruling on the applicable statute of limitations for Title VII claims. *Id.* at 990. On the issue of costs in favor of Boeing Vertol, the court vacated the award and remanded the issue to the district court to specify who should bear the costs and to what extent. *Id.* at 998-99.

[38] *Id.* at 984.

[39] *Id.* at 989.

[40] *Id.* at 981-82.

[41] FED. R. CIV. P. 58.

[42] *Id.*

[43] 662 F.2d at 981-92. Section 4(a) of the Federal Rules of Appellate Procedure requires that an appeal from a final order be filed within thirty days from the entry of judgment. FED. R. APP. P. 4(a).

[44] 662 F.2d at 982.

[45] *Id.* at 984.

[46] *Id.* at 982. The court exemplified this conflict by comparing Paeco, Inc. v. Applied Moldings, Inc., 562 F.2d 870 (3d Cir. 1977) and Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977) (each holding that judgment is not final until amount of attorney fees is determined) with De Long Corp. v. Raymond Int'l, Inc., 622 F.2d 1135 (3d Cir. 1980) and Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir. 1976) (judgments held to be final without resolving amount of attorney fees). 662 F.2d at 982.

Notwithstanding the court's recognition that Title VII and the Civil Rights Attorney's Fees Award Act of 1976[47] permitted it discretion to award "'reasonable attorney's fee[s] as part of the costs,'"[48] the court did not agree that the routine awarding of costs was meant to include the "time consuming process of setting fees."[49] In the majority's opinion, numerous considerations are involved in awarding attorney fees which often require a detailed factual and legal interpretation by the court.[50]

The court also refused to adopt Boeing Vertol's allegation that setting the amount of attorney fees was an issue collateral to the finality of the October, 1979, ruling on damages terminating litigation on the merits of the case.[51] The court based its determination on a Third Circuit opinion issued in *Richerson v. Jones*.[52] In that case, the majority relied upon a United States Supreme Court opinion in which it was determined that an order leaving unresolved the amount of damages or other relief was not a final judgment for the purpose of appeal.[53] Thus, the *Richerson* court established the rule that litigation was not terminated until the issue of attorney fees was resolved.[54] Extending this analysis, the *Croker* majority held that the scope of the parties' liability was not final until the amount of attorney fees was assessed or a fund had been set up from which these fees could be awarded.[55] As a result of this holding, the appellate court explicitly overruled conflicting decisions[56] and aligned the Third Circuit holdings on the issue of finality of judgment with respect to attorney fees.

The court of appeals next considered the employees' contention that proof of discriminatory intent was not necessary to establish a cause of action under section 1981.[57] The employees argued that section 1981 should also carry the less stringent disproportionate impact standard of proof applicable to Title VII claims.[58]

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[47] 42 U.S.C. § 1988 (1976).

[48] 662 F.2d at 982 (quoting 42 U.S.C. §§ 1988, 2000e-5(k) (1976)).

[49] *Id.* at 983.

[50] *Id.*

[51] *Id.*

[52] 551 F.2d 918 (3d Cir. 1977).

[53] *Id.* at 922 (citing Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742 (1976)).

[54] *Id.* at 929.

[55] 662 F.2d at 984.

[56] The holdings in De Long Corp. v. Raymond Int'l, Inc., 622 F.2d 1135 (3d Cir. 1980) and Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir. 1976) were overruled in so far as they conflicted with the *Croker* court's ruling on this issue. 662 F.2d at 984. *See* note 46 *supra*.

[57] 662 F.2d at 984.

[58] *Id.*

Addressing the issue, the *Croker* court acknowledged that case law on the standard of proof required to sustain a section 1981 claim was not dispositive.[59] Prior to the United States Supreme Court's decision in *Washington v. Davis*,[60] courts used a disproportionate impact standard when analyzing section 1981 claims.[61] Although the *Washington* Court did not consider the standard of proof necessary to sustain a section 1981 claim, it did decide the standard of proof required for a racially-based employment discrimination charge founded on constitutional grounds.[62] The Court held that proof of discriminatory intent was required to sustain a constitutional claim.[63] Subsequent to the holding in *Washington*, circuit courts increasingly adopted a discriminatory intent standard for section 1981.[64] Courts that tracked section 1981 to constitutional rights reached the conclusion that claimants must prove discriminatory intent.[65] Courts that aligned section 1981 with Title VII statutory

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[59] *Id.*

[60] 426 U.S. 229 (1976).

[61] *See, e.g.*, Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Carter v. Gallagher, 452 F.2d 315 (8th Cir.)(en banc), *cert. denied*, 406 U.S. 950 (1972). *See also* Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 169-70 (1980).

[62] 662 F.2d at 985. In *Washington*, District of Columbia police officers claimed racially discriminatory employment procedures. Their claim was predicated on the due process clause of the fifth amendment, section 1981, and D.C. CODE ANN. § 1-320(a) (1973). 426 U.S. at 232-33. On appeal, however, the employees based their claim solely on constitutional grounds. *Id.* at 237. In a later decision, the Supreme Court vacated as moot the only case on its docket to raise the issue of the standard of proof under section 1981. Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979). Certiorari has been denied in several cases involving a section 1981 claim. *E.g.*, Guardians Assoc. of the New York City Police Dep't v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3931 (U.S. June 16, 1981); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981). In a footnote to the majority's opinion, the *Craig* court noted that *Davis* was no longer binding law because of the Supreme Court's action. 626 F.2d at 668 n.9.

[63] 426 U.S. at 238-39.

[64] *See, e.g.*, Guardians Assoc. of the New York City Police Dep't v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3931 (U.S. June 16, 1981); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981); Mescall v. Burrus, 603 F.2d 1266 (7th Cir. 1979); Williams v. De Kalb County, 582 F.2d 2 (5th Cir. 1978) (per curiam); Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

[65] *See, e.g.*, Williams v. De Kalb County, 582 F.2d 2, 2-3 (5th Cir. 1978) (per curiam) ("a claim under § 1981 is . . . to be equated with a claim under the Fourteenth Amendment"); Mescall v. Burrus, 603 F.2d 1266, 1270 (7th Cir. 1979) ("[s]ection 1981 had its beginnings in the Civil Rights Act of 1866 and the Enforcement Act of 1870. Although enacted pursuant to Congressional powers under the Thirteenth Amendment . . . § 1981 also has strong ties to the Fourteenth Amendment"). *See also* Guardians Assoc. v. Civil Serv. Comm'n, 633 F.2d 232 (1980), where the court stated: "[W]e have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provision understood

rights held that a disproportionate impact was sufficient.[66] In *Croker*, the Third Circuit adopted the requirement of proof of discriminatory intent, thus linking section 1981 with the constitutionally based analysis. Chief Judge Seitz stated in *Croker* that "[t]he guarantee of the 'same right' to make contracts 'as is enjoyed by white citizens' [in section 1981] is similar to the guarantee of 'equal protection' embodied in the fourteenth amendment a standard that requires proof of intentional discrimination under *Washington v. Davis*."[67]

The majority in *Croker* cautioned that the language of section 1981 is not decisive as to the required standard for proof but "if it points in any direction, it suggests a requirement of proof of purposeful discrimination."[68] The court compared the language of section 1981 to Title VII and concluded that Title VII could be interpreted as applying to the consequences of racial discrimination as well as intentional discrimination, and that both an intent standard and a disproportionate impact standard could be used. Section 1981 is not as broad and does not lend itself to an impact standard.[69]

In order to determine the intent of Congress in enacting section 1981, the court focused its attention on the legislative history of the statute.[70] In so doing, it considered the employees' contention that section 1981 had its roots in the thirteenth amendment and that it was therefore improper to apply the more stringent intent standard of fourteenth amendment claims.[71] Section 1981 was originally passed as section 1 of the Civil Rights Act of 1866.[72] Congressional authority

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the law to prohibit anything other than the racially motivated refusal to treat whites and nonwhites in the same, neutral manner." *Id.* at 267 (emphasis in original).

[66] *See, e.g.*, Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 838 n.22 (D.C. Cir. 1977) (Title VII and section 1981 are implicitly equated and, thus, disproportionate impact is sufficient for section 1981 claim); Dawson v. Pastrick, 441 F. Supp. 133 (N.D. Ind. 1977), *rev'd in part on other grounds*, 600 F.2d 70 (7th Cir. 1979); Woods v. City of Saginaw, 13 Empl. Prac. Dec. (CCH) ¶5988 (E.D. Mich. 1976).

[67] 662 F.2d at 986.

[68] *Id.*

[69] *Id.* The court considered the language of 42 U.S.C. § 2000e-2(a)(2) (1976) when it compared Title VII to section 1981. The United States Supreme Court has also concluded that the language of Title VII can be interpreted as applying to the consequences of discrimination. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[70] 662 F.2d at 987. For a discussion of the legislative intent of section 1981 leading to the conclusion that Congress intended the prohibition of intentional conduct, see generally Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207 (1979); Comment, *supra* note 61, at 176-80. *But see* Note, *supra* note 5, at 155-59.

[71] 662 F.2d at 987.

[72] The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. *See* note 2 *supra*. In enacting the Civil Rights Act of 1866 Congress was primarily concerned with purposeful racial discrimination effectuated by the Black Codes. The reconstruction states of the south enacted the Black Codes specifically to deny newly freed blacks their basic civil rights. For this reason, these codes were

to enact this statute was found in the enforcing clause of the thirteenth amendment.[73] The court noted the employees' argument that since this amendment was enacted to eliminate "all badges and incidents of slavery,"[74] motivation was immaterial and thus discriminatory intent was not required.[75] The court took the position that the 1866 Act was legislated to strengthen freedoms granted to former slaves by the thirteenth amendment.[76] It noted that at the time the Act was passed, membership in the Ku Klux Klan was growing and the southern states were adopting Black Codes which restricted blacks in the right to bear arms, the right to serve as ministers, and the right to educational opportunities, among other things.[77] The *Croker* court concluded that the 1866 Act was meant to protect against this type of intentional conduct.[78]

In further support of its position that section 1981 requires an intent standard, the majority in *Croker* reasoned that section 1981 was tied to the fourteenth amendment.[79] Although section 1981 first appeared in the Civil Rights Act of 1866, it was reenacted in the Enforcement Act of 1870,[80] which was passed after the fourteenth amendment and in response to Congressional uneasiness over the constitutionality of the Civil Rights Act of 1866.[81] Linking section 1981 to the fourteenth amendment reinforced the *Croker* court's position that section 1981 should carry the same standard of proof as the *Washington* Court required for employment discrimination claims based on the fourteenth amendment.

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facially invidious. In effect, the Black Codes were a substitute for the slave system. For further discussion, see Heiser, *supra* note 70, at 237-39.

[73] The thirteenth amendment states:

> Section 1: Neither slavery nor involuntary servitude, except as punishment for a crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.
>
> Section 2: Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

[74] Civil Rights Cases, 109 U.S. 3, 20 (1883).

[75] 662 F.2d at 987.

[76] *Id.* at 987-88.

[77] *Id.* at 988. *See* note 72 *supra.*

[78] 662 F.2d at 988.

[79] *Id.* at 987.

[80] Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144. *See* note 2 *supra.*

[81] 662 F.2d at 987. For a comparison of the language of section 1 of the Civil Rights Act of 1866, section 16 of the Enforcement Act of 1870, and section 1981 as it now reads, see Note, *Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42 U.S.C. Sections 1981 and 1982?*, 1977 DUKE L.J. 1267, 1275 n.46. For a discussion of the history of section 1981, see Note, *supra* note 5, at 149-50, and Note, *Plaintiff's Burden of Proof Under § 1981*, 9 GOLDEN GATE L. REV. 1, 14-20 (1978-1979).

The court of appeals concluded that since nothing in the legislative history of section 1981 demonstrated that it was meant to reach any conduct other than purposeful conduct, the district court properly held that proof of discriminatory intent was required to sustain a section 1981 claim.[82] The court, analogizing to a similar rationale in *Washington*, further reasoned that because of policy considerations, a disproportionate impact standard for section 1981 must be rejected. Were such a standard adopted, it might invalidate legislation in such areas as tax, welfare, public service, government regulation, and licensing because blacks were adversely affected by the impact of the legislation.[83]

Rejecting the employees' alternative argument that section 1981 liability was co-extensive with Title VII liability, the *Croker* majority recognized that the two remedies were " 'separate, distinct and independent.' "[84] The court noted that Title VII was subject to detailed administrative procedures, that it exclusively protected employment rights, and that its express language differed from that found in section 1981.[85] Although Congress intended a comprehensive adjudication of Title VII claims that could be sustained by proof of a disproportionate impact, the *Croker* court refused to accept a similar standard for section 1981.[86]

Turning to the issues raised under Title VII, the court acknowledged that a Title VII claimant could bring an action based on a theory of disproportionate impact or disparate treatment under the same set of facts.[87] In both instances, the plaintiff must sustain the burden of persuasion by a preponderance of the evidence.[88] The court of appeals found that the employees failed to meet this burden on the class-wide Title VII claim and affirmed the district court's

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[82] 662 F.2d at 988.

[83] *Id. But see* Note, *supra* note 5, at 160-61, suggesting the policies for not applying an impact standard to constitutionally based claims of racial discrimination in employment are not as compelling for section 1981 claims. The author suggests that the *Washington* decision shows the Court's attempt at judicial restraint and reluctance to act as a super-legislature. *Id.*

[84] 662 F.2d at 989 (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975)). On two occasions Congress rejected an amendment that would have barred Title VII claimants from section 1981 claims. *See* 110 CONG. REC. 13, 650-52 (1964); 118 CONG. REC. 3371-73 (1972).

[85] 662 F.2d at 989.

[86] *Id.*

[87] *Id.* at 991.

[88] *Id.* at 990-91. Once a disproportionate impact is shown, the burden shifts to the employer to prove that the challenged employment practice is a business necessity and that the employment practice is job related. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court stated: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. *See* note 5 *supra*.

holding that the statistical disparities did not prove a pattern or practice of racial discrimination.[89]

Two dissenting opinions were expressed in *Croker* which related to the standard of proof for section 1981. Circuit Judge Aldisert asserted that the proper statutory construction of this provision was the essential point dividing the court.[90] Acknowledging that the statute was ambiguous, he asserted that section 1981 should be analyzed in relationship to Title VII.[91] Jointly these two statutes were intended to cover the whole area of racial discrimination in employment[92] and, as a matter of public policy, the reach of these statutes should be expanded because racial discrimination in employment has far-reaching social and economic consequences.[93] Since an intent standard restricts the applicability of section 1981, a disproportionate impact standard should be used for both statutory claims.[94]

In his dissenting opinion, Judge Gibbons stated that the majority's decision to apply an intent standard rested on ambiguous statutory language and a cursory review of the legislative intent behind section 1981.[95] The majority overlooked legislative history that supports an impact standard. Judge Gibbons asserted that the Civil Rights Act of 1866 was part of a larger Congressional scheme designed "to effect a major revolution in the Southern social order."[96] The Thirty-Ninth Congress examined the difficulties encountered in eliminating slavery and establishing a free labor system.[97] The legislators were aware of the way in which facially neutral practices could be used to shield intentional discrimination.[98] The objective of Congress was "to accomplish the *result* of a change from a centuries old social system based on involuntary labor . . . to the free labor system."[99] The majority overlooked this special purpose when it established an intent standard for section 1981. Furthermore, Judge Gibbons asserted that

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[89] 662 F.2d at 997. The court's opinion on the Title VII issue was unanimous. The section 1981 standard of proof issue, however, resulted in a 5 to 4 split with Judges Aldisert, Higginbotham, Gibbons, and Sloviter dissenting. Each held that proof of a disproportionate impact was sufficient. *Id.* at 992, 1002.

[90] *Id.* at 999 (Aldisert, J., dissenting).

[91] *Id.* at 1002 (Aldisert, J., dissenting).

[92] *Id.* at 1001 (Aldisert, J., dissenting).

[93] *Id.*

[94] *Id.* at 1002 (Aldisert, J., dissenting).

[95] *Id.* at 1003 (Gibbons, J., dissenting).

[96] *Id.* at 1004 (Gibbons, J., dissenting).

[97] Judge Gibbons discussed a congressional report outlining the problems which the federal government was having in eliminating slavery and instituting a free labor system. One goal of Congress was to make available employment opportunities for blacks in areas other than servile farm labor. *Id.* at 1004-05 (Gibbons, J., dissenting).

[98] *Id.* at 1005 (Gibbons, J., dissenting).

[99] *Id.* at 1006 (Gibbons, J., dissenting) (emphasis in original).

the reliance placed on the Supreme Court's holding in *Washington* was "a make-weight justification for [a] hostile interpretation of Section 1981."[100]

For almost 100 years it was assumed that section 1981 applied to state action only, and consequently claims were rarely based upon it.[101] The Supreme Court revived section 1981 when it acknowledged that its coverage extended to private acts of discrimination.[102] Since its recognition as a viable statutory claim, a controversy surrounding the evidentiary standard required to sustain a section 1981 claim has developed. Commentators have argued that due to the sophisticated and often subtle forms of racial discrimination, application of the onerous standard of proof of a discriminatory intent may severely impair or obliterate the effectiveness of section 1981.[103] Some writers have suggested that civil rights legislation should be liberally construed in order to achieve racial equality and freedom.[104] The less burdensome impact standard accomplishes this because it ameliorates the historical social and economic differences among races by attempting to promote equal status.[105] Applying this rationale in the employment sphere, a disproportionate impact standard would force employers to reassess their employment practices and remedy any imbalance or justify their continued use.[106] Indeed, the dissenting

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[100] *Id.* at 1007 (Gibbons, J., dissenting).

[101] Larson, *The Development of § 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 57 (1972).

[102] In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Supreme Court held that a companion statute to section 1981, 42 U.S.C. § 1982 (1976), entitled "Property Rights of Citizens," applied to private acts of discrimination. Like section 1981, section 1982 also had its beginnings in the Civil Rights Act of 1866. The Supreme Court held that section 1982 was "meant to prohibit all racially motivated deprivations of the rights enumerated in the statute." 392 U.S. at 426. Within a few months of the Court's decision in *Jones*, a federal district court applied section 1981, which guarantees persons the right to make contracts free of racial discrimination, in a case involving discriminatory practices by a labor union. Dobbins v. Local 212, 292 F. Supp. 413 (S.D. Ohio 1968). A few years later in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court acknowledged that section 1981 applied to private acts of racial discrimination in employment: "[I]t is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Id.* at 459-60. The Third Circuit first recognized section 1981 as a statutory basis for an employment discrimination action in Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971).

[103] *See* Heiser, *supra* note 70, at 242-43; Comment, *supra* note 61, at 185. One commentator has suggested that facially neutral practices having a racially disproportionate impact reflect a subtle type of racism in the " 'sense of blindness to minority welfare.' " Note, *supra* note 5, at 160 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1032 (1978)).

[104] Note, *supra* note 5, at 161; Note, *supra* note 81, at 1286.

[105] One commentator has suggested that a discriminatory intent standard promotes equal treatment, whereas a disproportionate impact standard attempts to compensate victims of past discrimination by easing the burden of proof and promoting equal status. Comment, *supra* note 6, at 727-30.

[106] Note, *supra* note 5, at 160.

justices in *Croker* opined that it is appropriate to apply a disproportionate impact standard to section 1981 claims because Congress enacted section 1 of the Civil Rights Act of 1866 to achieve "the *result* of a change from a feudal to a free labor system."[107] The feudal system relegated individuals to closely supervised servile labor because of their race.[108] Through the Reconstruction era civil rights legislation, Congress attempted to shift the nation's economic base from a system of involuntary servitude to a system of free labor.[109] The express language of this legislation was broad based because the drafters sought to encompass future infringements on racial freedom and equality as well as Reconstruction era acts of overt discrimination.[110] This prospective consideration gives support to an impact standard for section 1981 claims.

Policy justifications favoring application of an intent standard contravene arguments for an impact standard. In *Washington*, the Supreme Court established an intent standard for constitutional claims of racial discrimination in employment.[111] If the less burdensome impact standard is adopted for section 1981, civil rights litigants will tend to utilize this statute as a basis for their claims, thereby circumventing the constitutional standard espoused in *Washington*. This could effectively be accomplished by raising a section 1981 claim in lieu of an equal protection claim.[112] While this option is currently available to plaintiffs, if section 1981 became an established way of circumventing the constitutional standard of proof, the court's concern with invalidating facially neutral statutes in areas such as tax and welfare could become a reality. This concern was expressed by Justice White for the majority in *Washington* and was a significant factor in the Court's refusal to apply an impact standard to constitutional claims.[113] The Court feared that an impact standard might invalidate legislation simply because it burdened or benefited one race more than another. Government might be forced to justify any state action having a disproportionate effect on minority groups.[114] The *Croker*

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[107] 662 F.2d at 1008 (emphasis in original).

[108] *Id.* at 1006.

[109] *Id.*

[110] Note, *supra* note 81, at 1278.

[111] *See* note 62 *supra* and accompanying text.

[112] *See* Heiser, *supra* note 70, at 245.

[113] 426 U.S. at 248.

[114] One commentator has suggested that the objection to the potential invalidation of facially neutral legislation by an impact standard was a practical one as well as one of principle. Equal protection of the laws is a guarantee made to individuals and not to a group. Thus, a disproportionate impact standard would be inappropriate for an equal protection claim. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300-01 (1972).

court used a similar line of reasoning for applying an intent standard to section 1981 since it also covers state as well as private action.[115] Judicial concern with invalidating facially neutral statutes by an impact standard may be based on tenuous grounds. Use of this standard involves judicial review of the disproportionate impact of the legislation. The interests of the minority group alleging the adverse effect of the statute would be weighed against the interests of the public. This balancing test would guard against invalidating statutes solely on the basis that they impact adversely on one group more than another.[116]

Another justification for applying an intent standard to section 1981 emerges from the similarity of its language with the equal protection language of the fourteenth amendment. Since both provisions address the same rights it can be argued that they should carry the same standard of proof.[117]

Arguments for a discriminatory intent standard arise in relationship to Title VII. If section 1981 carried a less burdensome impact standard, civil rights plaintiffs may be tempted to circumvent the administrative and procedural requirements of Title VII by basing their claims only on section 1981. The conciliatory procedures of Title VII would be frustrated.[118] Moreover, section 1981 does not have an administrative screening procedure analogous to the Equal Employment Opportunity Commission under Title VII.[119] The stringent discriminatory intent standard has been suggested as a means of screening tenuous section 1981 claims.[120] The question arises though

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[115] *See* note 83 *supra* and accompanying text.

[116] *See* Perry, *supra* note 5, at 563. "The Supreme Court . . . failed to consider the intrinsic sensitivity of the [disproportionate impact] standard of review to the character of the interests at stake." *Id.* at 566.

[117] *See* note 67 *supra* and accompanying text.

[118] Note, *supra* note 5, at 166. This consideration loses some vitality in view of the fact that a civil rights litigant retains the right to bring a civil action if the Title VII dispute is not resolved. During the first nine months of 1978 only 3% of all Title VII claims adjudicated were settled through conciliation. *Oversight Hearing on Fed. Enforcement of Equal Employment Opportunity Laws Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 95th Cong., 2d Sess. 7 (1978) (testimony of EEOC Commissioner Norton).

[119] 42 U.S.C. § 2000e-5(e) (1976) requires that an administrative charge of discrimination be filed with the EEOC. The charge is investigated and if the EEOC finds reasonable cause, the claimant is notified of his right to sue. *Id.* § 2000e-5(f) (1). There are no statutory guidelines to describe section 1981 violations and the language of the provision offers no guidelines. Heiser, *supra* note 70, at 244.

[120] Heiser, *supra* note 70, at 244. This argument was first pointed out by Judge Wallace in his dissenting opinion in Davis v. County of Los Angeles, 566 F.2d 1334, 1350 (9th Cir. 1977) (Wallace, J., dissenting), *vacated as moot*, 440 U.S. 625 (1979). Judge Wallace expressed the fear that an impact standard under section 1981 would open up the possibility of "frivolous" claims. Although the *Davis* holding has lost vitality since the Supreme Court vacated it for mootness, another case in the Ninth Circuit adopted the position that the higher standard of proof of discriminatory intent serves this screening function. *See* Gay v. Waiter's Union, Local 30, 23 Emp. Prac. Dec. (CCH) ¶ 30,928, at 15,786 (N.D. Cal. 1980).

whether the higher intent standard goes beyond serving as a screening mechanism for frivolous claims by eliminating those plaintiffs who bring their claims in good faith. Since section 1981 remedies are more comprehensive than those available under Title VII, the statutory choice on which a claim is based is significant. Compensatory and punitive relief are available to a section 1981 plaintiff as well as a back pay award which is not restricted to two years as in Title VII.[121] Although class-wide injunctive relief is available under both claims, a Title VII claimant must exhaust administrative remedies before seeking equitable relief and thus cannot seek the immediate temporary relief available to a section 1981 claimant.[122] Relief is limited to racial discrimination under section 1981, but Title VII relief can be awarded to claimants charging discrimination on the basis of race, sex, religion, national origin, or color.[123] Title VII affords a remedy for employment discrimination only, whereas section 1981 reaches discrimination in other areas.[124] Furthermore, section 1981 reaches those cases of employment discrimination not covered by Title VII.[125] Because of these differences, restricting the availability of section 1981 by a strict intent standard may be unfair to plaintiffs who bring an action in good faith.

The *Croker* court did not address the question left open in *Washington* as to whether a showing of disproportionate impact could be used to prove discriminatory intent.[126] The Supreme Court suggested that when a facially neutral practice had a remarkably disproportionate impact the inference of intentional discrimination may arise.[127]

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[121] Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975). 42 U.S.C. § 2000e-5(g) (1976) limits monetary recovery to two years back pay marked from the date of the filing of the EEOC complaint. *See* note 84 *supra* and accompanying text.

[122] *See* notes 16 & 119 *supra*.

[123] *See* Note, *supra* note 5, at 142-44.

[124] *Id.*

[125] Title VII does not reach employers with less than fifteen employees and private membership clubs with less than twenty-five employees, 42 U.S.C. § 2000e(b) (1976), and religious groups with employees in religion-oriented jobs. *Id.* § 2000e-1.

[126] The *Croker* court did note, however, that proof of a disproportionate impact could be a factor in proving a racially discriminatory motive under a section 1981 claim. 662 F.2d at 989. Writing for the majority in *Washington*, Justice White stated:

> [A]n invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact . . . that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory inpact . . . is very difficult to explain on nonracial grounds.

426 U.S. at 242.

[127] *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"). The Court qualified this statement by indicating that only the most obvious disparities, unexplainable on any ground but race, will support a claim of discriminatory intent. Proof of a disproportionate impact will more likely be a starting point. *Id.*

The Court further acknowledged that a plaintiff could base an argument on circumstantial evidence concerning the defendant's historical treatment of racial minorities[128] and the sequence of events leading up to the challenged practice in order to demonstrate intentional discrimination.[129] In effect this would relieve to some degree the rigorous burden imposed by *Croker* on civil rights plaintiffs bringing a section 1981 claim.

Although a section 1981 and a Title VII claim often can be instituted on the same set of facts, there are instances when they will not both apply. For instance, Title VII does not apply to employers with less than fifteen employees, to private membership clubs with less than twenty-five employees,[130] and to religious groups with employees in religion-oriented jobs.[131] In these cases, section 1981 may be the basis of a cause of action but the onerous burden of proving discriminatory intent may minimize the likelihood of the employee prevailing on the claim. Moreover, section 1981 is most often raised in employment discrimination but it is not so limited. For example, it has been applied to racial discrimination in access to recreational facilities[132] and private schools.[133] The effect of an intent standard on claims brought in areas such as these, where an alternative claim carrying a less severe burden may not be available, may be too burdensome for a civil rights litigant to overcome. As it is, a discriminatory intent standard for section 1981 may dilute the viability of this statute in employment discrimination claims because of the often subtle and refined forms of discrimination involved.

Janice Falivena

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[128] This approach was used by the district court in Walker v. Robbins Hose Co. No. 1, 465 F. Supp. 1023 (D. Del. 1979). A black applicant charged the volunteer fire department with racial discrimination. The court looked at the "totality of the circumstances" and concluded that the fire department did not affirmatively recruit black applicants after abandoning their overtly discriminatory policies. Until 1960, the fire company had restricted membership to "respectable white males." *Id.* at 1026.

[129] These circumstantial factors were outlined in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977).

[130] 42 U.S.C. § 2000e(b).

[131] *Id.* § 2000e-1.

[132] Olzman v. Lake Hills Swim Club, 495 F.2d 1333 (2d Cir. 1974).

[133] Runyon v. McCrary, 427 U.S. 160 (1976).