INDIVIDUALIZING BACK PAY RELIEF IN TITLE VII CLASS ACTIONS

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INTRODUCTION

Under Title VII of the Civil Rights Act of 1964,[1] as amended by the Civil Rights Act of 1991 ("1991 Act"),[2] back pay is one of the available monetary

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1. 42 U.S.C. §§ 2000e-2000e(17) (1988).

2. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 2 U.S.C. §§ 601, 1201-1224; 16 U.S.C. § 1a-5 note; 29 U.S.C. § 626; 42 U.S.C. §§ 1981, 1981 notes, 1988, 2000e, 2000e note,

remedies for victims of discriminatory employment practices.[3] The primary goal of the 1991 Act, signed into law on November 21, 1991,[4] was to revitalize the nation's employment discrimination laws. The 1991 Act was expected to accomplish this goal, in part, by strengthening the substantive provisions supporting disparate impact claims[5] by legislatively overturning the Supreme Court's ruling in *Wards Cove Packing Co. v. Atonio*.[6]

The scope and effectiveness of a law is determined as much by the contours of the remedy it provides as by the standards for determining its violation.[7] In the context of antidiscrimination law, commentators have traditionally focused on injunctive relief.[8] Recent scholarship, however, has emphasized the importance of monetary remedies in providing incentive for victims of employment discrimination to pursue what are often difficult and

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2000e-1; 2000e-2, 2000e-4, 2000e-4 note; 2000e-5, 2000e-16, 12111, 12112, 12209) [hereinafter Civil Rights Act of 1991].

3. Section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, *with or without back pay* . . . , or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e(5)(g) (1988) (emphasis added). Courts also generally have discretion to award "front pay" as a substitute for immediate promotion or reinstatement when "there are no positions currently available." Pitre v. Western Elec. Co., 843 F.2d 1262, 1279 (10th Cir. 1988). *But see* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 72 n.410 (1990) (noting that the Supreme Court has neither approved nor disapproved this type of monetary relief under Title VII).

The 1991 Act provides for compensatory and punitive damages in cases of intentional discrimination. Civil Rights Act of 1991 § 102. The statute explicitly precludes recovery of compensatory and punitive damages for employment practices that are illegal because of its disparate impact. *Id.*

4. Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A1.

5. Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In contrast, a claim of disparate treatment involves a situation where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Id.*

6. 490 U.S. 642 (1989).

7. Thus, a statute with an expansive standard for liability may in practice be severely limited by restrictions on the scope of available remedies. Similarly, an expansive remedial scheme may be contracted by placing limits on the definition of liability. *See* Samuel Issacharoff, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982).

8. *See, e.g.*, Eric Schnapper, *The Varieties of Numerical Remedies*, 39 STAN. L. REV. 851 (1987); Dale Carpenter, *Bumping the Status Quo: Actual Relief for Actual Victims Under Title VII*, 58 U. CHI. L. REV. 703 (1991); *cf. infra* note 13.

lengthy Title VII claims.[9] Congress recognized the connection between remedy and liability in the 1991 Act by providing for compensatory and punitive damages for victims of *intentional* discrimination in the workplace.[10] However, the primary monetary remedy in disparate impact actions remains back pay.[11] Given Congress' reaffirmation of disparate impact as a central theory for proving employment discrimination, an analytic exploration of the monetary relief for such Title VII violations is in order.

This Note analyzes doctrine governing the award of back pay in Title VII class action suits by examining the case law dealing with procedures for awarding back pay in both disparate impact and systematic disparate treatment class action cases.[12] In particular, this Note explores the difficulty courts confront in moving from a finding of liability on the part of a Title VII defendant against a group of employees to the granting of back pay relief to individuals within that group.[13] This problem arises most starkly when the number of members in a successful plaintiff class exceeds the number of employment opportunities which were apparently denied to that class on discriminatory grounds. The court must decide whether each individual plaintiff will receive a full award of back pay or only a proportionate share of the total back pay owed to "theoretical discriminatees."[14]

This issue has never been addressed by the Supreme Court. Nor have the lower courts firmly settled the matter. For example, in *Kyriazi v. Western Electric Co.*,[15] the court ordered that each plaintiff class member proving entitlement to back pay be given a full award, even though there were as many as three individuals competing for every one job. In contrast, the court in *EEOC v. Chicago Miniature Lamp Works*[16] held that each class member was entitled only to a pro rata distribution from a limited back pay fund calculated by multiplying the number of positions discriminatorily denied to black workers by the wages that would have been earned in those positions.

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9. *See infra* note 29 (citing sources).

10. Civil Rights Act of 1991 § 102.

11. *See supra* note 3. The statute apparently does not preclude back pay awards in addition to compensatory and punitive damages in cases of intentional discrimination. The text of the statute, however, is unclear on this matter. Civil Rights Act of 1991 § 102 ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.") The courts will have to resolve this issue.

12. The courts have not distinguished between the two Title VII theories in developing methods for awarding back pay.

13. This tension between group and individual justice represents a recurring theme in American public law adjudication. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). In employment discrimination law, courts and commentators have struggled with this problem in the context of remedial issues such as affirmative action, numerical remedies, and constructive seniority. The problem, however, has been left relatively unaddressed in the context of back pay.

14. On the concept of "theoretical discriminatee," see *infra* note 124 and accompanying text.

15. 465 F. Supp 1141, 1146 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

16. 640 F. Supp. 121 (N.D. Ill. 1986).

This Note argues that the *Kyriazi* full compensation approach should be the standard by which back pay is awarded under Title VII. Part I describes the underlying goals of back pay relief and the procedures currently utilized by the courts to award this remedy to individual members of a successful plaintiff class. The section identifies a doctrinal discrepancy in back pay jurisprudence by tracing the apparent correlations between the full compensation award and the individual-by-individual procedure for granting back pay, and between the class-wide award and the shared limited fund. Part II examines theories offered by courts and commentators to justify the doctrinal discrepancy. After reviewing the various conceptions of the harm caused by workplace discrimination, this section argues that the underlying goals of Title VII are best satisfied by the full compensation approach. Finally, Part III identifies equitable concerns that justify awarding back pay on an individual-by-individual, full compensation basis, and then goes on to specify limiting principles that argue in favor of the use of the pro rata distribution method in certain circumstances.

I
BACK PAY JURISPRUDENCE

A. Title VII, Back Pay, and the Need for Stronger Remedies

Title VII prohibits unlawful employment practices that discriminate on account of an "individual's race, color, religion, sex, or national origin."[17] The statute serves both individual and group purposes.[18] It provides a remedy for individuals who are the victims of specific acts of discrimination based on their membership in a protected group. In addition, the statute establishes a regulatory scheme for eliminating workplace discrimination against protected groups by removing "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[19]

Among the remedies available for a violation of Title VII is back pay, which is considered to be a form of equitable relief necessary for a court to fashion a complete remedy.[20] In *Albermarle Paper Co. v.*

17. 42 U.S.C. § 2000e-2 (1988).

18. *See* Diaz v. American Tel. & Tel., 752 F.2d 1356, 1360 (9th Cir. 1985) ("Title VII protects individuals, as well as groups, from discrimination on the basis of group characteristics.").

19. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

20. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969). Although the Supreme Court has never directly ruled on the issue, the lower courts are nearly unanimous in holding that Title VII relief, including back pay, is equitable. Consequently, the courts generally refuse to grant jury trials in Title VII cases. *See generally* Matthew F. Davis, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 KAN. L. REV. 1003 (1990). Plaintiffs bringing suit claiming compensatory or punitive damages under the 1991 Act will be entitled to a jury trial. Civil Rights Act of 1991 § 102.

Moody,[21] the Supreme Court articulated the twin aims that underlie an award of back pay: (1) to eliminate " 'so far as possible . . . the discriminatory effects of the past' " and (2) to " 'bar like discrimination in the future.' "[22] Back pay acts to eliminate the discriminatory effects of the past by awarding the victim of employment discrimination the wages she would have earned absent the illegal employment practice. The Court derived this "make-whole" remedy in part from the fact that Congress invested a Title VII court with "full equitable powers," which implied that courts should fulfill "the historic purpose of equity to 'secur[e] complete justice.' "[23] In the context of employment discrimination, "complete justice" includes the mandate to place, as near as possible, " '[t]he injured party . . . in the situation he would have occupied if the wrong had not been committed.' "[24] An award of wages lost because of discrimination serves this make-whole goal.

Additionally, back pay furthers Title VII's aim of ending discrimination in the nation's economy. According to the Court, the primary objective of Congress in enacting Title VII was " 'to achieve equality of employment opportunities and remove barriers that have operated in the past.' "[25] The threat of monetary liability fulfills this goal by serving as a deterrent to discriminatory employment practices. As the Court stated:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' "[26]

As a general rule, back pay must be awarded once a defendant has been found liable for a violation of Title VII.[27] The Supreme Court has stated that

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21. 422 U.S. 405 (1975).

22. *Id.* at 418 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

23. *Id.* (quoting Brown v. Swann, 10 Pet. 497, 503 (1836)).

24. *Id.* (quoting Wicker v. Hoppock, 6 Wall. 94, 99 (1867)).

The second source of Title VII's make-whole purpose was the statute's legislative history. Congress modeled Title VII's back pay authorization after a similar provision in the National Labor Relations Act, 29 U.S.C. § 160(c) (1988), under which "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Albermarle Paper Co.*, 422 U.S. at 419 (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941)). In addition, the Court noted that Congress, while considering the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(g), rejected several proposals to limit a court's authority to award back pay. *Id.* at 420-21.

25. *Albermarle Paper Co.*, 422 U.S. at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

26. *Id.* at 417-18 (quoting United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973)).

27. *See id.* at 421. *But see* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1092 (1983) (denying back pay award because a retroactive remedy would have had a potentially disruptive impact on the operation of the employer's pension plan); City of Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 721 (1978) (same).

this remedy "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[28]

In the years prior to the passage of the 1991 Act, the limitation of Title VII monetary relief to back pay came under criticism.[29] Indeed, despite the continued existence of widespread discrimination in the workplace,[30] changes in antidiscrimination jurisprudence as well as in employment relations have compelled a transformation in the character of the typical Title VII lawsuit. During the first decade after the passage of the 1964 Civil Rights Act, class actions constituted a significant proportion of Title VII suits.[31] By the late 1970s, however, individual claims of discriminatory discharge began to predominate.[32] During the 1980s, the Supreme Court made it significantly more difficult for Title VII classes to be certified[33] and for plaintiffs to prevail on disparate impact claims,[34] a theory upon which class actions are commonly based. Additionally, because compensatory and punitive damages were not permitted under Title VII until 1991, many victims of discriminatory employment practices lacked incentive to bring suit.[35] Working class victims of discrimination were particularly affected by this restriction on damages since the relief they could seek was limited by the amount of wages they would have earned absent the discrimination.[36] Consequently, the majority of cases now involve discriminatory discharge claims filed by middle class professionals and white-collar workers.[37]

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28. *Albermarle Paper Co.*, 422 U.S. at 421.

29. *E.g.*, Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301 (1990); Anne C. Levy, *Righting the "Unrightable Wrong": A Renewed Call for Adequate Remedies Under Title VII*, 34 ST. LOUIS U. L.J. 567 (1990); The Committee on Civil Rights, et al., *The Civil Rights Act of 1990*, 45 REC. 430, 461-62 (1990).

30. *See, e.g.*, David Wessel, *Racial Bias Against Black Job Seekers Remains Pervasive, Broad Study Finds*, WALL ST. J., May 15, 1991, at A8.

31. Kotkin, *supra* note 29, at 1379, App. I (stating that from 1973-77, class actions comprised around 20% of employment discrimination filings in federal courts).

32. *Id.* (stating that in 1987 and 1988, class actions accounted for only about 0.5% of employment discrimination filings); *id.* at 1346-47 (asserting that "it would hardly be surprising if the figures today showed that discharge claims are approaching one-half of all claims filed"); *see also* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (noting that in 1985, "19 percent of suits alleged discrimination in hiring, while 59 percent alleged discrimination in discharge").

33. *See* General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (refusing to permit named plaintiff, a Mexican American complaining of discrimination in company's decision not to promote him, to maintain a class action on behalf of Mexican American job applicants alleging hiring discrimination).

34. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

35. *See* Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. TIMES, July 24, 1991, at A1, col. 1.

36. *Id.*

37. *See* Donohue & Siegelman, *supra* note 32, at 1008 (reviewing data which suggest that higher-wage workers are "overrepresented" among Title VII plaintiffs).

In enacting the 1991 Act, Congress responded to the problem of incentive by authorizing an award of compensatory and punitive damages in individual cases of intentional discrimination.[38] While this reform helps to revitalize Title VII challenges to employment discrimination, it fails to address the discrimination that class action suits brought under a disparate impact theory are intended to remedy. Indeed, a central purpose of the 1991 Act was to overturn the Court's evisceration of the disparate impact theory in *Wards Cove*.[39]

Reinvigorating disparate impact claims as a central form of Title VII litigation requires effective and meaningful remedies as well as permissive definitions of liability. In the 1991 Act, Congress expressed its judgment that Title VII violations which disparately impact upon a protected group should not be remedied by compensatory or punitive damages. Nevertheless, the courts should proceed on the strong statement inherent in the 1991 Act — that the *Griggs* disparate impact theory represents a cornerstone of antidiscrimination law — and establish remedial measures which strengthen and encourage such claims. As this Note will demonstrate, modifying the standards which govern the award of back pay to a successful Title VII class will best implement the statute's dual purposes of making whole individual victims and deterring employment discrimination.[40]

B. Procedures Governing Back Pay Awards in Class Actions

Title VII class actions generally proceed in two stages.[41] During the first stage, the liability of the defendant is adjudicated. If liability is established, the court proceeds to the second stage of determining an appropriate remedy. Generally, in order to receive a back pay award, a plaintiff class member must demonstrate actual injury.[42] Consequently, the courts must establish the criteria by which actual injury to an individual will be found.

Courts award back pay to Title VII class members either on an individual-by-individual or class-wide basis. Regardless of the approach, several fun-

38. Civil Rights Act of 1991 § 102.

39. *See id.* § 8; *see also* 137 CONG. REC. S15,473 (1991) (containing a section-by-section analysis of Sen. Dole, et. al) ("*Wards Cove* is . . . overruled").

40. Two other grounds justify a critical reexamination of the standards governing back pay awards to a Title VII class. First, the four circuits which have ruled on the issue have held that the 1991 Act does not apply retroactively to cases filed prior to the statute's passage. *See* Johnson v. Uncle Bens, Inc., 965 F.2d 1363 (5th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 934-38 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. Cincinnatti, 959 F.2d 594, 597-98 (6th Cir. 1992). For these cases, back pay will remain the primary form of monetary relief, even when the claim is for intentional discrimination. Second, the problem of individualizing relief after a class-wide finding of liability will also occur in the context of claims of intentional discrimination under the 1991 Act which ask for compensatory and punitive damages. Although this Note does not address this question directly, it is likely that many issues will be similar.

41. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1168-75 (5th Cir. 1978).

42. *Special Project: Back Pay in Employment Discrimination, Case*, 35 VAND. L. REV. 893, 961 (1982) [hereinafter *Special Project*]. *But see* Segar v. Smith, 738 F.2d 1249, 1298 (D.C. Cir. 1984) (identifying circumstances in which back pay may be awarded to nonactual victims of discrimination).

damental principles govern the granting of back pay relief. First, once it is found liable, the defendant is not permitted to relitigate its underlying violation of Title VII vis-a-vis the class.[43] Second, "unrealistic exactitude is not required" in resolving issues necessary to an award of back pay.[44] Finally, "ambiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer."[45]

1. Individual-by-Individual Relief: The Teamsters *Approach*

Although the Supreme Court has never directly ruled on the issue, a Title VII court should, as a general rule, award back pay relief on an individual-by-individual basis.[46] The foundation for this rule is the Court's decision in *International Brotherhood of Teamsters v. United States*,[47] which outlined a procedure for granting another type of Title VII make-whole relief — court-ordered promotions and retroactive seniority. In *Teamsters*, the Court sustained the lower court's finding of liability against defendant T.I.M.E.-D.C., Inc., a nationwide common carrier of motor freight, for engaging in a pattern and practice of discrimination by hiring minorities for less desirable jobs than whites.[48] The Court then addressed the problem of how to award relief to the individual class members. The government sought an order permitting class members to transfer to the positions that had been discriminatorily denied them and awarding them retroactive seniority in the new position. The company accepted this remedy in principle but argued that "no employee should be entitled to relief until the Government demonstrates that he was an actual victim of the company's discriminatory practices."[49] The company contended that the government's burden of proof should be equivalent to the prima facie case for individual disparate treatment claims under *McDonnell Douglas v. Green*.[50]

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43. Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976).

44. *Id.*

45. *Id.*

46. *But see infra* note 142.

47. 431 U.S. 324 (1977).

48. *Id.* at 337. The government also argued that the seniority system imposed by the collective bargaining agreements between the company and the Teamsters union perpetuated the effect of past discrimination because a transfer from a less to a more desirable job entailed a forfeiture of previously accumulated seniority. The Supreme Court rejected this claim, holding that the seniority system was protected by section 703(h) of the 1964 Act. *Id.* at 343-56.

49. *Id.* at 357.

50. *Id.* In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court defined a Title VII plaintiff's minimal burden of proof as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802 (footnote omitted). Once the plaintiff has established by a preponderance of the

The Court rejected the company's proposed procedure. Instead, the Court held that once an employer has been found liable for a Title VII violation in a disparate treatment pattern and practice suit, there arises "an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."[51] Once it is shown that an individual "was a potential victim of the proved discrimination," the burden of proof shifts to the employer to show that the individual "was denied an employment opportunity for lawful reasons."[52]

Teamsters involved two categories of potential discriminatees — rejected applicants and non-applicants. The Court ruled that individual class members who had applied for an improved position within the company "will be presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant [in the new] job was not based on its policy of discrimination."[53] The Court also held that non-applicants were en-

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evidence the *McDonnell Douglas* prima facie case, the "burden shifts to the defendant . . . to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). This rebuttal is accomplished "if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254-55. The plaintiff then has the opportunity to show that the defendant's rebuttal grounds for denying her an employment opportunity are pretextual. *Id.* at 256. The *McDonnell Douglas-Burdine* scheme shifts the burden of producing evidence between the parties, but the burden of proof remains on the plaintiff throughout. *Id.*

51. 431 U.S. at 362.

52. *Id.* In Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984), the Third Circuit apparently negated the holding in *Teamsters* when it refused to acknowledge that the burdens of proof at the remedy phase of a Title VII litigation differed from those at the liability stage. *Id.* at 1004 ("It is misleading to speak of the additional proof required by an individual class member for relief as being part of the damage phase; that evidence is actually an element of the liability portion of the case."). The *Dillon* court held that an individual claimant must satisfy the *McDonnell Douglas-Burdine* standard for showing discrimination at the remedy phase, *id.* at 1004-05, and found that "[t]he district court erred in placing on defendants the burden of proving by a preponderance of the evidence that the plaintiff's qualifications were such that she would not have been selected for promotion even absent discrimination." *Id.* at 1005.

Two comments on *Dillon* are in order. First, the Third Circuit placed the validity of *Dillon*'s holding in doubt in Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987). The court there denied that *Dillon* was in conflict with *Teamsters* and other Supreme Court precedent, and explicitly rejected the proposition that each class member must satisfy the *McDonnell Douglas-Burdine* prima facie case at the remedy stage of a litigation. *Id.* at 862 & n.44. Rather, the court read *Dillon* as holding that the extent of the presumption that defendant's discrimination affected each class member is limited to the nature and extent of the proof of discrimination at the liability phase of the litigation. Although *Gavalik* arose under ERISA, not Title VII, the Third Circuit applied the same standards under both statutes for individualizing class-wide relief. *Gavalik* may, therefore, be considered controlling, thus bringing the Third Circuit back in line with *Teamsters*.

Second, it should be noted that even if *Dillon* remains good law, its holding does not undermine the full compensation approach followed in Kriazi v. Western Elec. Co., 465 F. Supp. 1141 (D.N.J. 1979), *aff'd*, 647 F.3d 388 (3d Cir. 1981) (discussed *supra* text accompanying note 15). *Dillon* raises the barriers of proof which class members must satisfy in order to be entitled to an award of back pay. It does not determine whether back pay should be awarded as full compensation or divided pro rata through a shared limited fund.

53. 431 U.S. at 362 (footnote omitted).

titled to relief so long as they showed they were "potential victim[s] of unlawful discrimination."[54] The *Teamsters* opinion then identified a number of difficult issues for the lower court to resolve on remand. First, the Court instructed the district court to determine "which of the minority employees were actual victims of the company's discriminatory practices."[55] This task included deciding which non-applicants deserved relief. Second, the lower court had to, "as nearly as possible, 'recreate the conditions and relationships that would have been had there been no unlawful discrimination,' " in order to determine where to place a discriminatee desiring a promotion and how much retroactive seniority to award.[56] The Court observed that the lower court would have to make "a substantial number of individual determinations in resolving these issues."[57]

Teamsters has been interpreted as creating a general presumption that a court should proceed on an individual-by-individual basis in determining which members of a Title VII class are entitled to make-whole relief.[58] Under this individualized approach, a class member must undergo a "*Teamsters* hearing"[59] in order to recover back pay. Generally, two issues are addressed at this hearing. First, the class member must demonstrate that she was entitled to the employment opportunity that had been discriminatorily denied.[60] Generally, the court will only require that the individual establish "a prima facie case of individual discrimination"[61] since a stage one finding of liability in relation to the class as a whole creates a presumption that each class member was affected by the defendant's discrimination.[62] The circumstances of each case will determine the elements of a prima facie showing. For example, in cases involving discrimination in hiring or promotions, applicants will generally be required to show only that they in fact applied for the desired position,[63] while non-applicants who were deterred by the defendant's discriminatory practices must demonstrate that they had an interest in the

54. *Id.* at 367.

55. *Id.* at 371-72.

56. *Id.* at 372 (quoting Franks v. Bowman, 424 U.S. 747, 769 (1976)).

57. *Id.* at 371.

58. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1289 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) ("*Teamsters* certainly raises a presumption in favor of individualized hearings."); *see also* Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984); Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506, 519 (8th Cir. 1980) ("[W]here possible, an individualized remedy should be utilized because it will best compensate the victims of discrimination without unfairly penalizing the employer.").

59. *See* Kraszewski v. State Farm Gen. Ins. Co., 912 F.2d 1182, 1183 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991).

60. *See* Hartman v. Wick, 678 F. Supp. 312, 335 (D.D.C. 1988). The court in *Hartman* required that this showing be made by "a preponderance of the evidence." *Id.*

61. *See, e.g.*, Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150, 1155 (N.D. Tex. 1979).

62. *Id.* at 1155.

63. *See, e.g.*, Kraszewski v. State Farm Gen. Ins. Co., 41 F.E.P. (BNA) 1088 (N.D. Cal. 1986), *aff'd in part, rev'd in part*, 912 F.2d 1182 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991).

desired position.[64] In contrast to the *McDonnell Douglas-Burdine* scheme, once a prima facie case has been made, the burden shifts to the defendant to show, usually by clear and convincing evidence,[65] that the individual would not have obtained the employment opportunity.[66] If the defendant successfully rebuts the individual's presumptive entitlement to back pay, the court will then permit the individual to show that defendant's reasons are pretextual.[67]

Once it has been determined that an individual class member is entitled to back pay, the court will proceed to calculate the amount of the award.[68] Under Title VII, back pay liability may begin no earlier than two years before the claim is first filed with the EEOC.[69] A claimant's actual earnings during the liability period are deducted from the award, and the claimant has a duty to mitigate damages.[70] Generally, the court will refer back pay calculation to a magistrate or special master with instructions on how to make the determination. For example, in *Wattleton v. Ladish Co.*,[71] a case involving intentional discrimination against black workers in hiring and job placement, the court instructed the master to hold individualized back pay hearings that would be governed by the Federal Rules of Civil Procedure and Evidence. The court authorized the master to "require any party to th[e] lawsuit to submit such additional data or information as may be necessary or helpful" and to consoli-

64. Such evidence may include "an employee's informal inquiry, expression of interest, or even unexpressed desire." International Bhd. of Teamsters v. United States, 431 U.S. 324, 371 (1977).

65. *See, e.g.*, Hartman v. Wick, 678 F. Supp. 312, 335 (D.D.C. 1988). The Fourth Circuit, however, appears to apply a preponderance of the evidence standard. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). *But see* Knighton v. Laurens County Sch. Dist. No. 56, 721 F.2d 976 (4th Cir. 1983) (applying the clear and convincing evidence standard in a section 1981 race discrimination case).

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Court ruled that in the context of an individual disparate treatment claim, once an employment decision is found to have been made on the basis of an impermissible criterion, the defendant may avoid liability by showing, by a preponderance of the evidence, that the decision resulted from mixed motives and that, absent discrimination, the plaintiff would have been denied the employment opportunity on the basis of a permissible ground. Significantly, the plurality opinion in *Hopkins*, explicitly distinguished this scheme from the allocation of burdens of proof under section 706(g) at the remedy phase of a class action. *Id.* at 244.

66. *See* Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150, 1156 (N.D. Tex. 1979) (emphasis added) ("The burden that Shop Rite logically must overcome is not that a particular claimant should not have been promoted. Rather, the defendant must prove that given the actual promotion criteria and absent sex discrimination, a claimant would not *in fact* have been promoted."); *see also* Kyriazi v. Western Elec. Co., 465 F. Supp. at 1141, 1144 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981). The defendant's rebuttal may include a showing that there were other, more qualified persons available or that the plaintiff lacked the requisite qualifications for the position. *See Teamsters*, 431 U.S. at 369 n.53.

67. *See Hartman*, 678 F. Supp. at 335; Smith v. Union Oil Co. of Cal., 18 F.E.P. (BNA) 1183, 1184 (N.D. Cal. 1978).

68. *See* Wattleton v. Ladish Co. 520 F. Supp. 1329, 1350 (E.D. Wis. 1981), *aff'd*, 686 F.2d 586 (7th Cir. 1982); *Carter*, 470 F. Supp. at 1156.

69. 42 U.S.C. § 2000e-5(g).

70. *Id. See generally* Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

71. 520 F. Supp. 1329 (E.D. Wis. 1981), *aff'd*, 686 F.2d 586 (7th Cir. 1982).

date hearings on related claims and factual questions.[72] Though the court suggested possible methods for determining back pay, it gave the master full discretion to "calculat[e] the back pay due to individual class members in accordance with the evidence, law, and fairness."[73]

Under the individualized method, each plaintiff class member entitled to back pay receives a full award. As long as the class member satisfies the burdens of proof determining entitlement, she will be awarded the amount of back pay that she can prove she would have earned by virtue of the discriminatorily denied employment opportunity. Full compensation is awarded even though there may be more claimants than employment opportunities.[74] Thus, in *Kyriazi v. Western Electric Co.*,[75] the court refused to limit each claimant's relief to a proportion of the full back pay award. The defendant proposed that where "three women . . . should have been considered for one promotion and none were, and [the court] cannot now determine which of the[m] should have received [it], then each one [should] receive [ ] one-third of the benefits."[76] The court rejected this proposal, holding that if all "three claimants were discriminated against in that they were not considered for promotion but . . . only one . . . would have actually received the promotion, then *all three* should get the benefit of the promotional opportunity."[77]

Not surprisingly, the individual-by-individual method of determining back pay entitlement and calculating the amount of the back pay award is complicated, time consuming, and expensive.[78] In *Kyriazi v. Western Electric*

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72. *Id.* at 1355.

73. *Id.*

74. *See* Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1146 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981). *Kyriazi* is one of the only cases to explicitly make such a ruling. Nonetheless, it appears that most courts that pursue the individualized approach do not contemplate awarding back pay via a shared limited fund. *See infra* text accompanying notes 124-37 (explaining shared limited fund approach). The Second Circuit has apparently rejected the possibility of full compensation awards when there are more claimants than employment opportunities. *See* Ingram v. Madison Square Garden Ctr., 709 F.2d 807, 812-13 (2d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983).

In Hartman v. Wick, 678 F. Supp. 312 (D.D.C. 1988), which involved discrimination against women in hiring by the United States Information Agency, the parties appeared to assume that any claimant making a successful showing of entitlement "must be awarded back pay." *Id.* at 336. The court instructed that the awards be "based on a proxy salary constructed from the actual histories of the selectees who remain in agency employ." *Id.* The court, however, nowhere mentioned or suggested that a class-wide back pay fund should be distributed pro rata among the successful claimants. *See also Wattleton*, 520 F. Supp. at 1354-55 (lacking any mention of pro rata sharing among entitled claimants).

In Kraszewski v. State Farm Gen. Ins. Co., 41 F.E.P. (BNA) 1088 (N.D. Cal. 1983), *aff'd in part, rev'd in part*, 912 F.2d 1182 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 1414 (1991), a sex discrimination case, the court stated that "no individual claimant will have a right to any relief until she obtains an individual judgment of liability." *Id.* at 1185. However, this case did not present the problem of successful claimants exceeding employment opportunities. The court, therefore, did not address the issue.

75. 465 F. Supp. 1141.

76. *Id.* at 1146.

77. *Id.*

78. *See* Hartman v. Wick, 678 F. Supp. 312, 333-34 (D.D.C. 1988) (stating that the court

Co.,[79] a sex discrimination case involving 10,000 potential claimants, the district court appointed four special masters to determine the back pay eligibility of each rejected applicant. Each *Teamsters* hearing "consumed two to three hours, and required counsel preparation time ranging from several hours to two days."[80] Over the course of approximately half a year, the masters granted only 108 final judgments.[81] In *Carter v. Shop Rite Foods, Inc.*,[82] plaintiffs' attorneys spent over 600 hours litigating the back pay entitlement of twenty-four class members.[83] A special master then took approximately one year to calculate the awards for sixteen of those claimants, while plaintiffs' attorneys logged nearly 300 additional hours.[84] Although the master in *Carter* determined only the amount of a claimant's back pay, and not the claimant's eligibility for relief, his report comprised fifty-four pages of the Federal Supplement.[85] Problems of proof and considerations of judicial efficiency have given rise to a second procedure for awarding back pay in class action suits.

2. *Class-Wide Approach: Avoiding the "Quagmire of Hypothetical Judgments"*

The lower courts have not read *Teamsters* to require that individualized hearings be the sole method for determining a class member's entitlement to back pay.[86] Instead, the courts have recognized the continued validity of a line of pre-*Teamsters* cases in which back pay relief was awarded on a class-wide basis.[87] This departure from the *Teamsters* rule is permitted when an attempt to determine individual relief for class members "would lead the district court into a 'quagmire of hypothetical judgments,' . . . in which any supposed accuracy would be purely imaginary."[88] Thus, where the court is unable to determine with certitude which class members deserve relief, a class-

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was "aware of the enormous disruption [*Teamsters*] hearings can cause counsel and the Court or its designee, as well as the enormous dedication of resources the hearings require"); *see also* Douglas L. Parker, *Escape from the Quagmire: A Reconsideration of the Role of Teamsters Hearings in Title VII Litigation*, 10 INDUS. REL. L.J. 171, 187-190 (1988).

79. 465 F. Supp. 1141.

80. Parker, *supra* note 78, at 189.

81. Eventually, the parties settled the remaining claims. *See* Kyriazi v. Western Elec. Co., 527 F. Supp. 18, 21 (D.N.J. 1980).

82. 470 F. Supp. 1150 (N.D. Tex. 1979).

83. 503 F. Supp. 680, 692 (N.D. Tex. 1980).

84. *Id.*

85. For further examples of the burdens of individual *Teamsters* hearings, see Parker, *supra* note 78, at 199 n.129.

86. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1289-90 (D.C. Cir. 1984) (stating that "[t]he language of *Teamsters* is not so inflexible" as to require individual hearings in all circumstances), *cert. denied*, 471 U.S. 1115 (1985).

87. *See id.* at 1290 (citing Stewart v. General Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977)); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969). For a general discussion of the doctrinal origins of the class-wide approach in a series of Fifth Circuit cases in the early 1970s, see Parker, *supra* note 78, at 176-80.

88. Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976) (quoting Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir 1974)), *cert. denied*, 433 U.S. 919 (1977).

wide approach to back pay represents "the best that can be done under the circumstances."[89] As one court explained: "Given a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages [via class-wide relief], we choose the latter."[90]

Two rationales emerge from the case law to justify the "uncertainty" departure from *Teamsters*: (1) problems of proof and (2) judicial economy and manageability.[91] Under the first justification, courts use the class-wide approach where the myriad factors involved in determining each individual claim would obfuscate the identity of class members entitled to back pay relief or raise uncertainty about the amount of back pay to be awarded. By awarding class-wide relief, a court recognizes that it cannot adequately measure all of the considerations that would have gone into an employer's decision when hiring or promoting an individual worker.[92] An example of this problem of proof arises when the employer's lack of objective hiring standards, in effect, precludes an individual claimant from showing her entitlement to relief or the amount of the back pay award. As the Seventh Circuit noted, when a company or union is found not to have utilized "objective standards," "an individualized [remedy] would require the court to speculate as to which class members would have been promoted, transferred, etc."[93] In this situation, a court should award class-wide relief based on "an approximate measure of damages" rather than running the risk of denying a remedy to victims of the discrimination. In *Segar v. Smith*,[94] the district court found that " '[e]ach major criterion in the promotion process . . . was tainted by discrimination, making discrimination in the promotion process cumulative.' "[95] The D.C. Circuit affirmed the lower court's order of class-wide back pay relief, stating that "courts have not required [individual] hearings when discrimination has so percolated through an employment system that any attempt to reconstruct individual employment histories would drag the court into 'a quagmire of hy-

89. *Id.* at 453.

90. *Id.*

91. *See generally Special Project*, *supra* note 42, at 964-68 (discussing categories justifying class-wide approach).

92. *See* Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506 (8th Cir. 1980) (disparate impact case) ("Given the apparent complexity and uncertainty of identifying which 45 black applicants are entitled to back pay, a classwide back pay remedy is appropriate."). Another recent example of this justification is Thomas v. City of Evanston, 610 F. Supp. 422 (D.C. Ill. 1985), where the court stated:

> We cannot say with certainty which of the individual class members would have been hired but for the illegal discrimination. However, in spite of our ignorance of which individuals would have been hired, a general award of back pay to the class may properly be awarded, since some of the class members doubtless would have been hired.

Id. at 435.

93. Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

94. 738 F.2d 1249 (D.C. Cir. 1984).

95. *Id.* at 1290 (quoting District Court Memorandum Opinion).

pothetical judgments.' "[96] Thus, in a class action suit where a defendant's liability is found to stem from a lack of objective standards in its employment practices, and where *Teamsters* hearings would result in the denial of relief to members of the back pay class, the court may forgo the *Teamsters* approach and award a class-wide remedy.

Judicial economy and manageability[97] justify class-wide relief where "the physical and fiscal limitations of the court in granting and supervising relief . . . [might] preclude an award of back pay to each and every aggrieved employee."[98] In *Love v. Pullman Co.*,[99] where the plaintiff class included more than 1500 members, the district court concluded that "[a]n exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical."[100] Given the size of the class, the court determined that a class-wide approach to awarding back pay was "the only workable method."[101] Faced with the prospect that *Teamsters* hearings would overburden the resources of the judicial system, a Title VII court may appropriately order class-wide relief.

A court must address two further issues once it has found that the class-wide method is the appropriate procedure for awarding back pay to a Title VII class. First, the court must decide which class members are in fact entitled to back pay awards. Second, the court must determine the amount of back pay and the method for its distribution.

a. Actual Harm: Determining Entitlement Under the Class-Wide Approach

There are two methods by which a court employing the class-wide approach to award back pay determines which individual class members are entitled to relief. Some courts incorporate the method for showing entitlement

96. *Id.* (quoting Thompson v. Boyle, 499 F. Supp. 1147, 1170 (D.D.C. 1979) (quoting Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974), *aff'd*, 678 F.2d 257 (D.C. Cir. 1982)).

97. *Special Project: Back Pay*, *supra* note 42, at 968.

98. Pettway v. American Post Iron Pipe Co., 576 F.2d 1157, 1213 (5th Cir. 1978), *cert. denied*, 493 U.S. 1115 (1979).

99. 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Col. 1976).

100. *Id.* at 429.

101. *Id.* at 428; *see also* Hartman v. Wick, 678 F. Supp. 312, 333-34 (D.D.C. 1988); Liberles v. Daniel, 26 Fair Empl. Prac. Cas. (BNA) 547, 550 (N.D. Ill. 1981) (asserting that the class-wide approach is the most efficient method for awarding back pay because "[t]here simply are no remaining issues that could be resolved in individual hearings"), *aff'd in part, rev'd in part*, 709 F.2d 1122 (7th Cir. 1983).

The efficiency ground underlying the class-wide approach will often be cited by the defendant when wishing to limit total back pay liability by means of the pro rata distribution method. *See, e.g.*, Kraszewski v. State Farm Gen. Ins. Co., 41 Fair Empl. Prac. Cas. (BNA) 1088, 1089 (N.D. Cal. 1986) (quoting Defendant's Opposition to Plaintiffs' Motion for Stage II Remedy at 3) (rejecting defendants' argument for a class-wide approach despite defendants' claim that "individual hearings would 'entangle this Court . . . into the twenty-first century' and, at a minimum, 'produce a process spanning 7000 consecutive days — more than nineteen years"), *aff'd in part, rev'd in part*, 912 F.2d 1182 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991).

utilized under the individual-by-individual approach,[102] while others simply order an award for all individuals who make a threshold showing that they "fall within the class."

Hameed v. International Association of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396[103] illustrates the first method. In that case, the Eighth Circuit found that a union's selection criteria and procedures for admission into its apprenticeship program violated Title VII since these practices had a disparate impact on black applicants.[104] The court held that in order to be eligible for back pay awards, class members were required to show that they applied for the program but were rejected because they failed to meet the challenged criteria or "that they would have applied for an apprentice position had it not been for the defendants' discriminatory" practices.[105] The court also noted that the defendant could preclude a recovery by showing that "a black applicant was rejected for a nondiscriminatory reason."[106] Thus, under *Hameed*, the method for determining a class member's entitlement to back pay mirrors the procedure developed under the individual-by-individual approach. Once a claimant makes a prima facie showing that she falls within the class of discriminatees eligible for back pay, the burden shifts to the defendant to show that the claimant is not entitled to relief.

Under certain circumstances, however, the courts forgo the individualized method of determining back pay entitlement and award relief to all class members. The courts follow this approach in two situations. The first occurs when a court concludes that it has "identified all of the victims of discrimination as a result of the proof during Stage I, and that further proceedings to establish their basic eligibility [are] unnecessary."[107] In these "equal pay for equal work" cases,[108] the court finds at the liability phase of the litigation that every class member "was paid less than the nonclass members who were performing similar work, and there was no nondiscriminatory explanation for the wage disparity."[109] For example, in *Liberles v. Daniel*,[110] a disparate impact case, the court found that the Cook County Department of Public Aid utilized

102. *See supra* notes 60-67 and accompanying text; *see also* Myers v. Gilman Paper Co., 527 F. Supp. 647, 650-51 (S.D. Ga. 1981) ("[W]hile a court may switch to a class-wide approach to determine the actual amount of backpay, each individual claimant must still make a threshold presentation of some evidence that he qualifies for backpay given the particular circumstances of the case.").

103. 637 F.2d 506 (8th Cir. 1980).

104. *Id.* at 512.

105. *Id.* at 519-20.

106. *Id.* at 520.

107. Parker, *supra* note 78, at 195; *see* Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); Liberles v. Daniel, 26 Fair Empl. Prac. Cas. (BNA) 547 (N.D. Ill. 1981), *aff'd in part, rev'd in part*, 709 F.2d 1122 (7th Cir. 1983); Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), *aff'd*, 569 F.2d 1074 (10th Cir. 1978).

108. Parker, *supra* note 78, at 197.

109. *Id.*

110. 26 Fair Empl. Prac. Cas. (BNA) 547 (N.D. Ill. 1981), *aff'd in part, rev'd in part*, 709 F.2d 1122 (7th Cir. 1983).

invalid test and education requirements to disproportionately place black employees in lower level employment categories, despite the fact that employees at all levels "were performing virtually the same tasks."[111] Defendant's discrimination consisted of paying less money to plaintiffs who were doing the same work as higher level employees. "[T]he only thing that prevented the plaintiffs from earning a higher salary was illegal conduct."[112] In awarding relief, the court rejected the defendant's argument that "each class member . . . bear[ ] a minimal burden of showing entitlement to back pay which, in turn, may be rebutted by defendants."[113] Finding that "[t]here simply are no remaining issues that could be resolved in individual hearings,"[114] the court ruled that all class members were per se entitled to a back pay remedy.

Segar v. Smith[115] illustrates a second instance in which a court grants a per se entitlement to plaintiff class members and denies the defendant an opportunity for rebuttal.[116] In *Segar*, a class of black agents at the Federal Drug Enforcement Agency (DEA) alleged a pattern or practice of discrimination "in salary, promotions, initial . . . grade assignments, work assignments, supervisory evaluations, and imposition of discipline."[117] The court of appeals upheld the district court's liability finding and affirmed its procedures for awarding back pay relief.[118] The district court ordered individual *Teamster* hearings for class members at the lowest grade level because the evidence permitted it to reconstruct the "small number of discernible decisions as to initial grade assignment and promotions" necessary to determine back pay entitlement.[119] However, the district court found that class members employed at higher grade levels faced "discrimination . . . at every turn."[120] Consequently, the district court refused to order individual hearings to determine these class members' entitlement and precluded the DEA from rebutting a class member's claim.[121] The court of appeals justified this procedure because requiring "individualized hearings in these circumstances would . . . deny relief to the bulk of DEA's black agents despite a finding of pervasive discrimination against them."[122] Under *Segar*:

> [I]f plaintiffs have shown that defendant's discrimination is pervasive and probably adversely affected most class members in one way or

111. *Id.* at 548.
112. *Id.* at 550.
113. *Id.* at 549.
114. *Id.* at 550.
115. 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).
116. Parker, *supra* note 78, at 203.
117. 738 F.2d at 1258.
118. *Id.* at 1280.
119. *Id.* at 1290.
120. *Id.*
121. *Id.*; *cf.* Parker, *supra* note 78, at 202 ("[C]lass members would presumably have to come forward to file some sort of claim form and establish that they were employed at DEA during the relevant time periods.").
122. *Segar*, 738 F.2d at 1291.

another, and if the plaintiffs can show that the use of individual hearings will be so cumbersome, or require such speculation, that relief will be denied to some significant number of actual victims, the district court can dispense with individual hearings altogether.[123]

b. The Shared Limited Fund

The court's final task is to determine the size of the class-wide back pay award and a method of distribution. In computing the size of the back pay award, most courts adopt a two-step mathematical method. First, the court determines the number of "theoretical discriminatees" who, absent the employment discrimination, would have been granted an employment opportunity, such as hiring or promotion.[124] Second, the court calculates the difference between the amount of money a theoretical discriminatee would have earned absent discrimination and the actual amount earned by the discriminatee. The court then calculates the total amount of the class-wide back pay award by multiplying this earning differential by the number of theoretical discriminatees.

Hameed[125] illustrates one court's method for determining the number of theoretical discriminatees. The court assumed that the proportion of blacks who would have been admitted to the union's apprentice program under a nondiscriminatory selection process would have equalled the proportion of black applicants.[126] These calculations resulted in the court finding that there would have been sixty-seven black admittees. By subtracting the twenty-two actual black admittees, the court determined that the class of actual discriminatees consisted of forty-five persons.[127] An alternative method of determining the number of theoretical discriminatees is found in *Thompson v. Boyle*,[128] a case involving, *inter alia*, sex discrimination in promotions by the United States Government Printing Office. The *Thompson* court calculated the size of the theoretical discriminatee class solely by determining the proportion of women in the relevant labor pool. The court concluded that since women comprised fifty percent of the potential applicant pool within the Government Printing Office, fifty percent of all actual promotions should have gone to women.[129] The court did not subtract the number of women actually promoted.

The comparability formula is an example of a method utilized to deter-

123. Parker, *supra* note 78, at 206-07.

124. Theoretical discriminatee, in contrast to an actual discriminatee who is entitled to back pay, is a construct used by courts to calculate a defendant's total back pay liability vis-a-vis a class.

125. 637 F.2d 406 (8th Cir. 1980).

126. *Id.* at 520.

127. *Id.*

128. 499 F. Supp. 1147 (D.D.C. 1979), *aff'd in part, rev'd in part sub nom.* Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1983).

129. *Id.* at 1171.

mine the amount of back pay to be awarded to each theoretical discriminatee. Under this formula, the court selects a test group composed of employees not discriminated against that is "comparable in size, ability and length of employment" to the plaintiff class.[130] The court then computes a comparable pay figure which is the total amount of earnings made by the test group during the back pay liability period. In order to determine the actual amount of back pay liability, the court subtracts the amount actually earned by the plaintiff class during the back pay liability period from the comparable pay figure.[131]

After computing the size of the class-wide back pay award, the Title VII court then develops a method for distributing the fund to the members of the plaintiff class. Most courts have adopted a proportional approach. For example, the lower court in *Hameed* was instructed to distribute the resulting lump sum "pro rata among the black applicants" rejected during a particular year "or in a more equitable manner as determined by the district court."[132] However, the court cautioned that "[t]he method of distributing the back pay . . . should not result in some persons obtaining a back pay award greater than their actual damages."[133] This injunction meant that "[t]he maximum any one claimant may recover is the amount due if he were an actual discriminatee."[134] In this way, the Court limited the defendant's maximum liability to "the aggregate amount of back pay that would be due 45 actual discriminatees."[135]

This procedure for calculating and distributing a back pay award under the class-wide approach may be labeled the "shared limited fund" method. Using this method, a court, in effect, creates a back pay fund by calculating the employer's total liability. This limited fund is then distributed among the plaintiff class members by a pro rata formula. Thus, as the court stated in *Ivey v. Western Electric Co.*:[136]

> If there is more than one eligible claimant for a given designated vacancy, net back pay award figures shall be computed for each. The multiple eligible claimants shall share that award in the proportion that his/her individual net back pay award bears to the total of all claimant's net pay awards for that particular designated vacancy . . . .[137]

130. Pettway v. American Post Iron Pipe Co., 494 F.2d 211, 262 (5th Cir. 1974).

131. Love v. Pullman Co., 569 F.2d 1074 (10th Cir. 1978), provides an example of the use of the comparability formula. After an initial finding that the facts of the case made it impossible for the court "to reconstitute with any accuracy the individual opportunities of the members of the class," the Tenth Circuit panel affirmed the trial court's formula that compared the earnings of the class of discriminatees to the average wage scale of the next highest level of worker. *Id.* at 1077.

132. Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506, 521 (8th Cir. 1980).

133. *Id.* at 521 n.19.

134. *Id.*

135. *Id.*

136. 23 Fair Empl. Prac. Cas. (BNA) 1028 (N.D. Ga. 1978).

137. *Id.* at 1035.

3. Comparison of the Two Back Pay Procedures

The shared limited fund method of distributing a class-wide award of back pay has three important consequences when compared to the individual-by-individual method. First, under the shared limited fund, the amount of back pay awarded to each individual member of the plaintiff class is determined by the size of the class rather than by the earnings that an individual would have received had she obtained the employment opportunity. If the number of plaintiff class members equals the number of theoretical discriminatees, then each class member receives a full back pay award; however, if, as is often the case, the number of class members exceeds the number of theoretical discriminatees, then each class member receives *less* than a full back pay award. Thus, as one commentator notes, "recovery in the lump sum case may be substantially smaller than in the individualized case."[138]

Second, use of the shared limited fund method means that there is a ceiling on the defendant's back pay liability. The defendant cannot pay more than the amount calculated in the court's mathematical computation. Rather than increase a defendant's back pay obligations in accordance with the number of successful claimants, the shared limited fund method maintains a cap on liability and limits a class member's award to a prorated share of the total back pay fund. Under the individual-by-individual approach, there is no *a priori* cap on a defendant's back pay liability.

Finally, the shared limited fund method of awarding a class-wide back pay remedy raises the possibility that the defendant may end up paying less than the amount of back pay liability calculated by the court.[139] Each individual plaintiff class member may not be awarded more back pay than the amount determined by the court to be due to each theoretical discriminatee. Thus, when the number of class members is less than the number of theoretical discriminatees, the defendant will only be liable for the amount of back pay due those class members "who can come forward and show their entitlement."[140] The defendant will retain the remainder of the calculated award.[141]

This comparison demonstrates the existence of a doctrinal discrepancy in back pay jurisprudence. The form of back pay awards to members of a successful plaintiff class often vary depending upon the procedural posture at the relief state of the litigation. Where the court utilizes the individual-by-individual *Teamsters* method, class members are usually entitled to a full compensation award of back pay. In contrast, when the court departs from the *Teamsters* procedure, each member of a Title VII class may be awarded only a proportion of the amount which would have been granted under the individual-by-individual approach.[142] After a critique of the justifications put forth

138. Parker, *supra* note 78, at 194.
139. *Id.* at 192 n.108.
140. *Id.* at 193.
141. *Id.* at 192 n.108.
142. Despite the *Teamsters* injunction that individualized hearings are the general rule in

by courts and commentators for this discrepancy, this Note offers an argument for full compensation back pay awards which arises from a proper definition of the harm which Title VII and back pay were intended to remedy.

II
REMEDYING THE HARM OF DISCRIMINATION: THE PROPER RATIONALE FOR BACK PAY IN CLASS ACTIONS

An inquiry into the proper rationale for awarding back pay is needed to evaluate the discrepancy found in back pay relief in the class action context. The statute's dual purposes, as articulated by the Supreme Court in *Albermarle Paper Co. v. Moody*,[143] provide the analytical structure for such an inquiry. Under *Albermarle Paper Co.*, a back pay remedy implements the statute's goals of making whole a victim of employment discrimination and deterring employers from acts of discrimination.[144] The critical issue is to define the concept of "making whole" a victim of employment discrimination. The deterrence function will then be fulfilled by the adoption of a legal standard that will "make whole" victorious Title VII plaintiffs. Thus, the form of a back pay award must reflect the underlying conception of the harm which Title VII is authorized to remedy.

A. Make-Whole Relief: Defining the Harm Remedied by Back Pay

1. Three Rationales: "Lost Opportunity," "Class-Wide Harm," and "Full Compensation"

The discussion begins by examining rationales offered by courts and commentators for limiting back pay to pro rata awards. One justification for the shared limited fund was recently articulated by the D.C. Circuit in *Dougherty v. Barry*,[145] a "reverse discrimination" suit brought against the District of Columbia by eight white firefighters claiming discrimination by the city in promoting two black firefighters to the position of deputy fire chief.[146] After finding the defendant liable,[147] the district court awarded "full recompense to

determining stage two back pay relief, it appears that most courts turn to the class-wide method and the shared limited fund in awarding back pay in Title VII class actions. While a statistical analysis of this observation is beyond the scope of this Note, it is interesting to note that the strongest statements of the general rule favoring individualized hearings and full compensation occur most often in cases in which the courts pursue the class-wide approach. *See* cases cited *supra* note 58. Thus, it appears that, for back pay awards, the *Teamsters* rule is generally honored in the breach.

143. 422 U.S. 405 (1975).

144. *See supra* text and accompanying notes 21-26.

145. 869 F.2d 605 (D.C. Cir. 1989).

146. *Id.* at 607.

147. Plaintiffs brought their claims, and the district court found liability, under both Title VII and 42 U.S.C. § 1981. However, the court of appeals dismissed the former claim as untimely filed. 869 F.2d at 609-13. The court's discussion of relief, therefore, technically involved only section 1981. Nevertheless, the court proceeded as if section 1981 relief was coextensive with that under Title VII on the ground that the plaintiffs' section 1981 claims " 'request[ed] only those categories of relief available under Title VII.' " *Id.* at 615 n.9 (quoting Dougherty v.

each [plaintiff] as though each had been promoted."[148] Although the case was not brought as a class action, the circuit court evaluated the propriety of this full compensation award under the standards developed in the context of the class-wide approach.[149] Applying this approach, the court concluded that "precedent favors dividing the monetary value of the two promotions among [plaintiffs] pro rata."[150] The court found a pro rata division superior because it "more closely approximates the goal of ' "recreat[ing] the conditions and relationships that would have been had there been no" unlawful discrimination.' "[151] As the court stated:

> If the district court had been able to determine with certainty which two of the [plaintiffs] would have received the promotions, the proper course would have been to award those two [plaintiffs] full relief and the others none. . . . Because the court was unable to do so, however, one must assume *that each [plaintiff] enjoyed less than a one hundred percent chance of being promoted.* By awarding each [plaintiff] full back pay, however, the district court treated each as though he possessed a one hundred percent chance of receiving one of the promotions, counter to that court's own conclusion that one could not determine for certain which [plaintiffs], if any, would have been promoted. Thus, in order to restore [plaintiffs] to the position they would have occupied absent discrimination . . . , *the district court should have awarded each [plaintiff] a fraction of the promotions' value commensurate with the likelihood of his receiving one of the promotions.*[152]

The D.C. Circuit conceptualized the harm underlying a Title VII violation as a *lost opportunity* to enjoy the fruits of a promotion.[153] Had only two plaintiffs competed for the two promotions, then each would have obtained

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Barry, 607 F. Supp. 1271, 1289 (D.D.C. 1985)). Accordingly, the court cited as controlling authority cases determining relief under Title VII. *See infra* note 149.

148. 869 F.2d at 614.

149. *Id.* at 614 n.8 ("Although this case does not involve a class action, the same principles apply because all of the [plaintiffs] were eligible for promotion, and the district court was unable to determine which of them would not have been promoted."). Indeed, except for *Teamsters* and *Mathews*, all the cases cited by the court in its discussion of monetary relief involved a class-wide back pay remedy under Title VII. *See id.* at 614-15 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506 (8th Cir. 1980); Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976) (per curiam); United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

150. 869 F.2d at 614.

151. *Id.* at 615 (quoting *Teamsters*, 431 U.S. at 372 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747 (1976))).

152. *Id.* (citations and footnote omitted) (emphasis added).

153. *See also Hameed*, 637 F.2d at 521 n.19 (discussing pro rata distribution among class members).

the advancement. But since there were more plaintiffs than employment opportunities, the economic harm visited upon each was decreased. At most, recovery would be equal to the chance each plaintiff had to obtain the promotion. Thus, under *Dougherty*, Title VII's make-whole purpose is interpreted to mandate a proportional distribution of back pay.

In contrast to the lost opportunity rationale, one commentator argues that the Title VII injury runs to the class as a whole rather than to the individual class members.[154] Under this rationale, it is the entire plaintiff class, not the individual members, that a back pay award makes whole. Accordingly, in cases involving the shared limited fund approach, courts refer to a discriminatory selection process as a "loss to the class,"[155] or to the class as a "group [that] has suffered discrimination through subjective management decisions."[156] The class-wide injury rationale stresses Title VII's public law purpose of ending employment discrimination against protected groups. Accordingly, courts conceptualize back pay as placing the class as a whole, rather than individual class members, in the position it would have occupied absent the employer's illegal practices.

A final conceptualization of back pay relief justifies full compensation awards. This model focuses on the harm to the individual caused by illegal employment practices. The theory behind this model is that each victim of discrimination has experienced a complete denial of the available employment opportunity. Accordingly, if an illegal employment practice which denied a single promotion to ten qualified individuals is challenged by ten individual claims, rather than by a class action, the defendant cannot defeat any of the ten claims based solely on the fact that only one employee could have been promoted. As long as the defendant fails to make a successful rebuttal of each plaintiff's entitlement, all ten may receive a full back pay award.[157] Thus, the full compensation rationale differs from the lost opportunity and class-wide injury justifications in its conceptualization of the harm caused by discrimination. By recognizing that the discriminatory denial of an employment opportunity represents a separate and distinct injury to each victim of

154. Parker, *supra* note 78, at 191-92.

155. *Hameed*, 637 F.2d at 506, 520 (8th Cir. 1980).

156. Pitre v. Western Elec. Co., 843 F.2d 1262, 1277 (10th Cir. 1988).

157. This result was rejected by the D.C. Circuit under the lost opportunity rationale in *Dougherty*. *See supra* notes 145-53 and accompanying text. It may be suggested that the hypothetical posed in the text is an argument, not for full compensation, but for the necessary joinder of the 10 individual actions into a class action so that the court will have the power to distribute the back pay owed to two theoretical distributees among the 10 claimants. This argument begs the question as to what is the proper theory of the harm which Title VII is intended to remedy. A joinder of the 10 claims is the appropriate measure only if the lost opportunity and/or class harm theories provide the proper rationale. If, however, as argued below, full compensation is the correct method, then there should be no difference in the back pay remedy whether the 10 claims are pursued through individual actions or through a single class action.

discrimination, the full compensation rationale demonstrates that each person can be made whole only by a full back pay award.[158]

2. *Full Compensation Represents the Proper Form of Make-Whole Relief*

Neither the *Dougherty* lost opportunity justification nor the class-wide injury rationale adequately explain the harm caused by a Title VII violation. Both theories define this harm solely from an employer-based perspective.[159] Under these theories, the harm for which the back pay recipient must be compensated is measured by looking only to the discriminatorily denied employment opportunity.[160] Thus, an employer can mitigate its potential liability by limiting the number of hirings or promotions offered since the total number of lost opportunities can never exceed the number of employment opportunities

158. There is a fourth possible justification for the shared limited fund, not cited by courts or commentators, which emerges not from a theory of the harm which Title VII was intended to remedy, but from a more general theory of remedies. In the context of analyzing equitable, equal protection relief, Professor Paul Gewirtz distinguishes between two remedial theories — "rights maximizing" and "interest balancing." Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983). A rights maximizing theory "takes the viewpoint of the victims alone," and seeks a remedy which will "eliminat[e] the adverse consequences of violations suffered by victims." *Id.* at 591. Under this approach, "[t]he costs of alternative remedies are . . . irrelevant except when such costs actually interfere with a remedy's effectiveness, or when the alternatives are equally effective and a criterion other than maximum effectiveness must be the basis for selection." *Id.* at 589, 591. In contrast, under the interest balancing approach, "remedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness." *Id.* Interest balancing requires a weighing of the "net remedial benefits to victims against the net costs it imposes on a broader range of social interests." *Id.* Gewirtz's essay is an extended argument that other social interests, including societal resistance to court-ordered affirmative relief, must be taken into account in formulating appropriate relief. Following this analysis, the shared limited fund may be justified as arising from an "interest balancing" remedial theory, so that the goal of making whole victims of discrimination and deterring future discrimination must be balanced against and limited by the interests of, for example, employers and innocent third parties.

Applying the interest balancing theory in the context of Title VII back pay is problematic in at least two respects. First, as noted above, Gewirtz's argument arises from an analysis of affirmative, injunctive relief. Indeed, he explicitly admits that his analysis "does not consider the applicability of Interest Balancing to damage remedies." *Id.* at 606 n.50. Thus, it is questionable whether this framework should be applied to an essentially backward-looking, compensatory remedy such as back pay. Second, even assuming that relevance of an interest balancing remedial theory to Title VII back pay, it is difficult to ascertain on the otherside of the balancing sheet the existence of legitimate interests which should be weighed against awarding a full back pay award to class members who have satisfied the *Teamsters'* burdens of proof. The bearer of remedial costs is the adjudicated wrongdoer and the interests of so-called innocent third parties are not implicated, as in the context of court-ordered seniority or promotions. *See infra* text accompanying notes 180-83. Therefore, remedial interest balancing does not serve as an adequate justification for the shared limited fund.

159. The distinction between an employer-based and employee-based perspective originates in Professor Alan Freeman's framework, first developed in *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For the most recent restatement of his argument, see Alan Freedman, *Antidiscrimination Law: The View from 1989*, 64 TULANE L. REV. 1407 (1990).

160. *See, e.g.*, EEOC v. Chicago Miniature Lamp Works, 604 F. Supp. 1291, 1300 (N.D. Ill. 1986) ("In proper focus, the real question is the number of additional black workers [defendant] should have hired.").

offered. For example, when an illegal employment test is used to select a single candidate for promotion, the number of applicants is irrelevant. The harm suffered by ten applicants can be no greater than the harm suffered by 100. In effect, this model conflates all 100 denied promotions into a single act of discrimination.

In contrast, a discriminatee-based perspective measures the harm from the victim's point of view. Each act of discrimination is considered distinct, and each victim is made whole as if, absent discrimination, she would have obtained the position. Accordingly, the number of job openings does not affect the relief granted.

The distinction between an employer-based and a victim-based perspective sheds light on the Supreme Court's holding in *Teal v. Connecticut*,[161] which focused on the individual harm caused by a Title VII violation. In *Teal*, the Court confronted the issue of whether to recognize a defense for discriminatory practices that did not result in a discriminatory "bottom line."[162] The Court held that a test administered by the state of Connecticut which had a disparate impact on black employees seeking promotions violated Title VII, despite the fact that the overall number of promotions was equitable.[163] The Court refused to create a bottom-line defense because such a standard would "redefine the protections guaranteed" by the statute.[164] Title VII, the Court reasoned, focuses upon "the protection of the individual employee, rather than the protection of the minority group as a whole."[165] *Teal* thus rejected an understanding of Title VII that limited an employer's obligation for providing a proper number of employment opportunities to a protected group. Hence, the decision supports the proposition that in defining the harm of discrimination under Title VII, courts should adopt a victim-based perspective.

In the context of back pay relief, the logic of *Teal* precludes using the class-wide injury rationale to justify the shared limited fund approach. Back pay relief is a remedy intended to make individuals whole, not classes. The statute authorizes a group-oriented remedy as a form of prospective relief in

161. 457 U.S. 440 (1982).

162. *Id.* at 453 n.12.

163. *Id.* at 452-53

164. *Id.* at 453.

165. *Id.* at 453-54. On the surface, this statement appears to contradict the established understanding that Title VII protects *both* individuals and groups. *See supra* text accompanying notes 17-18. Nevertheless, the two positions are reconcilable. The statute protects groups, for example, by providing liability under a disparate impact theory, see Griggs v. Duke Power Co., 401 U.S. 424 (1971), and by providing prospective relief to nonvictims of discrimination who belong to a protected groups in order to integrate a workplace, see Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 420 (1986). *Teal*, however, stands for the proposition that the statute's protection of groups may not operate to undermine the ability of individual discriminatees to obtain relief. Thus, even though Connecticut's employment test, in the final analysis, did not harm black applicants as a group, Title VII still provided relief for individual blacks who were harmed by the test's disparate impact.

order "to eradicate the effects of unlawful discrimination,"[166] rather than to compensate victims. In contrast, back pay, like competitive seniority or court-ordered promotions, is a form of retroactive relief designed to place the individual in the position she would have occupied absent discrimination. The former type of remedy permissibly focuses on groups; the latter must address individuals.[167]

The reasoning of *Teal* also undermines grounding the shared limited fund approach in the lost opportunity rationale. If Title VII focuses on the individual, a definition of the harm caused by employment discrimination should derive from a discriminatee-based perspective. An individual's market opportunity, however limited, for obtaining a job or promotion does not negate the fact that discrimination has eliminated her chance for receiving the employment opportunity. This point is illustrated by *Kraszewski v. State Farm General Insurance Co.*,[168] a case in which State Farm was found liable for discriminating in the recruitment, hiring, and training of women for sales positions.[169] At the remedy stage of the litigation, the defendant argued that the court should adopt a shared limited fund approach and calculate back pay according to "the number of positions [State Farm] 'should have' filled with class members if they had hired women in proportion to their labor force availability and then subtracting the number of women actually hired."[170] Under State Farm's proposal, the insurance company's liability would be capped at the value of 214 positions, so that each of the anticipated 1000 members of the plaintiff class would receive roughly one-fifth the value of a sales position.[171]

The court rejected State Farm's scheme, refusing to accept the assumption that there would have been no discrimination against any of the class members had women comprised forty percent of the company's workforce. Citing *Teal* for the proposition that "Title VII focuses on whether *individuals* have suffered discrimination,"[172] the court stated that it could not "predict how many women would have actually been hired absent discrimination."[173]

166. *Sheet Metal Workers'*, 478 U.S. at 471 (plurality opinion).

167. This is not to argue that a back pay award plays no role whatsoever in Title VII's public law purpose of eradicating discrimination in employment relations. While prospective relief may integrate the workplace through a court decree, the deterrence value of back pay liability forces employers to carefully monitor their employment practices in order to fully comply with the law. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

168. 41 Fair Empl. Prac. Cas. (BNA) 1088 (N.D. Cal. 1986), *aff'd in part, rev'd in part*, 912 F.2d 1182 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991).

169. Kraszewski v. State Farm Gen. Ins. Co., 38 Fair Empl. Prac. Cas. (BNA) 197 (N.D. Cal. 1985).

170. 41 Fair Empl. Prac. Cas. at 1091.

171. *Id.* The court determined that women comprised 40% of the qualified labor market during the liability period, 1974-81. Out of a total of 821 hires for the period, only 94, or 11.4%, were women. Thus, State Farm would have needed to hire 214 more women to have equalled 40% of the hired sales trainees for the period. *Kraszewski*, 38 Fair Empl. Prac. Cas. at 212.

172. 41 Fair Empl. Prac. Cas. at 1091 (citing Teal v. Connecticut, 457 U.S. 440, 455 (1982)).

173. *Id.* at 1092.

Rather, the court held that "all class members are entitled to show that they were actual victims of discrimination as to *any* of the vacancies that occurred during the period of liability and that were filled by men."[174] At this point then, the *Teamsters* framework applied, placing the burden of proof on the employer to rebut an applicant's prima facie case. Each class member touched by defendant's discriminatory practice would have the opportunity to satisfy the entitlement burdens of proof and receive a full back pay award. Of course, this procedure left open the possibility that the number of successful backpay recipients would exceed the number of positions women would have theoretically obtained, absent State Farm discrimination. But since State Farm was the adjudicated wrongdoer, the court properly shifted the risk of error so that the employer would have to pay a greater amount of back pay rather than risk wrongly denying a class member full compensation for the harm she suffered.

Title VII's focus upon the discrimination individuals experience requires that a remedy for that harm be defined from a victim-based perspective. Neither the lost opportunity rationale, with its focus on the victim's market chance of obtaining a position, nor the class-wide justification, with its emphasis upon group harm, fulfill this mandate. By limiting an individual's back pay award to only a proportion of what she would have earned absent discrimination, both justifications conceptualize the harm of employment discrimination from the perspective of the employer. In contrast, the full compensation approach properly focuses on the discrimination and defines the harm from the victim's point of view. If claimants can meet the established burdens of proof for back pay entitlement in the remedy stage of a Title VII litigation, they will be made whole by a full back pay award.

B. Deterrence

The shared limited fund also fails to serve the public law goal of deterring potential employers from adopting discriminatory practices. First, since Title VII's focus on the individual requires full compensation rather than a limited recovery based on lost opportunity or a percentage of the class-wide harm, deterrence is served only by allowing successful plaintiffs to receive the fullest compensation permissible under the law. Only this "reasonably certain prospect" that each act of discrimination will result in monetary liability will deter employers from discriminating in the workplace.[175]

Second, the deterrence effect of back pay is undermined by the discrepancy between the back pay award under the individualized approach and that under the class-wide approach.[176] Since current standards guarantee the use of the shared limited fund under the latter approach, Title VII defendants are

174. *Id.* at 1088 n.3. *Kraszewski* illustrates that the reasoning behind *Teal* is inconsistent with a lost opportunity rationale. The Court did not have to address the specific question of full compensation. *See supra* note 74.

175. Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

176. *See supra* text accompanying notes 138-41.

motivated to characterize cases at the remedial stage as requiring the class-wide procedure for awarding back pay. However, when the courts limit the level of relief on the grounds of judicial efficiency or the distorting effects of the defendant's discriminatory practices, back pay's role as a deterrent is diminished. Such a rule may permit a wrongdoer to limit its liability on account of its own wrongdoing.

Lastly, the full compensation approach best serves the goal of deterrence because it treats each individual plaintiff as the victim of a discrete act of discrimination. Consider the following example: Twenty applicants, of which ten are women, apply for four positions; assuming that women comprise fifty percent of the qualified labor force, the shared limited fund approach will restrict a defendant's back pay liability to the amount two women applicants would have earned had they been hired. The defendant's liability is the same whether she discriminates against two or all ten of the women applicants. Thus, the failure to hire the final eight female applicants goes undeterred.

III

EQUITABLE BALANCING AND THE PROBLEM OF NONACTUAL VICTIMS OF DISCRIMINATION

If the full compensation standard represents the proper approach for awarding back pay under Title VII, what accounts for the apparent discrepancy between the individual-by-individual and the class-wide method of awarding back pay? Absent a principled justification, courts should not differentiate between similarly situated Title VII plaintiffs simply because the conditions for pursuing *Teamsters* hearings are not present.

At this point in the analysis, it becomes clear why courts utilize the shared limited fund method despite its lack of an adequate theory of the harm to be remedied by a back pay award. The shared limited fund reflects the courts' uneasiness with dispensing individualized justice in a group remedy situation. In pursuing the class-wide approach, courts implement Title VII's remedial scheme in light of common law equitable principles that demand a balancing among the interests at stake in a litigation.[177] The back pay cases suggest that the shared limited fund represents the product of a kind of equitable balancing among the various parties regarding monetary relief under Title VII.[178] On the one hand, plaintiff class members are guaranteed a measure of

177. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 375 (1977) (quoting Hecht Co. v. Bales, 321 U.S. 321, 329-30 (1944)) ("In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' "); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 770 (1976).

178. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 262 n.152 (5th Cir. 1974); *see also* Pitre v. Western Elec. Co., 843 F.2d 1262, 1278 (10th Cir. 1988) ("[D]istrict court properly attempted to balance the employer's and the employees' interests."). Because prior to the 1991 Act the courts construed Title VII to grant only equitable remedial powers, the mandate of "balancing the equities" in awarding relief represented a strong strand in Title VII

monetary relief which, while perhaps not making them *entirely* whole,[179] leaves them better off than if no back pay were granted. On the other hand, the shared limited fund method provides a ceiling to defendants' liability, thus preventing excessive penalties and affording incentive to acquiesce in the class-wide approach.

However, the nature of the equitable balancing required when determining back pay relief diverges significantly from the balancing necessary in the context of other Title VII remedies, such as court-ordered promotions and hiring or retroactive seniority. The most salient difference between the two forms of relief is that the latter implicates the equitable interests of third parties. While retroactive seniority or a court-ordered promotion may not be denied "on the sole ground that such relief [would] diminish [ ] the expectations of other, arguably innocent employees,"[180] the exact contours of these forms of relief may nevertheless be shaped by this concern. Thus, the Supreme Court in *Teamsters* strongly emphasized that, in awarding a promotion, "the [district] court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members."[181] As part of this balance, the Court expressed its concern that the promotion and retroactive seniority remedies would disturb "the legitimate expectations of other employees innocent of any wrongdoing."[182] In contrast, a back pay award affects only the employer. The courts should show less deference to the interests of a proven wrongdoer.[183]

However, in balancing the interests of plaintiffs and defendants, another justification for the shared limited fund emerges from a concern familiar to the jurisprudence of Title VII remedies — namely, the possibility of relief being granted to individuals who are not actual victims of discrimination.[184] The class-wide approach may significantly lower the barriers faced by individual class members seeking an award of back pay. This development raises concerns in a system which traditionally demands a logical correspondence between a legal violation and its remedy.[185] In particular, there is a fear that

jurisprudence. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984). Of course, since courts in disparate impact cases may still award back pay as the only monetary form of relief, the balancing issue remains.

179. *See Pitre*, 843 F.2d at 1276 ("We recognize that a Title VII remedy will often fail to completely 'make whole' each victim of actual discrimination.").

180. Franks v. Bowman Transp. Co., 424 U.S. 747, 773 (1976).

181. International Bhd. of Teamsters v. United States, 431 U.S. 324, 372 (1977).

182. *Id.* at 372.

183. *See* Stewart v. General Motors Corp., 542 F.2d 445, 453 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

184. *Compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 772-73 (1976) (limiting seniority relief to "actual victim") *with* Sheet Metal Workers' v. EEOC, 478 U.S. 421, 471 (1986) (permitting affirmative relief for nonactual victims); *see* Parker, *supra* note 78, at 210-12. *See generally* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337 & n.23 (1988).

185. *See* Chayes, *supra* note 13, at 1282-83.

when the entire plaintiff class is found to be entitled to relief, an individual who, for example, lacked sufficient qualifications for a promotion will nevertheless make a sufficient showing of back pay entitlement. Such an individual would have been denied an employment opportunity for legitimate business reasons rather than illegal discriminatory ones. Under a full compensation method, the lowered barriers under *Teamsters* to back pay entitlement threaten to increase a defendant's liability beyond the limit of its culpability by granting nonactual victim class members a back pay award. Indeed, in some cases, the defendant may be precluded altogether from challenging a class member's back pay entitlement.[186] The shared limited fund method shields defendants from this threat by providing an upper limit to back pay liability.

Thus, the shared limited fund method does not arise from a theory based on individual injury. Rather, it originates in an equitable mandate "to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly."[187] The underlying concern about affording relief to nonactual victims of discrimination has resulted in challenges to the class-wide approach. One version of the nonactual victim challenge fails to raise sufficient equitable concerns to limit the use of the full compensation approach. However, a second instance, involving class-wide entitlement to back pay, implicates an important fairness concern, and therefore justifies the use of the shared limited fund.

A. The Argument for Limiting Back Pay Relief to Actual Victims of Discrimination

In recent years, courts have grappled with the proposition that the class-wide approach to back pay is impermissible under Title VII because it permits recovery by individuals who are not "actual victims of discrimination."[188] According to this argument, Supreme Court precedent either forbids completely or restricts to a limited set of circumstances the granting of make-whole relief to individuals as to whom the court has not made specific findings of discrimination. This contention finds support in a line of Supreme Court cases from the 1980s concerning the power of a Title VII court to order relief in the form of retroactive seniority or numerical job hiring goals that benefit nonactual victims of discrimination.

In *Firefighters Local Union No. 1784 v. Stotts*,[189] the district court ordered a modification of the city of Memphis's plan to lay off firefighters in order to protect the positions of black firefighters who had been hired or promoted under a consent decree entered in settlement of a Title VII suit. The

186. *See supra* text accompanying notes 107-23.

187. Pitre v. Western Elec. Co., 843 F.2d 1262, 1277-78 (10th Cir. 1988) (quoting Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 262 n.152 (5th Cir. 1974)).

188. *See, e.g., id.* at 1275 (defendant objecting that district court's remedy awards "greatest compensation" to plaintiffs who "were not actual victims of discrimination").

189. 467 U.S. 561 (1984).

Court reviewed the propriety of this order to determine "whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority."[190] In affirming the order, the court of appeals argued that a Title VII court has the power to enforce a consent decree by the same means it could have employed in remedying a Title VII violation. Thus, the district court possessed the " 'authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the [consent] decree,' "[191] because it could have made the same order had the plaintiffs proved the allegations of racial discrimination in the original complaint. In rejecting this argument, the Supreme Court stated that Title VII, as a statutory matter, "provide[s] make-whole relief only to those who have been actual victims of discrimination."[192] This line of reasoning apparently precluded a Title VII court from ordering "racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of" the statute.[193]

Two years later, the Court limited the holding of *Stotts* in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*.[194] In this case, a lower court established a twenty-nine percent non-white membership goal for a union that had violated Title VII. After fining the union twice for failure to obey court orders, the district court established a 29.23% minority membership goal to reflect an increase in the non-white proportion of the relevant labor pool. In upholding this order, a plurality of the Court distinguished retrospective make-whole relief, such as the retroactive seniority at issue in *Stotts*, from " 'prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom.' "[195] According to the plurality, the *Stotts* "limitation on *individual* make-whole relief does not affect a court's authority to order race-conscious affirmative action."[196] The latter form of relief is "provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination."[197] Title VII, the plurality concluded, "does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination."[198]

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190. *Id.* at 572-73.

191. *Id.* at 578 (quoting 679 F.2d 541, 566 (6th Cir. 1982)).

192. *Id.* at 580.

193. *Id.* at 581-82 (quoting 110 CONG. REC. 14,465 (1964)).

194. 478 U.S. 421 (1986).

195. *Id.* at 471 (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 n.47 (1977)).

196. *Id.* at 474.

197. *Id.*

198. *Id.* at 445. According to the four-Justice plurality, "such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Id.* Two other

Although the Court in *Sheet Metal Workers'* appeared to endorse the *Stotts* rule as applied to make-whole relief, it did not rule directly on the issue. The *Stotts* language on nonactual victims was dictum, and the plurality in *Sheet Metal Workers'* expressly treated it as such.[199] Nevertheless, the plurality observed that the lower court's remedy did not contravene *Stotts* since make-whole relief was "properly limited . . . to the actual victims of discrimination. The [district] court awarded back pay, for example, only to those class members who could establish that they were discriminated against."[200]

The dicta in *Stotts* and *Sheet Metal Workers'* suggest "that Title VII prohibits the award of back pay to any class member who has not come forward (presumably in a *Teamsters* hearing) to prove that she was an 'actual victim' " of defendant's discrimination.[201] This proposition, in turn, raises two questions. First, is the prospect of back pay relief going to nonactual victims sufficient to preclude the courts' use of the class-wide approach? Second, assuming the applicability of this Note's argument for full compensation awards, under what circumstances do the courts' reasons for utilizing the class-wide approach justify a concomitant use of the shared limited fund in the place of full compensation?

B. Identifying an Equitable Limiting Principle to Full Compensation

The courts have dealt with the nonactual victim challenge to the class-wide approach in two ways.[202] In *Segar v. Smith*,[203] a case involving discrimination which "percolated through an employment system,"[204] the court acknowledged that a class-wide award of back pay would result in a few nonactual victims obtaining relief. However, the court also recognized that precisely because of the fact that defendant's rampant practices of discrimination made employment criteria so subjective and difficult to discern, few if any

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Justices concurred with the general proposition that a Title VII court has the authority, in appropriate circumstances, to order preferential treatment for nonactual victims of a defendant's discrimination. *Id.* at 483 (Powell, J., concurring); *id.* at 499 (White, J., dissenting). On numerical remedies in general, see Schnapper, *supra* note 8.

199. 478 U.S. at 473 (explaining that the language in *Stotts* was "not strictly necessary to the result" of the case).

200. *Id.* at 474 n.44.

201. Parker, *supra* note 78, at 211.

202. It should be noted that several courts have sidestepped the issue by finding that the defendant had agreed earlier in the litigation to a class-wide back pay award, thereby waiving any objections to the court's use of this method. *See, e.g.*, Pitre v. Western Elec. Co., 843 F.2d 1262, 1274 (10th Cir. 1988) (stating that because "both parties agreed that a group remedy was appropriate and that the back pay award should be divided pro rata among the class," court may avoid deciding "how far a district court may go in ordering a group remedy to be shared by the class instead of holding hearings to determine the individual victims of the employer's discrimination"); Thompson v. Sawyer, 678 F.2d 257, 286 (D.C. Cir. 1982) (defendant waived objection that class members "should not have shared *pro rata* in the [back pay] pools, without showing individually that they sought and were qualified for the training and supervisory opportunities that they were denied").

203. 828 F.2d 1260 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

204. 738 F.2d at 1290.

members of the plaintiff class were likely to make a successful showing of back pay entitlement. Confronted with this dilemma, the court held that, "[t]hough section 706(g) generally does not allow for back pay to those whom discrimination has not injured, this section should not be read as requiring effective denial of back pay to the large numbers of [plaintiff class members] whom [defendant's] discrimination has injured in order to account for the rise that a small number of undeserving individuals might receive backpay."[205] Thus, under *Segar*, a Title VII court may award back pay to nonactual victims where the number of such recipients is small and a class-wide remedy affords the only means for the court to provide back pay relief.

Despite its apparent violation of the Supreme Court's dicta in *Stotts* and *Sheet Metal Workers'*, the court's ruling in *Segar* is correct. Problems of proof arising from an employer's wrongdoing should not preclude a back pay award. *Segar* ensures that worthy back pay claimants will obtain make-whole relief, even at the cost of some nonactual victims receiving awards. Perhaps more importantly, the *Segar* holding furthers the deterrence aim of Title VII. The statute's mandate would be seriously undermined if an employer could escape back pay liability simply because its own illegal employment practices made it impossible to identify entitled claimants. The implication of such a result — the greater the employer's discrimination, the less it will owe in back pay — is unacceptable. It would be unreasonable to derogate both the make-whole and deterrence aims of Title VII by insisting on a rigid adherence to the nonactual victims standard. In order to fulfill the statute's mandate that a Title VII violation lead to back pay liability, the court in *Segar* awarded back pay to claimants without permitting the defendant to contest their entitlement.

Segar does, however, implicate the requirement that the equitable interest of the defendant be balanced against the mandate of full recovery of make-whole relief by plaintiffs.[206] While the *Segar* court's inability to ascertain entitlement via individualized hearings arose from the defendant's own discriminatory practices, the court determined that some claimants receiving relief would have been unable to show actual harm, even under the relatively easy *Teamsters* presumptions applied at the remedy stage of a Title VII litigation. The court's finding that nonactual victims would count among the back pay recipients also represents a determination that full compensation would lead to an award which exceeds the defendant's actual liability. In this situation, the shared limited fund emerges from a legitimate balancing analysis. It is proper to limit the defendant's back pay liability to an amount found by the court to approximate the value of the injury caused by the defendant's illegal employment practices. While this method deprives an individual claimant of the opportunity to show entitlement to a full award, the court has already determined that most, if not all claimants would in fact fail. Thus, in this instance, the shared limited fund does not deprive otherwise worthy claimants

205. *Id.* at 1291.

206. *See supra* text accompanying notes 177-79.

of a full award by incorrectly defining the harm to be remedied by back pay.[207] Rather, it represents the only procedure for awarding back pay by which the court may fulfill, however inadequately, Title VII's make-whole and deterrence purposes.

A similar situation arises when a court decides to employ the class-wide approach on grounds of manageability and judicial efficiency.[208] In this context, the court is faced with having to undertake an inordinate number of individualized entitlement hearings and chooses to forgo the *Teamsters* method in order to complete the litigation without unduly burdening the judicial system. As in *Segar*, this procedure provides claimants with an adequate means for obtaining relief which, due to the limits of the judicial system, might otherwise be unavailable. But again, as in *Segar*, the plaintiffs' opportunity for relief comes at the cost of depriving the defendant of the opportunity to context entitlement. Accordingly, the shared limited fund is appropriate.

The *Segar* and judicial manageability situations need to be distinguished from a second context in which the nonactual victims challenge has arisen. Defendants have contested the class-wide approach in cases in which the defendant has the opportunity to rebut class members' entitlement to back pay at the remedy stage. The courts have rejected these challenges by holding that the working of the evidentiary burdens ensures that relief does not reach persons who are not identifiable victims of discrimination. For example, in *Catlett v. Missouri Highway and Transportation Commission*,[209] the Eighth Circuit rejected a *Stotts*-based objection and held that the evidentiary presumptions applied at the remedy stage of a Title VII litigation ensured that relief would go only to actual victims of discrimination. "[Q]ualified members of the class," the court stated, "are presumptively victims of discrimination absent proof, which [defendant] has not made in the case, to the contrary."[210] Similarly, in "equal pay for equal work cases,"[211] there is no nonactual victim problem when the court has precluded the defendant from challenging back pay entitlement to back pay. Class-wide entitlement arises not because of problems of proof, as in *Segar*, but precisely because the court has all the proof it needs before it is able to rule that defendant is unable to rebut any class member's right to a back pay award. Full compensation is appropriate in these cases.

Some courts have confused these two situations, reflecting the tension in the case law as to the proper definition of the harm which Title VII was intended to remedy. For example, in *Thomas v. City of Evanston*,[212] a case involving an employment test which disparately impacted upon women job applicants, the court rejected a *Stotts*-based challenge to class-wide back pay

207. *See supra* text accompanying notes 97-101.
208. *See supra* text accompanying notes 83-94.
209. 828 F.2d 1260 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).
210. Id. at 1267.
211. *See supra* text accompanying notes 107-14.
212. 610 F. Supp. 422 (D.C. Ill. 1985).

relief by holding that all class members were actual victims of discrimination because the class was composed only of women who failed the test.[213] The court then proceeded to utilize the shared limited fund on the ground that it could not "say with certainty which of the individual class member would have been hired but for the illegal discrimination."[214] Thus, the court in *Thomas* drew upon two distinct definitions of the discriminatory harm for different parts of its analysis. The court rejected the nonactual victims challenge by conceptualizing the harm as the taking of a discriminatory test which had a disparate impact upon women. But the court then justified the use of the shared limited fund by redefining the harm solely as the denial of a job opportunity.

Under the method of analysis proposed by this Note, the court in *Evanston* should have given the defendant the opportunity to rebut each claimant's entitlement to back pay by showing that there existed legitimate grounds, other than the applicant's market opportunity of obtaining a position, for denying the class member a job. Full compensation should have been awarded to those claimants whose prima facie entitlement the defendant failed to rebut. If, however, the court determined that there existed problems of proof so that the defendant would have been able to rebut most or all of the class members' prima facie entitlement showings, then the court should have turned to the shared limited fund as the product of a proper balancing between the interests of the class members in obtaining relief and those of the employer in not being liable for awards to nonactual victims of its discriminatory employment practices.

CONCLUSION

Title VII represents a foundational statute that implements the fundamental norm of antidiscrimination. In applying the statute, the judiciary must interpret its provisions in a manner that gives fullest effect to eradicating all forms of prejudice in the workplace and compensating victims of discrimination. Although the Supreme Court in recent years has read the statute in an increasingly narrow manner, the passage of the Civil Rights Act of 1991 signifies a clear repudiation of the Court's attempt to "turn the clock back" on civil rights. The courts should respond to this legislative mandate with renewed efforts to make Title VII an effective tool for guaranteeing civil rights in the workplace.

This Note has examined a doctrinal discrepancy in the courts' approaches to awarding back pay in Title VII class action suits. Under the *Teamsters* individual-by-individual approach, the courts generally grant a full award to any individual class member who demonstrates entitlement to back pay relief. Under the class-wide method, the courts generally adopt a shared limited fund, which is distributed proportionally to entitled claimants. The

213. *Id.* at 435.
214. *Id.*

shared limited fund, while proper in certain limited situations, is generally unjustified as a remedial procedure when applied to the types of harm which back pay is intended to compensate. Full compensation, rather than shared limited back pay for lost opportunity or class-wide harm, is the proper relief for the harm caused by illegal employment practices. Plaintiffs who meet the burdens of proof at the remedy phase should obtain full awards regardless of whether those awards are calculated at individualized hearings or through a class-wide formula method. This standard will not only best fulfill Title VII's twin goals of compensation and deterrence. It will also provide a remedial structure to reestablish the disparate impact claim as a central method for combatting discrimination in the workplace.