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Cost Allocation in Title VII Remedies: Who Pays for Past Employment Discrimination

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COMMENT

COST ALLOCATION IN TITLE VII REMEDIES: WHO PAYS FOR PAST EMPLOYMENT DISCRIMINATION?

I. INTRODUCTION

The past decade has seen the rise of a variety of "affirmative action" programs designed to increase the participation of minorities and women in job categories and educational institutions that were previously closed or at least partially closed to them. These programs have been much publicized,[1] though their effectiveness in significantly changing the relative economic position or altering the available options of minorities and women as classes is open to question.[2]

There is evidence that we may have reached a kind of turning point—or at least a point of reevaluation—in the use of affirmative action schemes as a significant tool against racism and sexism. There has been opposition to affirmative action from its inception and uneasiness about its implications, particularly its potential impact on nonminority and/or male peers.[3] However, with relaxation of the mass social pressures of the 1960's, with heightened competition for scarce resources during the economic downturn of recent years,[4] with increased organization of various forces opposing either the basic assumptions or practical applica-

1. *See, e.g.*, N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975).

2. For a summary historical description of black employment trends, including an analysis of the fact that the overall income gap between black and white families has widened in the seventies, see Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L.F. 572. For data on trends for women workers, see U.S. BUREAU OF LABOR STATISTICS, U.S. WORKING WOMEN: A CHARTBOOK (1975).

3. One celebrated case that highlighted such opposition was DeFunis v. Odegaard, 416 U.S. 312 (1974). For a complete record of the case, see DEFUNIS V. ODEGAARD AND THE UNIVERSITY OF WASHINGTON, THE UNIVERSITY ADMISSIONS CASE: THE RECORD (A. Ginger ed. 1974). *See also* KRAFT, DEFUNIS V. ODEGAARD—RACE, MERIT, AND THE FOURTEENTH AMENDMENT (1976).

4. *See, e.g.*, the layoff cases discussed in note 64 *infra*. *See generally* Black, *Civil Rights in Times of Economic Stress—Jurisprudential and Philosophic Aspects*, 1976 U. ILL. L.F. 559.

tions of affirmative action programs,[5] and with signs from the Supreme Court that it may be ready to tackle some of the issues that litigants on both sides have been pressing for years,[6] the challenge to affirmative action appears to have reached a critical point.

A key element in this crisis, both inside and outside the courtroom, is the attempt to define what is basically fair to the white and/or male competitor who, because of his sex or race, suddenly finds himself "dispreferred"[7] for a desired job opening, promotion, or admissions slot. The expressed concern for fairness to the dispreferred individual is central to the policy arguments of those challenging affirmative action programs. Thus, it may prove crucial to the survival of such programs to find remedies that could minimize the adverse impact upon dispreferred individuals. These remedies should, however, recognize the legitimacy of the struggle to eliminate discrimination in an aggressive and consistent way.

This comment will describe the beginnings of a search for remedies in the area of employment discrimination. It will trace a brief history of the use of preferential remedies, particularly under Title VII of the Civil Rights Act of 1964.[8] It will then discuss

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5. These forces include elements as diverse as the lobby against ratification of the Equal Rights Amendment, the Anti-Defamation League, and Ivy League college presidents restive under the burden of affirmative action conditions imposed on federal funding to higher education.

6. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (preliminary print) (whites can claim racial discrimination under 42 U.S.C. § 1981 (1970)); Washington v. Davis, 426 U.S. 229 (1976) (preliminary print) (new standard for determining whether employment test is discriminatory under fifth amendment); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (competitive "fictional" seniority granted to discriminatee); Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977) (challenge to medical school special admissions program).

7. Paul Brest has suggested three categories of people affected by affirmative action preferential remedies: the "preferred" individual, who is the immediate beneficiary of the plan; the "dispreferred," who is in direct competition with the beneficiary for a scarce resource; and the "nonpreferred," who is not directly affected by the plan but might be equally entitled to the resource. Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36 (1976).

8. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). The Act makes it unlawful for an employer, employment agency, or labor union "to discriminate against any individual with respect to his compensation, terms, conditions,

the possible emergence of a "burden-sharing" approach to Title VII remedial preferences, whereby the cost of a remedy would be shifted at least to some extent from the prior victim and the presently dispreferred employee to the discriminatory employer. It will end with an examination of the recent lower federal court decision in *McAleer v. AT&T*[9] which imposes such a remedy, and an evaluation of its strengths and weaknesses.[10]

II. HISTORY

The Civil Rights Act of 1964 was enacted in response to the massive pressure of a broad-based and militant civil rights movement,[11] at a time when overt discrimination and racial segrega-

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or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2 (1970).

Employment discrimination suits may also be brought under 42 U.S.C. §§ 1981 & 1983 (1970), but courts have tended to apply Title VII analysis to such claims as well. *Compare* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), *petition for cert. filed*, 45 U.S.L.W. 3263 (U.S. Oct. 5, 1976) (No. 76-344) (traditional fourteenth amendment analysis), *with* Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, *subsequent appeal*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (Title VII analysis). The recent Supreme Court case of Washington v. Davis, 426 U.S. 229 (1976) (preliminary print), drew a distinction between the tests to be employed for a finding of discrimination under sections 1981 and 1983 and those used in Title VII cases. The implications of this distinction for future divergent treatment of the statutes are not clear. The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), is another available federal tool in some cases of sex discrimination, but it has a different history and thrust. *See, e.g.*, Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

9. 416 F. Supp. 435 (D.D.C. 1976).

10. A somewhat parallel response from the executive branch soon followed when President Johnson signed Executive Order No. 11,246, 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. app. § 2000e (1970 & Supp. V 1975), which prohibited discrimination in employment by government contractors, with enforcement responsibility in the Secretary of Labor. This comment will focus primarily on Title VII, although Executive order cases are also relevant. The history of available remedies under the Executive order has closely tracked that of Title VII, and it is not unusual to find a case involving both. *See, e.g.*, EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976).

11. The Act was basically aimed at discrimination on the basis of race, not gender. Opponents included sex in the list of prohibited discriminatory classifications in Title VII in hope that such inclusion would block its passage. See 110 CONG. REC. 2577-84 (1964) for an enlightening glimpse at some of the varying congressional attitudes toward sex discrimination at the time. An un-

tion[12] were still widespread and candid.[13] Many of the most overt forms of racial discrimination, including those in the employment sphere covered by Title VII, disappeared relatively quickly under the new law. Employers who had not already seen the handwriting on the wall acted—often under court order, sometimes voluntarily—to end the practice of maintaining separate (and unequal) departments and lines of progression for blacks and whites.[14] Unions merged formerly segregated locals.[15] But litigants were soon confronting the courts and enforcement agencies with the fact that while employers and unions were generally following practices racially neutral on their face, the problems of minorities in gaining access to and security in previously closed job areas were as grave and unyielding as ever. In many instances, the effects of prior discrimination were being carried over directly into the new "colorblind" systems. A typical example is the case of firms that ended segregation in lines of progression and began allowing black employees to transfer from previously all-black into previously all-white departments, but nevertheless retained the old departmental or job form of seniority. This new system required a transferring black to forfeit his or her previously accumulated seniority and begin at the bottom of the ladder in the new department, with less protection from layoff than white workers who might have greater departmental but lesser plantwide seniority than he or she.[16]

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ravelling and reweaving of the sex and race threads of Title VII litigation is beyond the scope of this comment. The bulk of the analysis that follows is applicable to both kinds of cases, although there is some divergence.

12. *See generally* H.R. REP. No. 914, 88th Cong., 1st Sess. (1964), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII & XI OF CIVIL RIGHTS ACT OF 1964, at 2122-53 (1968) [hereinafter cited as EEOC, LEGISLATIVE HISTORY].

13. *See, e.g.*, Thornton v. East Tex. Motor Freight, 497 F.2d 416 (6th Cir. 1974) (trucking industry practice of separate departments for city and over-the-road drivers); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (paper industry); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (tobacco industry).

14. *See, e.g.*, English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972).

15. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) (preliminary print).

16. The Supreme Court voiced its concern for this type of carryover discrimination in a case involving the use of employment tests. Noting the effect on black applicants of longtime inferior education in segregated North Carolina

Another pattern that emerged was employment practices that systematically excluded minorities and women because of the cumulative effect of general societal disadvantages borne by those groups, or because of cultural differences between them and the mainstream. Typical of this pattern was the imposition of special educational requirements or tests for hiring and promotion.[17]

Faced with these realities and taking the view that Title VII required more visible results, courts began imposing "preferential" remedies, measures that favored members of the previously discriminated-against class. At times these decisions took the form of approving plans imposed or negotiated by relevant government agencies;[18] other remedies were devised by the courts themselves, usually only when they were convinced that there was no effective alternative.[19]

Some of these preferential awards were in the form of "make-whole" remedies running to individual victims of demonstrated

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schools, the Court enjoined the use of tests and requirements that excluded a disproportionate number of women or minorities unless the employer could demonstrate that they were job-related. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that *Griggs* had been "rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *Id.* at 806. *But see* Washington v. Davis, 426 U.S. 229 (1976) (preliminary print) (applying different standard to tests challenged under fifth amendment than to those under Title VII).

17. *E.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

18. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), in which a divided court reluctantly imposed a temporary hiring quota on the Mississippi Highway Patrol, remarking:

> Experience since the entry of this decree provides this Court on rehearing with the hindsight to determine what was fathomed by foresight in the dissent from the panel opinion: the relief ordered by the District Court is insufficient. When this case was heard by the original panel in June 1972, the Highway Patrol had four black patrolmen. By the time the case was heard by the *en banc* Court in October, 1973, there were six black patrolmen—six black patrolmen hired since entry of the decree during a period when 91 patrolmen were added to a total force of approximately 500 troopers.

Id. at 1055.

19. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

discrimination. Thus in *Local 189, United Papermakers v. United States*,[20] the court ordered that blacks transferring into previously all-white departments be allowed to exercise their plantwide seniority within their new departments despite the fact that this would alter the seniority rights of incumbent whites. The black workers were direct victims of the former discriminatory system, and the court reasoned that each should be slotted into his "rightful place"[21] in the seniority ladder—the place he arguably would have occupied had it not been for the discrimination.

Other preferential remedies ran to the disadvantaged group as a whole. Courts ordered hiring ratios for employers[22] and ordered some craft unions to start referring certain numbers of minority workers for jobs,[23] thus imposing remedies that would ben-

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20. *Id.* at 988. The "rightful place" doctrine was first articulated in an influential law review article, Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). The article set up "rightful place" as a mean between alternate approaches dubbed "freedom now" and "status quo."

21. *E.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1971).

22. *E.g.*, Rios v. Enterprises Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971).

23. Although it may be difficult for professionals to appreciate the importance of seniority to nonprofessional employees, it is a crucial aspect of workplace life. It serves as protection for workers in their later years when their ability to compete in the labor market has eroded. It also serves as a similar shield against favoritism and arbitrary treatment at the hands of management. The degree to which the "seniority principle" has been secured at present varies widely, of course, and it has been achieved only through hard-fought battles by unions and rank-and-file workers. The fact that seniority can also function as a position of privilege should not obscure the fact that unions and workers are legitimately and naturally wary of encroachments on seniority systems. They are aware that management may try to take advantage of any erosions in the system, and are not always assured that antidiscrimination agency staffs, for instance, are sensitive to union concerns. For a union view, see Fischer, *Seniority is Healthy*, 27 LAB. L.J. 497 (1976). A recent case that begins to address some of the problems of the union's responsibilities and rights in a Title VII situation is Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977), in which the court balanced the legitimacy of a union-negotiated antidiscrimination plan against one reached by the company with minority group representatives. The whole area is filled with contradictions and uncertainties. The extent to which a union has an affirmative duty to fight discrimination or is barred from doing so by its "conflicting" obligations to the majority is still unresolved. *See id.* (affirmative

efit minority applicants irrespective of a particular discriminatory incident between the employer or union and a given applicant in the past.

Predictably these preferences ran into stiff opposition from unions whose seniority arrangements were violated by the orders, and from majority applicants and employees whose chances of hiring and promotion were curtailed or whose job security was eroded.[24] Opponents of the preferences fought them in a variety of ways. They argued that the preferential remedies were unconstitutional as violative of equal protection and due process.[25] They argued that such remedies violated several provisions of Title VII itself: first, its general proscription of discrimination against any individual because of his or her race or sex;[26] second, its clause specifically protecting practices based on "bona fide" seniority system;[27] and third, its assurance that no preferential treatment to correct numerical imbalance would be required.[28] In some cases the remedies were attacked as breaches of collective bargaining

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duty); Communications Workers v. New York Tel. Co., 8 Fair Empl. Prac. Cas. 509 (S.D.N.Y. 1974) (union not allowed to represent complaining female discriminatees because of its dual membership). The extent to which a union should be held jointly liable for employer discrimination is another difficult issue. *See generally* Interational Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1874 (1977), *vacating and remanding* United States v. TIME-DC, Inc., 517 F.2d 299 (5th Cir. 1975).

24. The same basic arguments as those advanced against Title VII remedies were pressed against preferences imposed pursuant to Executive Order No. 11,246, note 10 *supra*.

25. *E.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

26. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e (1970). For text, see note 8 *supra*.

27. Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1970), states: "[I]t 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 or merit system . . . ." The Supreme Court explicitly put this objection to remedial grants of constructive seniority to rest in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). *See* notes 87-92 *infra* and accompanying text.

28. Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1970), states: "Nothing contained in this subchapter shall be interpreted to require any employer . . . 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 . . . ."

agreements on the ground that they interfered with established seniority systems.[29] Generally, the courts have resolved these arguments in favor of the remedial preferences.[30] While the constitutional issues involved in "reverse discrimination" appear to be far from settled,[31] to date courts have found little difficulty in holding preferential employment remedies constitutional.[32]

Considerably more judicial effort has gone into evaluating the provisions of Title VII itself[33] to see if they prohibit preferential remedies. Opponents of these remedies have frequently relied on the Act's legislative history, which, although ambiguous, does reveal a distinct antipathy on the part of many members of Congress toward preferential treatment for discriminatees.[34] Never-

29. *E.g.*, Savannah Printing Specialties, Local 604 v. Union Camp Corp., 350 F. Supp. 632 (S.D. Ga. 1972).

30. For a well-ordered list of challenges rejected, see EEOC v. AT&T, 419 F. Supp. 1022, 1040-56 (E.D. Pa. 1976).

31. For differing judicial views on the subject of special admissions to professional schools, see DeFunis v. Odegaard, 416 U.S. 312 (1974); Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976), *noted in* 16 WASHBURN L.J. 190 (1976). One area of discussion among the commentators is whether a benign racial preference in employment (or admissions) should be considered a "suspect classification" in the language of equal protection theory, and therefore subjected to strict scrutiny, or whether the less stringent rational basis test is the appropriate one. (Since the Supreme Court has so far decided that sex is not a strict suspect classification, as is race, the standard for employment cases is all the more confused.) A recent New Jersey case found an employment quota ordered by the state's division of civil rights to be a violation of the state's constitution. Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976). The upcoming decision in *Bakke* may have wide-ranging consequences for preferential remedies for employment discrimination. *See generally* Brest note 7 *supra*; Edward & Zanetsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975); Ginsberg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 MINN. L. REV. 842 (1972); Comment, *Reverse Discrimination: The Balancing of Human Rights*, 12 WAKE FOREST L. REV. 852 (1976).

32. *E.g.*, United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976). The court in that case remarked that a constitutional challenge to membership goals and referral quotas was "foreclosed by the settled law of this circuit." *Id.* at 1018.

33. *See* notes 26-28 *supra*.

34. Seniority rights were a subject of specific concern. Senator Clark placed two interpretive memos in the record, both explicitly stating that exist-

theless, the overwhelming weight of authority has come down on the side of allowing remedial preferences on the ground that Congress' limitation of preferential treatment and its protection of seniority were not intended to restrict the courts' broad equitable powers to fashion effective relief for past discriminatory acts.[35]

Courts have also refused to find that collective bargaining agreements are a bar to preferential remedies.[36] They have pointed out that seniority provides a worker with expectations, not vested rights,[37] and that earlier precedent had already established that these expectations might legally be altered by subsequent bargaining[38] or in the interests of overriding national policy.[39]

This rapidly increasing body of precedent validating the use of preferential remedies was implicitly approved by Congress in the 1972 amendments to Title VII.[40] Further, in 1973 and 1974,

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ing seniority systems would remain undisturbed by the Act. 110 CONG. REC. 7207, 7213 (1964). Similarly, Senator Humphrey assured the body that seniority rights would not be destroyed by Title VII. 110 CONG. REC. 6549 (1964). *See generally* EEOC, LEGISLATIVE HISTORY note 12 *supra*.

35. *See, e.g.*, United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. Local 189, United Papermakers, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976) (and authorities cited therein). Section 706(g) of the Civil Rights Act of 1964 provided: "The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . ." 42 U.S.C. § 2000e-5(g) (1970). In 1972 Congress strengthened the mandate further by adding "or any other equitable relief as the court deems appropriate." *Id.* § 2000e-5(g) (Supp. V 1975).

Affirmative action plans under Executive Order No. 11,246, *supra* note 10, have been vindicated on similar grounds. *See, e.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

36. *E.g.*, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Savannah Printing Specialties, Local 604 v. Union Camp Corp., 350 F. Supp. 632 (S.D. Ga. 1972).

37. *E.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971) (and authorities cited therein).

38. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Pellicer v. Board of Ry. & S.S. Clerks, 217 F.2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955).

39. *See, e.g.*, Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964) (veterans' preference).

40. *See* note 35 *supra*.

the government successfully negotiated far-reaching nationwide settlements with AT&T and the steel industry that received judicial approval and that were likely to have at least some impact on employment practices in key areas of the economy.[41] Affirmative action appeared to have a firm legal foundation, though its effect on the lives of minority and female workers and job seekers was less than clear.[42]

III. MISGIVINGS

Despite this widespread approval of the legal foundation for preferential remedies, courts have frequently been reluctant to invoke them. The Second Circuit has described its own approach as "gingerly,"[43] and its attitude is not completely untypical.[44] Even when willing to invoke these remedies, courts often try to limit them in duration and in scope. Quotas are usually seen as temporary expedients[45] to be employed only long enough to achieve some more rightful balance, at which time they should be promptly discontinued,[46] in the belief that this balance will maintain itself, or that any imbalance that occurs thereafter will be a "natural" one, not the result of discrimination.[47]

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41. *See* United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (preliminary print); EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976). *See generally* Kilberg, *Current Civil Rights Problems in the Collective Bargaining Process: The Bethlehem and A.T.&T. Experiences*, 27 VAND. L. REV. 81 (1974).

42. *See* note 2 *supra*.

43. Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973), *subsequent appeal*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

44. *See generally* Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. CHI. L.J. 315 (1974); Comment, *Hiring Goals, California State Government and Title VII*, 8 PAC. L.J. 49 (1977).

45. *See, e.g.*, Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973).

46. Commentators who support benign preferences have also stressed the importance of limitations. *See, e.g.*, Davidson, *Preferential Treatment and Equal Opportunity*, 55 ORE. L. REV. 53 (1953).

47. The validity of this assumption is certainly open to question, especially in a period of economic decline and given the fact that gross disadvantages are still borne by many minority members in society at large. In a time of high unemployment and stiff competition for available jobs, it may be unrealistic to think that ending discrimination is a one-shot affair. (Determining when one has

One court, for instance, has refused to impose remedial quotas when proof of prior discrimination was incomplete;[48] another removed a quota when the defendants produced arguably credible alternative selection procedures;[49] one diluted "absolute" hiring preferences to ratios;[50] and another allowed a hiring quota while rejecting one for promotions, in order to minimize the impact on the whites' expectations.[51] Courts have almost uniformly refused to allow actual displacement, or "bumping," of majority incumbents.[52] Few distinctions have been consistently applied, and no single coherent notion concerning the proper scope of preference has emerged. A nearly universal theme running through the cases, however, has been the search for limiting principles to contain what the courts seem to fear is a potentially explosive remedy, both jurisprudentially and socially.

One approach that courts have taken in this search for limits has centered around defining the proper class of people to whom Title VII remedies should apply. Since its passage, there has been a question as to whether Title VII creates rights for groups or for individuals. On the one hand, sexual or racial discrimination can be viewed as a class-wide injury that deserves class-wide relief. Under this theory, remedies can run unreservedly to members of

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erased the discriminatory past, even assuming the discrimination is truly *past*, appears to be about as harrowing a task as assessing when one has achieved a "unitary school system" under a school desegregation plan, and is thereby entitled to relax.) On the other hand, a permanent, federally-administered caste system does not seem to offer an ultimate solution to our deep-rooted and continuing problems of racism and sexism.

48. Kirkland v. New York Dep't of Correctional Servs., 520 F.2d 420, *rehearing denied* (en banc), 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (preliminary print).

49. *E.g.*, United States v. City of Chicago, 420 F. Supp. 733 (N.D. Ill. 1976). But see Davis v. County of Los Angeles, 13 Fair Empl. Prac. Cas. 1217 (9th Cir. 1976), in which Judge Tuttle was less sanguine about proposed new selection procedures.

50. Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

51. Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *subsequent appeal*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). *But see* Bolden v. Pennsylvania State Police, 73 F.R.D. 370 (E.D. Pa. 1976).

52. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976) (preliminary print) (and authorities cited therein).

the group discriminated against, without regard to whether a particular individual can show that the defendant discriminated against him or her personally. Many courts have in fact awarded remedies of this type.[53] For instance, the imposition of hiring quotas is fairly common and seldom hinges on whether a given preferred applicant has been wrongfully rejected by the defendant in the past.[54] There must, however, be a finding of discrimination by the defendant against *someone*, or there is no claim upon which relief can be granted.[55] Some consent decrees have involved large scale reordering of seniority and promotion rights without requiring proof of past individual injury by beneficiaries.[56] The Fifth Circuit has held that class-wide relief is particularly appropriate in "pattern or practice suits."[57]

Many courts, however, are reluctant to award class-wide relief, and seem to be reaching toward a standard of the "identifiability" of the beneficiary as one possible limiting principle in the design of Title VII remedies.[58] In *Watkins v. United*

53. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

54. *See, e.g.*, Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

55. A showing of some prior discrimination may be crucial in a court's decision on voluntary affirmative action plans. *See, e.g.*, Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976) (voluntary preferences in collective bargaining agreement struck down); Brunetti v. City of Berkeley, 12 Fair Empl. Prac. Cas. 937 (N.D. Cal. 1975) (voluntary affirmative action by school board held violative of Title VII); *cf.* Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977) (voluntary preferences in collective bargaining agreement viewed as legitimate). *But see* Germann v. Kipp, 429 F. Supp. 1323 (1977) (upholding voluntary affirmative action plan for public employees).

56. *See* note 37 *supra*. There is some evidence that courts are more liberal in approving remedies worked out in a consent settlement than otherwise. Query whether the majority workers feel any better about it just because their boss (or union) negotiated it. *See* Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir.), *cert. denied*, 427 U.S. 911 (1975) (preliminary print).

57. The Attorney General, and later the EEOC itself, was authorized by Title VII to bring "pattern or practice" suits designed to challenge big pace-setting violators. 42 U.S.C. § 2000e-6(a) (1970 & Supp. V 1975). *See* United States v. TIME-DC, Inc., 517 F.2d 299, 319 (5th Cir. 1975), *vacated and remanded sub. nom.*, International Bhd. of Teamsters v. United States, 97 S. Ct. 1843 (1977).

58. *See, e.g.*, Stevenson v. International Paper Co., 516 F.2d 103, 118 (5th Cir. 1975); Thornton v. East Tex. Motor Freight, 497 F.2d 416 (6th Cir. 1974).

Steelworkers Local 2369,[59] a case which posed the problem of the "nonidentifiable" discriminatee in a particularly stark form, the Fifth Circuit refused protection from layoffs to recently hired black workers who could not have been past discriminatees because they were simply too young to have applied for work during the employer's discriminatory period. Therefore the court reasoned that none of them could claim a "rightful place" beside the older workers and that Title VII did not prohibit layoff by seniority, even though that process returned the plant to virtually all-white status.

Although the Supreme Court has steadily approved most Title VII remedies that it has reviewed, it has been careful to limit that approval to preferences which run to "identifiable" victims of past discrimination.[60] How the Court will eventually reconcile the underlying Title VII goal of eliminating job discrimination as a class-wide societal phenomenon[61] with its desire for a containable remedy remains to be seen. As the instances of glaringly illegal racial and sexual discrimination become more isolated, the numbers of minority and female workers who can point to a comfortably obvious, discrete instance of discrimination to give them "standing" under an identifiable victims rule are likely to diminish. Yet they should still have a remedy, if they are in fact being denied real opportunities.[62]

A second focus courts have employed in the search for limits on Title VII remedies has centered on the issue of equitable treatment for majority workers and job seekers whose interests may be adversely affected by a preferential plan. The collision of interests

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59. 516 F.2d 41 (5th Cir. 1975).

60. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (preliminary print); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1874 (1977).

61. Given this goal of Title VII, it would seem that remedies under the statute should look forward as well as backward and should be designed to help eliminate future discrimination as much as to compensate the victim of a past wrong.

62. *See generally* Affeldt, *Title VII in the Federal Courts—Private or Public Law*, 14 VILL. L. REV. 664 (1969); Brest note 7 *supra*; Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177 (1975).

between "preferred" and "dispreferred" workers[63] has become sharper over the past several years as the economic recession has heightened the competition for available jobs, inflicting heavier consequences on those who lose a given conflict.[64]

The Second Circuit seems to be in the process of refining a standard to gauge when Title VII remedies favoring minorities or women must yield to the interest of majority members. This standard also turns on "identifiability," but the focus here is on the majority employees adversely affected by a preferential plan rather than on the original discriminatee. The more individually

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63. *See* note 7 *supra*.

64. The layoff situation is an especially painful instance of hard times exacerbating the short term conflicts of interest between white and black and male and female workers. The challenge to minority layoffs has been much litigated but with no conclusive results. The circuit courts that have confronted the question so far have declined to alter last-hired, first-fired layoff rules to protect minorities and women in newly-opened jobs, at least when the workers seeking the relief could not prove prior discrimination by the employer against them personally. The Supreme Court remanded one of these cases, Jersey Cent. Power & Light Co. v. EEOC, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded*, 425 U.S. 987 (1976) (preliminary print), for reconsideration in light of its decision in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (preliminary print). *See* text accompanying notes 87-92 *infra*. *Jersey Central* had specifically found it unnecessary to determine whether the workers to be laid off were deprived of seniority because of specific discriminatory acts. It may be that *Franks* will eventually be interpreted to mean that relief from layoffs will turn on the "identifiability" of the claimant. One case, in which a district court had enjoined layoffs of recently hired policewomen, was remanded by the Sixth Circuit with instructions to make individual determination of seniority status in light of *Franks*. Schaefer v. Tannian, 538 F.2d 1234 (6th Cir. 1976), *vacating and remanding* 394 F. Supp. 1136 (E.D. Mich. 1975); *see* Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3263 (U.S. Oct. 5, 1976) (No. 76-344) (must show prior discrimination); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) (policewoman who could prove prior discriminatory rejection entitled to retroactive seniority protection from layoff); Watkins v. United Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975) (must show prior discrimination); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (preliminary print) (seniority system bona fide). *See generally* Poplin note 62 *supra*; Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487 (1975); Summers & Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U. PA. L. REV. 893 (1976); Note, *Last Hired, First Fired: Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975); Comment, *Last Hired, First Fired: Discriminatory or Sacrosanct?*, 80 DICK. L. REV. 747 (1976); 14 DUQ. L. REV. 475 (1976).

identifiable such majority employees are, the more reluctant the court is to order a preferential remedy. In *Bridgeport Guardians, Inc. v. Members of the Civil Service Commission,*[65] the court approved temporary hiring quotas for the Bridgeport police force but rejected any quotas for promotion of minorities, primarily because the class of disappointed white incumbents would be more ascertainable than that of disappointed white applicants.[66] The court reasoned that the incumbents had more of a reliance interest in their jobs, and further, that their disappointment if passed over for an expected promotion might exacerbate racial tensions on the force. The court suggested less disruptive ways of increasing minority mobility, such as lessening time-in-grade requirements and reducing the weight given to seniority in promotion decisions.

This reasoning was refined in *Kirkland v. New York Department of Correctional Services,*[67] in which the court set up a two-pronged test for the imposition of preferential quotas: first, there must be a demonstrated pattern of long and clear-cut discrimination, and second, the adverse impact of the preference must not be "identifiable."[68] A year later in *EEOC v. Local 638, Sheet Metal Workers,*[69] the court applied the *Kirkland* test and refused to order placement of a minority member on the union's joint apprenticeship committee, because the replacement would have required bumping an identifiable white member of the committee. Again in *Chance v. Board of Examiners,*[70] the Second Circuit refused to grant preferential seniority rights to protect minority school supervisors from layoffs. Though relying primarily on layoff cases from other circuits,[71] the court stressed that the group-

65. 482 F.2d 1333 (2d Cir. 1973), *subsequent appeal,* 497 F.2d 1113 (2d Cir. 1974), *cert. denied,* 421 U.S. 991 (1975).

66. Although the court did not stress this, it would also appear that the original victims of discrimination in promotions are more ascertainable than the victims of hiring discrimination, and therefore a less "drastic," more individually tailored remedy is available for the former and should be more favored by the court.

67. 520 F.2d 420, *rehearing denied* (en banc), 531 F.2d 5 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976) (preliminary print), *noted in* 22 WAYNE ST. L. REV. 1263 (1976).

68. 520 F.2d at 427.

69. 532 F.2d 821 (2d Cir. 1976).

70. 534 F.2d 993 (2d Cir. 1976).

71. *See* note 64 *supra.*

ings of supervisors whose seniority rights would be changed sometimes contained as few as two or three people, and that the impact on older white supervisors and on general morale would be too great to countenance.

This identifiability test appears to be unfortunate in several respects. Its one-dimensional approach (looking primarily at the potential impact on incumbents) precludes the consideration of other factors, such as the impact of a choice of "no remedy" on minority representation in that workplace, or the importance of a given job slot to overcoming significant employment barriers for others. For instance, in *Sheet Metal Workers*, the court applied a mechanical ascertainability test and concluded that it could not order a black representative to replace a white incumbent on a selection committee. The court would have been in a better position to evaluate the full implications of available remedies (presumably including expansion of the board) if it had considered the special importance of a minority representative on such a crucial "admissions" body of the union to the process of ending future discrimination within that organization.

IV. Cost-Sharing Approach

Other courts, while voicing concern for the affected incumbents, have taken a more flexible approach, often looking for a way to share the burden of paying for discrimination rather than visiting it all on one party or the other. Sometimes rather than flatly denying a preferential remedy, courts have remanded cases back to a district level or sent the parties back to conference directing the lower courts or the parties to consider more fully the interests of an affected group or to discuss ways of spreading costs.[72] Some commentators have suggested work-sharing as an alternative to racially or sexually disproportionate layoffs.[73] There have been no cases formally ordering an employer to institute work-sharing. The cases imposing racial admission and referral quotas on craft unions, however, have much the same effect, especially during an economic downturn, since the quotas make it

72. *See, e.g.*, Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832 (9th Cir. 1976); United States v. Navajo Freight Lines, Inc., 525 F.2d 1318 (9th Cir. 1975); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974).

73. *See* Summers & Love note 64 *supra*.

much more problematic for such unions to follow their usual practice of restricting the size of the work force in relation to available jobs, and all members may end up working less.[74] The district court in *Watkins v. United Steel Workers Local 2369*[75] tacitly acknowledged this effect and decided to shift the burden from the work force in that case to the employer by ordering reinstatement of laid-off blacks to restore a previous ratio, but refusing to allow white workers to be bumped to make way for them. All retained workers were to continue getting full-time wages. Similarly, the district court in *Patterson v. American Tobacco Co.*[76] provided that some whites be bumped back to lower level jobs in favor of blacks whose advancement had been wrongfully blocked, but ordered that white workers' wages be held to their previous level. Both cases were reversed on appeal, because the preferences that had been ordered in favor of blacks were seen as too extreme. But the idea of shifting some costs to the employer is still viable. In general it would appear that an approach toward remedies for discrimination that focuses on the problem of cost allocation and on which party or parties should most appropriately bear remedial costs would be useful and might help both to clarify policy and to frame some standards for the imposition of remedial measures.[77]

Two recent Supreme Court decisions highlight the current tension and uncertainty around affirmative action, pointing up new possibilities for the use of the cost allocation approach discussed above, but also suggesting potential threats to the whole notion of preferential remedies. *McDonald v. Santa Fe Trail*

74. *See, e.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

75. 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975).

76. 8 Fair Empl. Prac. Cas. 778 (E.D. Va. 1974), *rev'd*, 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976) (preliminary print).

77. For a decision that seemed to ignore this dimension when it might have been relevant, see EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated*, 97 S. Ct. 2669 (1977), in which the court granted seniority carryover (which came largely at the expense of white fellow workers) to all transferring blacks regardless of whether they had previously applied for transfer, but denied back pay (which would have come from the employer's pocket) unless they could prove a previous application. This result was reached despite the fact that the district court had found the company's actions so egregious and intentional that it had imposed punitive damages.

Transportation Co.[78] held that Title VII and the Civil Rights Act of 1866 (42 U.S.C. § 1981)[79] prohibit racial discrimination against whites. Although this result seems entirely logical and unassailable in the rare context in which a white person suffers true racial discrimination unrelated to any redress for traditional discriminatees,[80] it would be ironic, to say the least, if Title VII or section 1981 became weapons for the defense of entrenched racial[81] privilege.[82] The language of the opinion in *McDonald* concerning the coverage of whites under section 1981 is expansive, but the Court explicitly reserved the question of whether either of the statutes at issue would invalidate affirmative action programs or "benign" (that is, remedial) preferences.[83] Already, however, one state court has relied partly on *McDonald* to strike down such a preference in medical school admissions.[84]

If one goes behind the colorblind wording of Title VII, both to the history that brought it forth and to its underlying policy, it seems clear that traditionally oppressed groups have a different claim upon that law than does the majority. As Paul Brest has recently articulated,[85] discrimination against a minority race (or, one might add, against the subordinate sex) is pernicious because it both stigmatizes the individual and has the cumulative effect of denying group members a vast range of opportunities in every

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78. 427 U.S. 273 (1976) (preliminary print).

79. 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 (1970).

80. *See, e.g.*, Spiess v. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976).

81. Section 1981 deals only with race. Title VII, of course, prohibits sex discrimination as well and has been used by males to strike down illegitimate gender-based bars to employment. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

82. *See* Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412 (1976).

83. 427 U.S. at 280 n.8 (preliminary print).

84. Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977).

85. *See* Brest note 7 *supra*.

sphere. Discrimination against a member of a dominant race or sex, though potentially unjust, does not have this stigmatizing and cumulative effect. On a very elementary level black is not white.[86] It would thus seem that a reasonable interpretation of Title VII would rest on an understanding that it would not be available as a weapon against legitimate affirmative action, that its operation would be different for dominant groups than for subordinated ones, but that it offers some protection to both.

The second recent Supreme Court case, *Franks v. Bowman Transportation Co.*,[87] approved a grant of constructive seniority to an identifiable victim of race discrimination. Although plaintiff was awarded seniority dating from the time of his original (wrongfully rejected) application for employment, many members of the Court found themselves as uncomfortable as their brethren below about the impact of such a remedy on majority incumbents. The majority opinion is firm, however, that such concern does not destroy the necessity for remedial preferences. Justice Brennan wrote that the "[d]enial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make-whole' objective of Title VII."[88]

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86. Twelve years ago Robert Carter noted:

> [D]ebate about the wisdom of compensation, preferences, and even benign quotas, insofar as Negroes are concerned, distorts and obscures the basic problem that our society now faces and must resolve. Ours is a racist social order . . . .
>
> Today, newspapers are concentrating on what is called the "white backlash" in reaction to the "Negro revolution." In short, the inference from use of this terminology is that Negro progress has been so phenomenal that white people are beginning to react against it. The real facts are that the so-called Negro revolution is merely a drastic break with the traditional Negro image. No great improvements in the Negro's status have yet been accomplished. . . .
>
> I put the discussion of quota, preference and compensatory treatment in the same myth-making category. If we debate about these questions, we can pretend that the problem of discrimination itself has been solved.

R. CARTER, EQUALITY (1965), *quoted in* Edwards, *supra* note 2, at 620.

87. 424 U.S. 747 (1976) (preliminary print). *See also* Edwards, *Author's Note*, 1976 U. ILL. L.F. 623 (1976).

88. 424 U.S. at 774 (preliminary print).

Concurring Justices Powell and Rehnquist, while admitting that such remedies are sometimes necessary, expressed concern for "innocent" employees,[89] and urged courts to consider more carefully the equities on the white workers' side. They seemed to be saying that if the impact would be very hard on the incumbent, the remedy should not be granted. This approach is problematic, though, since in most cases if the burden of losing the scarce job or seniority would be hard on one, it would be equally hard on the other. Recessional layoffs are perhaps the best example of this dilemma. As the harshness of the consequences increases, the equities on *both* sides increase. It would have been helpful had Justices Powell and Rehnquist explained more fully what they saw as relevant factors in the balancing process beyond an instinctive distaste for "granting favors" to minority groups.

Chief Justice Burger, concurring, doubted that an award of competitive seniority[90] could "ever" be equitable. He advocated a kind of cost-sharing model in which the white worker retains his seniority, and the minority worker who has proven discrimination gets a monetary award from the employer.[91] The trouble with this approach, in which the original victim gets money but not the job, although it does utilize a cost-sharing idea, is that it does nothing to help rectify the substantive distortions in the racial composition and interrelations of the work force.

The impulse toward protecting whites (and, by extension, males) that is evidenced by the *Franks* dicta and the *McDonald* case, together with *Franks'* affirmation of limited remedial preferences for minorities, reflects the unresolved tension over proper remedies for employment discrimination. *Franks* does provide support for some version of a cost-sharing approach, both in the opinion of Chief Justice Burger and in that of Justice Brennan who noted, "We are of the view, however, that the result which

89. It is somewhat ironic that the innocent white incumbent should make such a strong debut in *Franks*, since the record from the court below showed that "[t]he apparent source of the resistance to change . . . was the unwillingness of the white drivers to 'ride double' with blacks, to train them for the job or to share bunk and shower facilities with them on the road." 495 F.2d at 411.

90. "Competitive seniority" is that seniority which determines the allocation of scarce benefits, such as promotions and protection from layoffs, among competing employees. It is different from "benefit seniority," which is used to compute earned noncompetitive benefits of the job.

91. 424 U.S. at 781 (preliminary print).

we reach today . . . establishes that a sharing of the burden of the past discrimination is presumptively necessary."[92] Justice Brennan further planted an open-ended question about monetary awards to victims of affirmative action. The Court seemed to be issuing a broad invitation to lower courts to start experimenting with such devices.

The invitation was soon accepted by Judge Gesell of the Federal District Court for the District of Columbia in *McAleer v. AT&T*.[93] Plaintiff, a male employee of AT&T, was passed over for promotion in favor of a less-qualified junior female employee, though by the terms of a collective bargaining agreement[94] he was entitled to the vacancy. In promoting the woman ahead of plaintiff, the company had acted in compliance with a consent decree embodying a comprehensive settlement negotiated by the company and the federal government and designed to remedy the company's past discrimination against minorities and women.[95]

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92. *Id.* at 777. In a footnote he had this to say:

> In arguing that an award of the seniority relief established as presumptively necessary does nothing to place the burden of the past discrimination on the wrongdoer in most cases—the employer—the dissent of necessity addresses issues not presently before the Court. Further remedial action by the district courts, having the effect of shifting to the employer the burden of the past discrimination in respect to competitive status benefits, raises such issues as the possibility of an injunctive "hold harmless" remedy respecting all affected employees in a layoff situation, the possibility of an award of monetary damages (sometimes designated "front pay") in favor of each employee and discriminatee otherwise bearing the burden of the past discrimination, and the propriety of such further remedial action in instances wherein the union has been adjudged a participant in the illegal conduct. Such issues are not presented by the record before us, and we intimate no view regarding them.

Id. at 777 n.38 (citations omitted).

93. 416 F. Supp. 435 (D.D.C. 1976).

94. The plaintiff's union, Local 2350, Communications Workers of America, sought to join the action, claiming that the consent decree was invalid and that AT&T's actions had interfered with the union's ability to represent and protect its members under the collective bargaining agreement. The court dismissed the union's claims for lack of jurisdiction, finding that a challenge to the decree was an impermissible collateral attack, and that even should the union amend, it would be unable to bring an independent suit under Title VII or the National Labor Relations Act.

95. The consent decree was entered in a federal district court in Pennsylvania by Judge Higgenbotham on January 18, 1973. He later described it as "the

Plaintiff sought both damages and promotion.

After recounting the history behind the AT&T consent decree,[96] Judge Gesell pointed out that it was a final judgment by a

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largest and most impressive civil rights settlement in the history of this nation." EEOC v. AT&T, 365 F. Supp. 1105, 1108 (E.D. Pa. 1973). The text of the consent decree and a later supplemental order can be found in 1 EMPL. PRAC. GUIDE (CCH) ¶ 1860 (1973), and 8 LAB. REL. REP. (BNA) ¶ 431:73 (1973). Later phases of that case are reported at 506 F.2d 735 (3d Cir. 1974), and 419 F. Supp. 1022 (E.D. Pa. 1976). For documentation of discrimination at AT&T, see *EEOC Prehearing Analysis and Summary of Evidence, A Unique Competence: A Study of Equal Employment Opportunity in the Bell System*, Docket No. 19143 (1972), *reprinted in* 118 CONG. REC. 4507-36 (1972).

96. Negotiations and implementation of the consent decree had truly been a massive undertaking. In December 1970, the EEOC had attempted with various private groups to intervene in an FCC hearing on AT&T's rates. The FCC denied the intervention in the rate proceeding but agreed to schedule a separate adversary hearing on the question of employment discrimination. After a year of investigation and informal negotiations, proceedings began in January 1972, and lasted for over a year, with 60 days of hearings. (The major union at AT&T, the Communications Workers of America (CWA), was consulted during this time and was asked to participate formally in the proceedings, but declined.) Finally, in January 1973, an agreement was reached between the government and AT&T. The administrative judge in the FCC proceedings suspended the hearing to allow for settlement. On January 18, suit was filed in federal district court against AT&T for violation of Title VII, Executive Order No. 11,246, note 10 *supra*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), and the consent decree was entered the same day. It was to remain in effect for six years, the court retaining jurisdiction during that period to monitor compliance and order appropriate modifications. CWA then tried to intervene as a plaintiff in the proceedings to enjoin implementation of the decree pending separate negotiations between it and the company. EEOC v. AT&T, 365 F. Supp. 1105 (E.D. Pa. 1973). After an appeal to the Third Circuit, CWA was allowed to intervene as defendant along with several other unions. EEOC v. AT&T, 506 F.2d 735 (3d Cir. 1974). Its attempt to win modification of the decree failed. EEOC v. AT&T, 419 F. Supp. 1022 (E.D. Pa. 1976).

The substance of the consent decree was far-reaching. William J. Kilberg, then Solicitor of Labor, says that the remedies were designed to compensate groups of women and minorities who had been unlawfully rejected for employment, wrongfully assigned or refused transfer, and promoted to craft jobs but paid an inferior wage. Kilberg, *Current Civil Rights Problems in the Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 VAND. L. REV. 81, 92 (1974). Some major provisions included: goals for hiring and promotion of women and minorities in all jobs, hiring goals for male operators, back pay for women paid less than men for equivalent work, lowered threshold of skill and seniority requirements for competition for entry-level craft jobs, all tests to be validated as job-related, special opportunities and training for management-

sister federal court and therefore not subject to his review. For that reason he said he could not entertain the proffered arguments going to the overall validity of the affirmative action plan. He went on to hold, however, that McAleer had suffered a clear case of Title VII sex discrimination, that an action to recover for that violation was not a collateral attack on the consent decree, and that the court therefore had jurisdiction to decide the Title VII claim. Then, relying on *Franks*, Judge Gesell held that in addition to being a member of a class protected by the consent decree, the promoted woman was a victim of discrimination and had a legitimate claim on the vacancy. McAleer could not therefore prevail on his demand for the promotion. Nevertheless, Judge Gesell noted that both the majority and minority opinions in *Franks* had urged courts to "attempt to protect innocent employees by placing this burden [of eradicating past discrimination] on the wrongdoing employer whenever possible."[97] The court ruled that AT&T would have to help bear the burden. Since McAleer had apparently shown that he would have been promoted but for the affirmative action program, he was entitled to damages on a "rough justice" basis. The court noted tangentially

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level jobs for female college graduates in the system (unusual because Title VII remedies have seldom been imposed beyond the blue-collar level), publicity to all employees, and lump sum restitution of $100-400 to 10,000 women and minorities eventually promoted to craft jobs to compensate them for delay (also an unprecedented remedy). *Id.* at 93-94.

Naturally enough, this plan led to significant alteration of expectations. The shock experienced by many Bell customers at hearing a male voice say, "Can I help you?" was only the tip of the iceberg. The company reported that in 1973-74, it had resorted to use of the "affirmative action override" (leapfrogging women and minorities into vacancies for which they were qualified in order to meet goals) in 28,886 out of 112,518 hirings and promotions. EEOC v. AT&T, 419 F. Supp. 1022, 1051 (E.D. Pa. 1976). By July 1975, the union reported that several thousand grievances had already been filed by disgruntled incumbents and 57 had been approved for arbitration. Four cases already arbitrated had resulted in awards for the union. *Id.* at 1055. Various suits were filed challenging the decree. *See, e.g.*, Federation of Tel. Workers v. Bell Tel. Co., 406 F. Supp. 1201 (E.D. Pa. 1975), *aff'd*, 546 F.2d 415 (3rd Cir. 1976), *cert. denied*, 97 S. Ct. 1651 (1977) (promotions not arbitrable); Taterka v. Wisconsin Tel. Co., 394 F. Supp. 862 (E.D. Wis. 1975) (action by rejected white off-the-street applicant dismissed for failure to state a claim). Meanwhile, intended beneficiaries of the consent decree could point to the fact that many goals were not being met. EEOC v. AT&T, 419 F. Supp. 1022, 1034 (E.D. Pa. 1976).

97. 416 F. Supp. 435, 439 (D.D.C. 1976).

that this cost should accrue to AT&T's stockholders.[98]

The decision in *McAleer* is in some ways most noteworthy for what it does not say. Judge Gesell awarded a novel remedy using a cost allocation approach that has much to commend it, but the opinion either ignored or glossed over many of the stickiest problems. For instance, the court held that Title VII provides a cause of action to a male employee whose seniority expectations have been disrupted by a judicially decreed remedial program.[99] This was a holding of major import, and one that could impede or halt the use of preferential remedies for victims of employment discrimination.[100] It answered a question that the Supreme Court expressly reserved in *McDonald*.[101] Yet Judge Gesell reached his conclusion in three sentences: "It is undisputed that plaintiff McAleer would have been promoted but for his gender. This is a classic case of sex discrimination within the meaning of the [Civil Rights Act] . . . . That much is clear." Even if one agreed that that much was clear, it would be helpful to know why the court thought so.[102]

A second major problem with the case concerns its procedural posture. Judge Gesell acknowledged that the consent decree was a valid and binding judgment, "not subject to review or modification in any other court."[103] Particularly since the federal district court in Pennsylvania still retained jurisdiction over the decree, this seems an appropriate conclusion. Analogous cases have reached the same result, holding that the proper vehicle for challenge of an ongoing consent decree is intervention in the original action, a direct approach to the rendering and supervising court.[104] Yet Judge Gesell went on to take jurisdiction of the plain-

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98. *Id.* at 440.

99. *Compare McAleer with* Hefner v. New Orleans Pub. Serv., Inc., 14 Fair Empl. Prac. Cas. 826 (E.D. La. Mar. 14, 1977) (*Franks* requires that impact on dispreferred be extreme before it is remediable).

100. *See* notes 78-86 *supra* and accompanying text.

101. 427 U.S. 273, 280 n.8 (preliminary print). *See* text accompanying note 83 *supra*.

102. Aside from the more substantive issues involved, the court did not even mention whether or not McAleer met the normal jurisdictional requirements for an individual Title VII suit (filing of charges with the EEOC, receipt of a notice of right to sue, and timely filing thereafter). *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

103. 416 F. Supp. at 438.

104. *See* Martini v. Republic Steel Corp., 532 F.2d 1079 (6th Cir. 1976);

tiff's claim, noting that it did "not in any way impugn or collaterally attack the judgment in [the Pennsylvania] case."[105] This statement appears a little disingenuous, given the potential impact of such a remedy on AT&T's liability under the affirmative action plan, if it were widely approved.

True, a reasonably equitable resolution of the procedural problem in a case like the AT&T consent decree is a delicate proposition. The varied, conflicting, and farflung interests involved in such an action can be truly staggering.[106] Similarly, the inventiveness of interested parties in their search for legal and extralegal tools to aid in their attempts to modify, block, or enforce the decrees appears boundless.[107] The judge's task in admin-

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Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975), *cert. denied*, 97 S. Ct. 1650 (1977); Black & White Children v. School Dist., 464 F.2d 1030 (6th Cir. 1972); Construction Indus. Combined Comm. v. Operating Eng'rs, Local 513, 67 F.R.D. 664 (E.D. Mo. 1975). *But cf.* Leisner v. New York Tel. Co., 358 F. Supp. 359 (S.D.N.Y. 1973) (retaining jurisdiction over suit already pending when decree was entered and granting greater relief). *See also* United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 838 n.9 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (preliminary print).

105. 416 F. Supp. at 438.

106. Judge Thornberry, in reviewing the district court's entry of the steel industry consent decree, noted:

> At the time of the decrees' entry, hundreds of employment discrimination charges were pending against the [defendant steel companies and the union] before the EEOC and federal district courts scattered throughout the country. Between twenty and sixty thousand minority and female individuals then stood beneath the overlapping umbrellas of these charges as members of putative aggrieved classes in actions seeking systemic injunctive relief and back pay. Thousands still do, and the problems of administrative and judicial management are truly awesome.

United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 836 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (preliminary print).

107. Aside from the regular EEOC mechanisms, the wide range of methods used in attempting to attack, modify, influence, or extend judicial orders of affirmative action plans include: (1) appeal from the original decree; *see, e.g.*, Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832 (9th Cir. 1976) (by some of the plaintiffs); Watkins v. Steel Workers Local 2369, 518 F.2d 41 (5th Cir. 1975) (by defendant); (2) intervention; *see, e.g.*, United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (preliminary print) (by outside feminist group and aggrieved minorities and women); Firebird Soc'y v. Board of Fire Comm'rs, 66 F.R.D. 457 (D. Conn. 1975) (by ad hoc group of white firemen); Mack v. General Elec. Co., 63 F.R.D. 368

istering such an action is far from easy.[108] But the difficulties of the problem—most centrally, how to make sure all interests are adequately represented,[109] while at the same time providing a judgment that can be relied upon by the parties with at least some measure of certainty—merit a more careful treatment than they received from the court in *McAleer*. Judge Gesell did point

(E.D. Pa. 1974) (by union); (3) use of grievance procedure; *see, e.g.*, EEOC v. AT&T, 419 F. Supp. 1022, 1055 (E.D. Pa. 1976); (4) suit to compel arbitration pursuant to the Labor Management Relations Act, 29 U.S.C. § 185 (1970); *see, e.g.*, Savannah Printing Specialties, Local 604 v. Union Camp Corp., 350 F. Supp. 632 (S.D. Ga. 1972); (5) suit to enforce arbitration award; *see, e.g.*, Federation of Tel. Workers v. Bell Tel. Co., 406 F. Supp. 1201 (E.D. Pa. 1975); (6) separate suit to enjoin the decree; *see* note 94 *supra*; (7) separate suit by beneficiary of plan for further relief; *see, e.g.*, Leisner v. New York Tel. Co., 358 F. Supp. 359 (S.D.N.Y. 1973); *see also* Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); (8) declaratory judgment action by employer; *see, e.g.*, Jersey Cent. Power & Light Co. v. EEOC, 508 F.2d 687 (3d Cir. 1975), *vacated*, 425 U.S. 987 (1976) (preliminary print); (9) suit against union under Landrum-Griffin Act, 29 U.S.C. § 411 (1970); *see, e.g.*, Gavin v. Iron Workers, Local 1, 11 Fair Empl. Prac. Cas. 1137 (N.D. Ill. 1975); (10) claim by employer against union for contribution; *see, e.g.*, Gilbert v. General Elec. Co., 59 F.R.D. 267 (E.D. Va. 1973), *further proceedings*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976) (preliminary print); (11) motion by employer to dismiss for failure to join dispreferred whites as indispensable parties; *see, e.g.*, English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972); (12) self-help by unions; *see, e.g.*, United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976) (protest strike when black worker not laid off in order of his seniority); (13) self-help by employers; *see, e.g.*, Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974) (foot-dragging); (14) suit under Freedom of Information Act, 5 U.S.C. § 552 (1970), for access to compliance reports; *see, e.g.*, United States v. Trucking Employers, Inc., 13 Fair Empl. Prac. Cas. 376 (D.D.C. 1976). This list is not exhaustive and the attempts have met varied fates. It does, however, give some idea of the complexity of the situation and the parade of potential liabilities that no doubt keep some management and labor lawyers awake at night.

108. For a provocative appraisal of the problems and possibilities in this new type of complex public law litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For a judicial plea for relief on the same subject, see McGowan, *Congress and the Courts*, 62 A.B.A. J. 1588 (1976).

109. Truly "adequate representation" in this situation is clearly as much a matter of politics and economics as it is of court rules. Still, the procedure developed will make some difference to interested parties and to their ability to have their concerns weighed in the judicial balance.

out the harshness of a rule that would require all aggrieved parties to travel to one location to litigate their claims, and that is certainly a legitimate concern.[110] It is not clear, however, that it is weighty enough to justify the taking of jurisdiction in this case, at least without a more extended discussion of the implications and alternatives.[111] In fact, subsequent to the *McAleer* decision, the judge who had issued the consent decree, explicitly disapproved of Judge Gesell's remedy, remarking, "Title VII recognizes narrow but nevertheless real and complete immunity for employer conduct undertaken in good faith reliance on a written interpretation or opinion of the EEOC."[112] By implication, he regarded the decision in *McAleer* as at least potentially disruptive.[113]

A third bothersome aspect of the *McAleer* opinion is the absence of any explanation of what plaintiff must show about his situation to be entitled to relief. This goes to the problem of identifiability. The court did say, "[o]f course, only that employee who would have been promoted but for the affirmative action program is entitled to recovery."[114] But nowhere does the court explain how McAleer had demonstrated this. It appears that the parties did not dispute McAleer's claim to the promotion, and this may be why the court treated it as a given. However, in light of the fact that promotion policy at AT&T was apparently never governed absolutely by seniority, but allowed

110. This concern is apparently not fully shared by the Fifth Circuit. In United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (preliminary print), the court noted that resort to the internal mechanisms set up to monitor the steel industry consent decree would have been a more convenient method than intervention "for employees who reside at a distance from the Northern District of Alabama," thus implying that grievances arising out of the consent decree, if litigated, should be addressed to the rendering court. *Id.* at 838 n.9.

111. It seems at least possible, for instance, that judges in future nationwide suits affecting the rights of thousands of employees and job-seekers might arrange for local hearings as part of the factfinding process, or demand that federal agencies involved develop some kinds of due process standards for dealing with both preferred and dispreferred employees.

112. EEOC v. AT&T, 419 F. Supp. 1022, 1055 n.34 (E.D. Pa. 1976).

113. *See also* Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412, 447 n.210 (1976) (remarks on *McAleer*).

114. 416 F. Supp. at 440.

the exercise of some management discretion,[115] and that promotions in at least one AT&T collective bargaining agreement were specifically declared to be nonarbitrable,[116] it would have been helpful to know what standard of proof the court thought was appropriate, and where the cutoff point on liability should fall, even if by way of dictum. How identifiable a victim has to be to claim the *McAleer* remedy is a key question, one yet unresolved,[117] but one upon which the court shed no light.

VI. Conclusion

Despite the weaknesses of the opinion in *McAleer*, it may perform a service in forthrightly responding to the Supreme Court's hints in *Franks* and in getting this damages remedy out on the table.[118] Its basic cost allocation approach, counting the employer in as a cost bearer, is also salutary. The question of damages for dispreferred employees could better be considered in other procedural contexts, perhaps when a court is originally trying to fashion a remedial Title VII decree or being asked to approve a negotiated settlement rather than in a separate proceeding as was involved in *McAleer*. Such relief would not run the risk of inconsistent results or disruptive effects in relation to an ongoing decree.[119] Perhaps more importantly, it could be applied as simply one way of assuring an affirmative action plan as fair as possible to all, and it would be the remedy most likely to provide a program upon which black and white, male and female workers could unite. It would not have to be based on a finding that the nonpreferred or dispreferred workers had an independent Title VII claim themselves, a finding that could pave the way for Title VII to dig its own grave. Rather it would be part of the general restitutional relief demanded from the employer for the

115. EEOC v. AT&T, 419 F. Supp. 1022, 1037 (E.D. Pa. 1976).

116. Federation of Tel. Workers v. Bell Tel. Co., 406 F. Supp. 1201 (E.D. Pa. 1975).

117. *See* text accompanying notes 53-62 *supra*.

118. In fact one gets the feeling that this is just what Judge Gesell was doing. It looks as though he was not particularly interested in finding the perfect case or building a careful logic for his holding but wanted simply to express the basic policy.

119. Additionally, it would avoid running into the problem (not treated in this comment) of whether an employer under court order should be granted immunity for acting in compliance therewith. *See* 416 F. Supp. at 440.

original act of discrimination. The scheme could be applied liberally on a class-wide basis for all those whose relative competitive seniority would be impaired by the impact of a preferential remedy, irrespective of whether they could show a particular benefit foregone at the present time. Ways of computing average future value of seniority are designable. All this would appear to be within the range of the legally possible at present.

Of course, there are likely to be significant practical obstacles to such an approach, especially if it were broadly applied. The most obvious problem is economic. The area in which seniority may be the most crucial of all, that is, job security against layoff, is often the very situation in which many employers are least able to pay restitutional damages. The district court in *Watkins v. Steel Workers Local 2369*,[120] for instance, granted a remedy that shifted the costs to the employer, ordering that blacks be reinstated and whites be kept on as well—both at full-time pay. One wonders when the employer had had to lay off such a big percentage of its work force, whether it could have absorbed further labor costs or (what may be more to the point) whether most courts would have been willing to require it to do so.

Another practical question about such a remedy is who would pay for it in the long run. Although this is a key question which both springs from and shapes our basic policy orientation on the whole issue of ending and remedying discrimination, it is one which courts will be reluctant and probably ill-equipped to address directly. Judge Gesell indicated that the cost would have to be absorbed out of profits, but it is hard to see how this could be enforced in most cases, and further, whether courts would try.[121] Enterprises often pass along costs, and they would surely attempt to do so in this case. Even with a pass-through of costs,

120. 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975).

121. Judge Gesell cited NAACP v. FPC, 425 U.S. 662 (1976), which held that the FPC had no duty to issue and enforce regulations prohibiting the practice of employment discrimination by the industries it regulates. However, the court also noted that the FPC did have a duty to make certain that any costs from such practices were not passed along to consumers. At least for regulated industries, such as AT&T, this would foreclose one way for the company to simply pass along costs. The employer would, however, still have the option of deducting the costs from the wages of his workers as a whole during the next round of collective bargaining, and unregulated industries could simply raise prices.

this remedy arguably would avoid placing an undue burden on a small group of somewhat arbitrarily penalized individuals and require society as a whole to bear the cost. Payment by "society as a whole," though, would, as always, be harder to bear for those with lower incomes, thus disproportionately burdening the class that may have had least benefit from or power over the mechanisms of discrimination. It would thus be preferable to take the cost out of profits. But as noted above, the mechanism and the will to do so are not readily at hand. The realities of a depressed economy make it even more unlikely that many courts would openly involve themselves in the underlying economics of this cost allocation remedy.

At any rate, it is to be hoped that the weight of the *McAleer* decision will be felt in its insistence on the importance of opening jobs to minorities and women, coupled with a refusal to allow disproportionate costs to be visited directly upon white and/or male fellow workers, when the wrongdoing employer can be made to help bear the burden. It does not constitute strong authority, and should not be taken as such, for the proposition that disadvantages experienced by members of the dominant groups as a result of legitimate, reasonably equitable affirmative action programs, constitute the kind of discrimination that Title VII will prohibit.

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