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WORK SHARING AS AN ALTERNATIVE TO LAYOFFS BY SENIORITY: TITLE VII REMEDIES IN RECESSION

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"Putting the wrong questions is not likely to beget right answers even in law."

Mr. Justice Frankfurter*

At the beginning of 1967, Continental Can Company's plant in Harvey, Louisiana had only three black employees out of more than four hundred hourly workers. That year the company began hiring more black workers, and by 1971 it had over fifty black employees. Then cutbacks in production began and, in accordance with the collective agreement, employees were laid off in reverse order of their plant seniority. By 1973, only two black employees were working and the first 138 persons on the recall list were white. Black employees who had been laid off brought a class action claiming that because the company's past discriminatory hiring policies had prevented blacks from ac-

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cumulating seniority, use of the "last hired, first fired" layoff procedure violated Title VII of the Civil Rights Act of 1964.[1]

The federal district court, in *Watkins v. Steel Workers Local 2369*,[2] agreed that Continental Can's seniority-based layoff procedure violated Title VII by perpetuating the effects of prior hiring discrimination. Judge Cassibry drew on two existing lines of seniority cases, involving departmental transfer and union hiring halls, to find a common principle: "[E]mployment preferences cannot be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority."[3]

Judge Cassibry ordered immediate reinstatement of enough laid-off black employees to restore the ratio of black-to-white employees at the Harvey plant to its 1971 level, and ordered that all future layoffs be allocated among employees in accordance with this ratio. All future recalls were to be made on a one-to-one basis from separate black and white recall lists until all laid-off black employees had been recalled.[4] In Judge Cassibry's words, this relief was not intended "to compensate the blacks who were not hired by the Company between 1945 and 1965," but was "designed to insure that, because the Company hired no blacks for twenty years, the plant will not operate without black employees for the next decade."[5]

The Court of Appeals for the Fifth Circuit reversed,[6] holding that

> an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or § 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual em-

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[1] 42 U.S.C. §§ 2000e to e-15 (1970), *as amended* (Supp. III, 1973).

The Civil Rights Act of 1866, § 1, 42 U.S.C. § 1981 (1970) also affords a federal remedy against employment discrimination on grounds of race. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The courts have generally held that the substantive law of Title VII applies as well in cases brought under § 1981. Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1316 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064).

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

[3] 369 F. Supp. at 1226.

[4] Judge Cassibry's order appears in full at 8 FEP Cas. 729, 730-31 (E.D. La. 1974).

[5] 369 F. Supp. at 1231.

[6] 516 F.2d 41 (5th Cir. 1975).

> ployees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.[7]

The court of appeals pointed out that the district court's order would require recalling black employees with five years seniority while denying recall to white employees with twenty-two years seniority. In fact, the recalled black employees would have been under eight years of age when the white employees denied recall were originally hired. "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites."[8] Such preferential treatment on the basis of race was held to be specifically prohibited by section 703(j) of the Act.[9]

Apart from the statutory prohibition against preferential treatment, the court suggested that the use of the "last hired, first fired" seniority clause was protected under section 703(h), which expressly exempts "bona fide" seniority systems from the strictures of the Act.[10] Even if the seniority system had a disproportionate impact on black employees, this was not the result of an intent to discriminate. The court refused to require the granting of "fictional" seniority to black employees as a precondition to deeming the seniority system "bona fide" within the contemplation of section 703(h).

Like both courts in the *Watkins* case, most recent commentary concerning the use of seniority in layoffs[11] has described the

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[7] *Id.* at 44-45.

[8] *Id.* at 46.

[9] Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . .

42 U.S.C. § 2000e-2(j) (1970).

[10] Notwithstanding any other provision of this subchapter it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1970).

[11] *See, e.g.*, Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A.L. REV. 177 (1975); Stacy, *Title VII Seniority Remedies in a Time of Economic*

problem in terms of who is entitled to a limited number of full-time jobs, thereby assuming a "winner take all" game in which the winners continue fully employed and the losers are out on the street.[12] Most union and management groups apparently share this assumption. The problem, so posed, creates a direct confrontation between the national policy of encouraging increased minority employment and statutory prohibitions against preferential treatment or quotas based on race or sex.

In determining who shall be the winners in this "winner take all" game, most unions have insisted on protecting contractual seniority rights,[13] even when this would place the heaviest burden of layoffs on recently hired minorities and women who as "last hired" are the "first fired."[14] On the other side, some civil rights advocacy groups have called for an abandonment of seniority in ordering layoffs on the ground that it perpetuates an insuperable obstacle to achieving equality of employment opportunity.[15] The positions of various government agencies on this issue have been neither consistent nor clear.[16] As a result,

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Downturn, 28 VAND. L. REV. 487 (1975); Note, *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J.L. & SOC. PROB. 343 (1975) [hereinafter cited as Note, *Seniority*]; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975) [hereinafter cited as Harvard Note].

[12] The following statement is representative:

> The concern expressed in Congress that Title VII would disrupt seniority systems was closely tied to a concern that the Act would be interpreted to require racial balance. In denying that Title VII would affect seniority, the supporters of the Act seem to have had most clearly in mind that *employers would not be required to achieve racial balance by firing whites in order to hire blacks*. The legislative history may not be determinative, but *it does cast considerable doubt on the propriety of altering seniority* solely to correct racial imbalance caused by past discrimination.

Harvard Note, *supra* note 11, at 1569 (footnote omitted) (emphasis supplied).

An exception is Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times*, 28 RUTGERS L. REV. 1082 (1975).

[13] *See, e.g.*, 1 LAB. REL. REP. 90 LRR 102-03 (Sept. 22, 1975) (resolution of AFL-CIO Industrial Union Department Convention in support of continued reliance on seniority in layoffs).

[14] Length of service was a factor in determining order of layoff in all but one of 364 contracts analyzed by the Bureau of Labor Statistics in a 1972 study. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-13, LAYOFF, RECALL, AND WORKSHARING PROCEDURES 31 (1972) [hereinafter cited as BLS, LAYOFF].

[15] *See, e.g.*, 1 LAB. REL. REP. 89 LRR 275-76 (July 14, 1975) (NAACP resolution on seniority, calling on the government to ensure that minority workers be hired pursuant to affirmative action and exempted from the operation of seniority in a layoff situation). *Cf. id.* 90 LRR 102 (Sept. 22, 1975) (speech by Vernon Jordan, Jr., Executive Director of the National Urban League).

[16] *Compare* Equal Employment Opportunity Comm'n, Proposed Guidelines on Work Allocation (Draft of March 14, 1975), *reprinted in* 58 BNA DAILY LAB. REP. A-14 (March 25, 1975) [hereinafter cited as EEDC Proposed Guidelines] *with* 1 LAB. REL. REP. 89

employers whose past discriminatory hiring policies are in large part responsible for the present vulnerable position of women and minorities in the work force are caught in a cross-fire of inconsistent demands from unions, civil rights advocacy groups, government agencies, and their own dissatisfied employees.[17]

To the extent that the problem is posed in terms of who shall work and who shall not, or whether seniority must govern or whether it must go, there seems to be little realistic doubt about the outcome. Unions and employers, left to their own devices, have little incentive to depart from their present practices; the union's strong interest in preserving seniority rights will be acquiesced in or supported by the employer. Nor is it likely that the courts will require unions and employers to abandon seniority in determining the order of layoff; three courts of appeals have refused to do so.[18] This judicial refusal to intervene seems almost inevitable as long as the courts see their only alternative as one of substituting winners in a "winner take all" game.

To pose the question in terms of who shall work and who shall not, however, is to pose the wrong question; it assumes that scarce work should be allocated on the basis of winner take all. Preceding the selection of which employees will be laid off is the decision whether some are to be laid be off while others are

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LRR 407 (Aug. 25, 1975) (statement of J. Stanley Pottinger, Assistant Attorney General for Civil Rights).

In April, 1975, the EEOC deferred indefinitely issuance of its Proposed Guidelines, which warned employers against the use of a seniority system whose operation would have a disproportionate impact on women and minorities, after a critical reaction from other agencies to which the draft had been circulated. Assistant Attorney General Pottinger criticized the EEOC draft as "likely to cause unnecessary dispute and disagreement, as well as arouse expectations which are not likely to be fulfilled." 88 BNA DAILY LAB. REP. A-6, A-7, (May 6, 1975).

[17] In Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182), the employer sought a declaratory judgment in federal district court to determine which of two allegedly conflicting contracts, one a conciliation agreement with the EEOC and the other the union collective bargaining agreement, should govern his policy on layoffs.

[18] *See* Watkins v. Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir.), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24 (1975) (No. 74-1064). Several cases involving the issue of seniority in layoffs are collected and discussed in Note, *Seniority*, *supra* note 11, at 345-57. More recent cases include Schaefer v. Tannian, 10 FEP Cas. 897 (E.D. Mich. 1975); Jones v. Pacific Intermountain EXPRESS, 10 FEP Cas. 913 (N.D. Cal. 1975); Acha v. Beame, 10 FEP Cas. 1237 (S.D.N.Y. 1975); Degraffenreid v. General Motors Assembly Div., 11 FEP Cas. 827 (E.D. Mo. 1975) (*semble*). *Contra*, Southbridge Plastics Div. v. Local 759, United Rubber Workers, 11 FEP Cas. 703 (N.D. Miss. 1975).

given all the available work. It is that prior decision—that some of the employees shall be given all the available work while others are to be given none—that gives present effect to past hiring discrimination. The useful question, if we are to get useful answers, is whether, and within what limits, an employer can determine that available work will be distributed unequally among his employees rather than shared equally, when the unequal distribution perpetuates the effects of past discrimination.

The thesis of this Article is that the solution to the problem of the discriminatory impact of layoffs on the work forces to employers with a history of past discrimination lies not in an attack on seniority, but in an avoidance of layoff; that answers are not to be found in formulas for the order of layoff, but rather in devices for distributing available work. The question whether the employer has violated the statute should focus on the employer's decision to lay off when that layoff will have a discriminatory impact, and the remedy should be directed toward requiring the employer to share the work in a way that will avoid the discriminatory impact.[19] This solution will preserve the principle that seniority shall determine the order of layoff, but will at the same time protect the employment gains of minorities during periods of recession.

Part I of this Article attempts to elaborate and refine the reasons for supporting seniority as an ordering principle in employment, reasons which led Congress affirmatively to endorse and explicitly to protect bona fide seniority systems in Title VII. The purpose is to reinforce the conclusion, already stated, that the solution is not to be found in repudiating seniority. Part II of this Article argues that when seniority-based layoff causes past discrimination to have a disproportionate impact on women and minorities perpetuation of the present effects of past discrimina-

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[19] Work sharing as an alternative to layoff has been suggested by some writers, *e.g.*, Blumrosen & Blumrosen, *supra* note 12; Note, *Seniority*, *supra* note 11, at 398-99; and by government agencies, *see* EEOC Proposed Guidelines, *supra* note 16. Except for the Blumrosens' article, however, discussion of worksharing has been essentially peripheral to what has been considered the main issue—whether layoffs by seniority violate Title VII. To date no one has recognized that whether the court finds there is a violation depends on whether the court sees a viable alternative, so that the question of liability can be answered only after resolving the question of remedy.

Because the courts have refused to hold seniority provisions violative of Title VII in layoff cases, civil rights advocates have felt compelled to turn to other methods of avoiding the impact of "last hired, first fired." Speech by Vernon Jordan Jr., Executive Director of the National Urban League to a convention of the AFL-CIO Industrial Union Department, in 1 LAB. REL. REP. 90 LRR 103 (Sept. 22, 1975).

tion can and should be remedied by Title VII. Part II also argues that work sharing is entirely consistent with remedial principles worked out in ten years of litigation under Title VII and with the purposes of the statute as expressed in its legislative history. Part III explores some of the variations of work sharing, its adaptability to different industrial settings, and the ability of the courts to administer this remedy.[20]

I. THE CASE FOR SENIORITY

Some critics of a "last hired, first fired" layoff system explicitly question whether seniority is worth preserving at all, particularly when measured against the need to foster minority employment.[21] The difficulty with their arguments becomes apparent when one asks what they would have replace it, for no one has proposed a satisfactory substitute. On the other hand, those who argue that the law supports continued reliance on seniority as a basis for determining order of layoff rarely examine their legal conclusions in terms of the nature and function of seniority. Few critics on either side of the debate have given systematic attention to the considerations that lie behind the importance assigned seniority in the legislative history of Title VII,[22] or have suggested how these considerations might guide a

[20] The discussion of work sharing in this Article relates solely to the private sector, where the employer is faced with reduced demand for a particular product or service, which reduces the need for labor. In the public sector the problem is quite different, because the shortage is not in the demand for services but in budgeted funds to pay for those services. Avoiding layoff in the public sector requires reduction in pay, with or without reduction of work. The socially preferable solution, which is essentially the solution favored by the public employer, is to maintain the same level of services but to reduce the labor costs of those services. Thus it has been suggested that public employees should accept wage cuts or a wage freeze, absorb a greater share of pension and other benefit costs, have holidays without pay, or even work days without pay. The fairness of such measures is subject to serious question, for they place the whole economic burden on the public employees while the taxpayers, as employers, get the same level of services at a lower cost.

[21] The conclusions reached in Note, *Seniority*, *supra* note 11, at 393, are typical: "If the employer followed discriminatory hiring policies, then to some extent the white or male employees as a group owe their seniority positions to these policies . . . . Therefore, where there are discriminatory hiring policies in the background, seniority expectations can be seen as not wholly legitimate . . . ." The district court's opinion in Watkins v. Steel Workers Local 2369, 369 F. Supp. 1229 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975), noted that the plaintiffs in that case were not asking for "some sort of 'super seniority' " but instead were challenging "the validity of seniority itself as a basis for allocating employment opportunities when the inevitable outcome of such a decision would be to perpetuate a past discrimination in favor of white employees." 369 F. Supp. at 1230 n.7.

[22] The legislative history of § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970),

court in tackling the problem of layoffs that have a discriminatory impact. If we understand the function and importance of seniority, we can better understand the significance of the negative directives of sections 703(h) and (j), and the courts' response to them.

Behind the explicit legislative approval of seniority in Title VII stands the widely, almost uniformly, accepted industrial practice of using length of service to determine various employment rights of employees.[23] Seniority provisions are incorporated into more than ninety percent of all union contracts,[24] and in more than seventy percent seniority is the sole or decisive factor in determining order of layoff.[25] Even in industries such

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has been treated extensively in law review commentary. *See, e.g.*, Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1607-14 (1969); Poplin, *supra* note 11, at 189-94; Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966); Note, *Seniority*, *supra* note 11, at 362-71; Harvard Note, *supra* note 11, at 1548-51; Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). Courts have also had occasion to review the legislative history at length. *See, e.g.*, Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 706-10 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182); Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1227-28 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516-17 (E.D. Va. 1968). When Title VII was extensively amended in 1972, § 703(h) was left unchanged, and the sponsors of the amendments said that "present case law as developed by the courts would continue to govern [sections not affected by the amendments.]" 118 CONG. REC. 7166 (1972) (section-by-section analysis of the Equal Employment Opportunity Act of 1972) (introduced by Senators Williams & Javits).

[23] Seniority may be calculated on a plant-wide, job, or departmental basis for different purposes under the same contract; for example, promotion opportunities may depend on job seniority, while order of layoff may be governed by length of employment service. Besides serving as the basis for a myriad of informal privileges on the shop floor, seniority may be the determining factor in transfer rights, shift or vacation preference, and scheduling days off. Many contracts provide for increased benefits, such as longer vacations, with increased length of service.

For a discussion of seniority and its place in the value structure of the overall employment relationship see S. SLICHTER, J. HEALY, & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104-41 (1960) [hereinafter cited as SLICHTER]; Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962).

[24] The most recent survey by the Bureau of National Affairs revealed that 92% of all collective bargaining agreements contain seniority provisions, with the major exceptions occuring in the longshore, construction, and apparel industries. 58 BNA DAILY LAB. REP. B-1 (March 25, 1975). In the first two industries, however, union seniority generally influences employment opportunities by determining the order of referral from hiring halls for available work. *See generally* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-11, SENIORITY IN PROMOTION AND TRANSFER PROVISIONS (March, 1970).

[25] U.S. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS, LAYOFF, REHIRING AND WORK-SHARING § 60:1 (1975). *See generally* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-14, ADMINISTRATION OF SENIORITY (1972); BLS, LAYOFF, *supra*

as construction and longshore, where short-term employment makes use of seniority impractical,[26] priorities in job referrals may depend on the worker's length of service in the union or industry. Seniority is not solely a product of union pressure; both public and private employers who are not bound by collective agreements commonly rely to some degree on length of service in making decisions on promotions, transfers, and layoffs.

The legislative approval of seniority in section 703(h) of Title VII might be viewed as no more than recognition of an existing social institution, but there still would remain the question why that institution exists and whether it is worth preserving. Widespread reliance on seniority when choices between employees must be made has its roots in fairly persuasive practical considerations.

First, seniority protects against arbitrariness. When choices must be made as to which employees will get the preferred shift, be promoted, or be laid off, there is always the danger and the greater fear that the person making that decision will act out of personal favoritism or spite, or without full and fair consideration. Seniority represents a simple, precise, and objective standard which provides employees "a degree of independence from the whims or personal preferences of supervisory officers."[27] It provides employees a basis for predicting their future employment status and a device for protecting that status. Unions have pressed for seniority provisions to protect workers from arbitrariness by management; and management has accepted seniority because it has recognized that those making the decisions may at times be arbitrary and that arbitrariness is costly in terms of maintaining plant morale and retaining valuable employees.

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note 14. Seniority for layoff purposes is usually calculated on an employment service basis, rather than on the length of service in a given job or department. Most contracts contain provisions for "bumping" rights, which may be exercised in a variety of ways to permit employees with greater employment seniority to replace junior workers in other jobs and thus to withstand layoff; plant location and job qualifications often limit these rights. Similarly, many contracts include generous retraining provisions for senior employees. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-7, TRAINING AND RETRAINING PROVISIONS 18-19 (March, 1969).

[26] Of 385 agreements in the construction industry analyzed by the Bureau of Labor Statistics in 1972, only 30 contained seniority provisions. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-14, ADMINISTRATION OF SENIORITY 32 (1972).

[27] Cooper & Sobol, *supra* note 22, at 1604 (footnote omitted).

Second, seniority is easy to administer. When a choice must be made among employees, seniority provides a simple and reasonable test which will supply a definite answer. From the employer's standpoint, it avoids grievances which require review of judgment; from the union's standpoint, it avoids internal disputes about which employee is most deserving. From the standpoint of both top management and top union officials, the application of seniority at the operating level is simple to oversee and, on balance, economical to administer.

Third, seniority enables an employee to acquire valuable interests by his work, to capitalize his labor and obtain something more than a day's wages for his continued production. When seniority determines promotion rights, it gives the employee a claim to better jobs when they become available; when seniority determines the order of layoff, it provides the employee a measure of insurance against unemployment. Seniority does not guarantee that vacancies in higher rated jobs will be filled or that any jobs will be available; but by giving the senior employee priority when a choice is made as to who will be promoted or who will remain employed, seniority gives an employee an interest of substantial practical value. As Professor Aaron has pointed out, "[m]ore than any other provision of the collective agreement . . . seniority affects the economic security of the individual covered by its terms,"[28] and it has understandably come to be viewed as one of the most highly prized possessions of any employee. Seniority may be the most valuable capital asset of an employee of long service.

In legal terms seniority "owes its very existence to the collective agreement"[29] and theoretically can be modified or bargained away by the union and employer, subject only to the union's duty of fair representation.[30] However, because of the strong sense that seniority rights are earned rights belonging to the employees, those rights are seldom significantly changed by bargaining.[31]

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[28] Aaron, *supra* note 23, at 1535.

[29] *Id.* 1534. Seniority expectations under a collective bargaining contract have been held subject to judicial modification on public policy grounds in cases where a seniority system is found to be unlawful under Title VII because it was adopted with an intent to discriminate. *See* Franks v. Bowman Transp. Co., 495 F.2d 398, 415 (5th Cir.), *cert. granted*, 420 U.S. 989 (1975). *See also* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[30] *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[31] A significant exception arises in the plant merger situation, over which there has

Seniority has thus assumed an importance to the employee and to the community of which he is a part well beyond whatever legal status it may derive from the collective agreement. It is both the symbol and the realization of a worker's expectations, expectations reinforced by a sense of rightness of the basic principle of length of service. It is the functional expression of a community expectation which, if it does not insist that seniority be immutable, at least assumes that earned rights will not be divested absent a compelling cause. That expectation assumes fair treatment by the union, to which control of seniority rights is committed, and protection by the courts in the event earned rights are unfairly denied.

The very prevalance of seniority and the expectations it has created adds a fourth, and perhaps most important, practical reason for its continued recognition as an ordering principle. Rejection of the principle of seniority where a seniority system has been established would be disruptive and demoralizing to the work force, for it would be viewed as depriving employees of rights earned in accordance with a just principle.

It should be kept in mind that seniority as an ordering principle is not a principle that determines when a choice between employees is to be made, or requires the making of an unnecessary choice. The decision that a choice is to be made—to fill a vacancy, make a transfer, make overtime work available, or reduce the number of employees—is governed by other rules, or by management discretion.[32] All that seniority as an ordering

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been much litigation. For a discussion of the issues and the cases see Kahn, *Seniority Problems in Business Mergers*, 8 IND. & LAB. REL. REV. 361 (1955); Comment, *Post*-Vaca *Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885 (1974).

[32] This management choice may be limited somewhat by provisions in collective bargaining agreements. For example, about 10% of collective agreements contain "guaranteed work" clauses requiring employers not to reduce the work week beyond that point specified in the contract. Some arbitrators have found an implied prohibition against reduction in the work week when the last hired, first fired clause is accompanied by a provision that the regular work week shall be forty hours, or five days of eight hours. Morris Machine Works, 40 Lab. Arb. 456 (1963) (Williams, Arbitrator); Lime Materials Indus., 35 Lab. Arb. 936 (1960) (Eckhardt, Arbitrator); Cook Mach. Co., 35 Lab. Arb. 845 (1960) (Boles, Arbitrator); Motch & Merryweather Mach. Co., 32 Lab. Arb. 492 (1960) (Kates, Arbitrator); Kennecott Copper Corp., 32 Lab. Arb. (1960) (Schedler, Arbitrator); International Harvester Co., 24 Lab. Arb. 311 (1955) (Cole, Arbitrator). The weight of opinion and the trend, however, seem to be to refuse to imply such a limitation on the scheduling of work and to uphold work sharing in the absence of some explicit contractual prohibition. Industrial Garment Mfg. Co., 65 Lab. Arb. 875 (1975) (Hall, Arbitrator); Lear Siegler, Inc., 58 Lab. Arb. 984 (1972) (Edelman, Arbitrator); Rex Chainbelt, Inc., 52 Lab. Arb. 852 (1969) (Murphy, Arbitrator); Jessop Steel

principle requires is that length of service be determinative when choices are in fact made.

Because seniority is an ordering principle, the core of seniority rights is the expectation that the order will be observed when choices between employees are made. To disregard the order of seniority by giving priority to a junior over a senior worker will be viewed as taking rights away from one person and giving them to another. The value of the right and the insistence on following the order of seniority strictly vary greatly, however, depending on the particular employment right that seniority is ordering. When overtime is distributed by seniority the right is to the first opportunity for extra earnings, a right that may have only occasional and limited value, during peak production periods, and a right that some employees choose not to exercise. When shift preferences are determined by seniority, the right may have personal rather than monetary value, and that value may be quite limited for many employees. In promotions the question is who shall have prior right to a better job, a matter of substantial and continuing consequence both as to earnings and desirability of the job.

In a layoff situation, however, seniority takes on an importance of a wholly different order, for it determines who shall continue to work and who shall not. That determination necessarily carries with it all the other employment rights ordered by seniority—overtime, shift preferences, promotions, and the rest. In addition, layoff may jeopardize or destroy other valuable rights attached to employment or accumulated by long service. Layoff may result in termination of group medical or life insurance which the employee can not afford to continue individually. If the layoff continues long enough to terminate seniority the employee may lose the longer vacations, accumulated sick leave, longevity pay, and perhaps even pension benefits, earned by length of service. When employees are confronted with mass layoffs, the symbolic and real importance of seniority is most

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Co., 51 Lab. Arb. 556 (1968) (Teple, Arbitrator); Patent Button Co., 37 Lab. Arb. 877, (1961) (Stouffer, Arbitrator); Struthers Wells Corp., 34 Lab. Arb. 372 (1959) (May, Arbitrator); Triangle Conduit & Cable Co., 33 Lab. Arb. 610 (1959) (Gamser, Arbitrator); Blaw-Knox Co., 32 Lab. Arb. 874 (1955) (Ebeling, Arbitrator). *But see* A. Hoen & Co., 64 Lab. Arb. 197 (1975) (Feldesman, Arbitrator), in which the arbitrator ruled that in light of the employer's past lay-off practices, the institution of work sharing violated the contract. The arbitrator suggested, however, that if work sharing had been instituted to prevent layoff of minorities or women it might not have been a violation of the contract.

compelling; deviation from the order of seniority is viewed as repudiation of a "vested right." It deprives the senior employee not only of his security but of all other values he has earned by his length of service.

In enforcing the provisions of Title VII relating to seniority, the courts have exercised considerable discretion in devising remedies to eliminate the vestiges of past discrimination. In an expansionist economic setting the problems presented were ones of promotion or referral, rather than layoff. Potential conflict between the expectations of incumbent white workers and the rights of those groups previously denied full employment opportunity could be glossed over or minimized.[33] The most an incumbent white employee generally lost was the certainty or probability of promotion or referral at a time he might otherwise have anticipated it. But when the challenge to seniority threatens to take away the very job an employee now holds, and to which his years of service purport to give him certain entitlement over others, the expectations created by seniority are entirely destroyed. The security against unemployment that he had earned is given to another.

When we give weight to the congressional judgment expressed in section 703(h) that seniority serves a useful social purpose and represents values worth preserving; when we identify the purposes and values on which that congressional judgment rests; and when we recognize that rejecting seniority in layoffs cuts to the heart of those purposes and values; then we can better understand why the courts uphold the use of seniority to determine layoffs even though it operates to the disadvantage of women and minorities because of past hiring practices.

By the same token, we should have misgivings about a position that rejects the principle of seniority and effectively abrogates the system itself, particularly when there is a possible alter-

[33] This apppears to have been particularly true in cases involving seniority in union hiring hall referral systems, in which the usual remedy permitted minority workers to bump into the referral line ahead of majority union members; an abundance of available work for all may well have been an important factor in quieting potential charges of reverse discrimination. For example, in Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969), the court noted that the union had, by its discriminatory membership policies, contributed substantially to a critical shortage of skilled labor in the area by "intentionally" limiting its membership to about 25% of what could have been absorbed. *Id.* at 1051. *But see* United States v. Navajo Freight Lines, Inc., 11 FEP Cas. 787 (9th Cir. 1975), in which the court of appeals instructed the trial court on remand to take into account the effect of its order on the seniority rights of nonminority employees. *See also* Stacy, *supra* note 11, at 496-97.

native which would preserve the principle of seniority without perpetuating the effects of past discrimination, by avoiding the layoff and the necessity of choosing who shall work and who shall not.

II. The Limits and Potential of Title VII

A. *The Dilemma of Rights and Remedies in Layoff Cases*

In order to understand why the precedents developed in the promotion and referral cases have not been extended to the layoff cases, and how such precedents are applicable to work sharing, it is necessary to state more explicitly the dilemma that courts confront when application of the "last hired, first fired" rule is challenged in layoff cases.

In promotion cases the courts have repeatedly and forcefully asserted that Title VII prohibits employment practices that perpetuate the effects of past discrimination.[34] In the words of the Court of Appeals for the Fifth Circuit: "Full enjoyment of Title VII rights sometimes requires that the court remedy the present effects of past discrimination . . . . If the present seniority system in fact operates to lock in the effects of past discrimination, it is subject to judicial alteration under Title VII."[35]

The principle was stated in even broader terms in *Griggs v. Duke Power Co.*,[36] in which hiring and promotion to jobs previously held only by white employees was conditioned on possession of a high school diploma or passing two intelligence tests. Because of its discriminatory impact of disqualifying a disproportionate number of black employees, this practice was declared illegal: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[37]

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[34] *See, e.g.*, U.S. v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3305 (U.S. Nov. 6, 1975) (No. 75-672); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[35] United States v. Georgia Power Co., 474 F.2d 906, 927 (5th Cir. 1973).

[36] 401 U.S. 424 (1971).

[37] *Id.* at 430.

If this broadly stated principle is accepted at face value and followed single-mindedly to its logical conclusion, as the district court in *Watkins* did,[38] then layoff by seniority must be prohibited whenever past hiring discrimination has prevented minorities and women from acquiring sufficient seniority to withstand layoffs as well as their white or male counterparts. This broad principle cannot be followed single-mindedly, however, because it is not the only mandate directing a court on this question. Alongside and limiting it are three other principles, two articulated in the statute and one articulated by the courts.

First, section 703(h) of Title VII[39] expressly states that it shall not be unlawful to apply different privileges of employment pursuant to a "bona fide" seniority system.[40] Congress thereby made clear its approval of seniority as an ordering principle for determining employment rights. By its use of the qualifying term "bona fide," Congress indicated that it did not intend to immunize seniority systems per se from judicial scrutiny, nor to insulate entirely all seniority expectations of majority workers.[41] But Congress certainly did not intend to invalidate per se all seniority rights where there had been prior discrimination in hiring. That would be the consequence of single-mindedly applying the principle that a seniority system cannot perpetuate the effects of past discrimination. Past discrimination in hiring minorities inevitably results in postponement of their seniority dates, and those seniority dates determine in perpetuity their relative rights to promotions, overtime, transfers, continued employment, the length of their vacations, the amount of their pensions, and a myriad of other rights and privileges. Em-

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[38] Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975); *see* text accompanying notes 2-5 *supra*.

[39] 42 U.S.C. § 2000e-2(h) (1970).

[40] *See* note 10 *supra* & accompanying text.

[41] *See* cases cited note 34 *supra*. In United States v. Jacksonville Terminal Co., 451 F.2d 418, 455 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), the court explicitly recognized that the kind of relief it ordered often "proves detrimental to whites' competitive seniority status, and consequently to their transfer and promotion expectations." In United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), Judge Matthes said that if the relief granted

> works to frustrate the seniority expectations of some incumbent [employees], it will only be frustrating expectations which would not exist but for the discrimination which is finally being redressed . . . . In the final analysis, allegations of reverse discrimination contend only that the hardships accruing from past wrongs should continue to fall exclusively upon those already discriminated against. The answer to that contention is self-evident.

464 F.2d at 312 (Matthes, J., concurring).

ployees are affected constantly by their seniority date throughout the course of their employment. The effects of past hiring discrimination are perpetuated to some extent unless use of the seniority principle is barred entirely when minorities are involved. This the courts have been unwilling to do in the face of section 703(h).

Second, section 703(j)[42] expressly states that nothing in the Act shall be interpreted to require any employer to grant preferential treatment to any minority individual or group on account of an imbalance between minority and non-minority employees.[43] The courts have not read this provision as barring them from requiring employers to give preferences to minorities in promotions or hirings to fill vacancies to offset the effects of past discrimination,[44] but the courts have read the provision as barring them from ordering the employer to displace incumbent majority employees to give their positions to minority employees.[45] The layoff situation does not permit this distinction between filling vacancies and displacing incumbents. If a court orders the junior minority employee retained, the senior majority employee will be displaced and the minority employee, in effect, will be given the majority employee's job. Displacement, if permanent, takes away the whole value earned by the senior employee by his long service. He loses all possiblity of promotion, all extended vacation benefits, accumulated sick leave, and perhaps some or all of his pension.

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[42] 42 U.S.C. § 2000e-2(j) (1970).

[43] *See* note 9 *supra*.

[44] United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972).

[45] "Qualified negroes with greater seniority can not displace incumbent workers. However, they are to be given a preference for future vacant jobs absent a compelling business reason." *Id.* at 118. The principle that incumbent workers may not be displaced is central to the so-called "rightful place" theory. *See* Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Note, *supra* note 22, at 1268.

This general limitation on the remedy applies only when the employment practice attacked is nondiscriminatory on its face and in its intent and is illegal only because it perpetuates the effect of past discrimination. When the practice attacked is discriminatory in itself the remedy can and normally should make the plaintiff whole, by placing the employee where he would have been but for the present discrimination.

The remedial provisions of Title VII are modeled after those of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970). Albermarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975). Under the NLRA, an employee who is discriminatorily denied employment because of an employer's anti-union sentiment can be ordered employed with full retroactive benefits. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187-89 (1941). An order of reinstatement may, and usually does, include both back pay and seniority calculated as if the discriminatory firing had not occurred. Corning Glass Works v. NLRB, 118 F.2d 625, 629 (2d Cir. 1941).

Third, even in cases involving employers with a past history of discrimination, the courts have refused to enjoin employment practices which are nondiscriminatory on their face and in their intent but which have a disparate impact, if the practice is justified by "business necessity."[46] To meet this test the employer must show that there are "no acceptable alternative policies" by which he can accomplish his business purpose "with a lesser differential racial impact."[47] Use of seniority in layoffs can be justified under the business necessity test if there are no acceptable alternatives that will provide an appropriate, objective standard for making choices between employees and will preserve the employees' earned rights.

Other objective standards which may not have the same discriminatory impact as seniority can be found to determine who shall work and who shall not, for example, age, number of dependents, or length of residence in the community.[48] Those to be laid off might even be chosen by lot. Such devices would be totally unacceptable, however, because the sense of rightness of the seniority principle is too deeply embedded in our industrial society; the results of such devices would not be tolerable in layoff situations. Any one or all of such standards could allow a recently hired employee to continue to work while an employee of long service was put out on the street. Nor would such standards serve the affirmative purpose of remedying the effects of past discrimination, for the criteria would apply equally to majorities and minorities.

The objective standard of a quota could be used, as was attempted by the district court in the *Watkins* case,[49] laying off proportionate numbers of majority and minority employees in accordance with their seniority within their respective groups.

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[46] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); United States v. N.L. Indus., Inc., 479 F.2d 354, 364-65 (8th Cir. 1973); Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Papermakers Local 189 v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[47] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (citation omitted). *See generally* Comment, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974). The degree of necessity has been described as a "compelling business necessity," United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), and as one that "connotes an irresistible demand," United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

[48] *See* Cooper & Sobol, *supra* note 22, at 1635-36.

[49] Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d. 41 (5th Cir. 1975).

But this requires creating, in effect, segregated seniority lists ordering the displacement of employees on the basis of race or sex. Apart from the nearly insuperable obstacle posed by section 703(j), such a method of choosing who shall work and who shall not would generate a deep sense of unfairness. Majority employees who would bear the burden of such quotas would include those who were hired after discriminatory hiring policies had ended and who obtained their jobs in fair competition with minority applicants, while more senior majority employees who had benefited from past discriminatory hiring might be unaffected. At the same time, the minority employees who would benefit are those who were hired more recently and may have entered the labor market after the discriminatory hiring policy ended. To the extent that seniority serves to bring a sense of fairness among employees to the workplace, this purpose is undermined by the use of quotas.

In the layoff cases the courts of appeals have manifested an awareness of the conflict between the broad principle that employment practices should not be allowed to perpetuate the effects of past discrimination and the limiting principles of sections 703(h) and (j) and the business necessity rule. That conflict has been resolved in layoff cases by refusing to enjoin the use of seniority systems that are neutral on their face and in their intent. In *Jersey Central Power & Light Co. v. Local 327, IBEW*,[50] the Court of Appeals for the Third Circuit acknowledged that the seniority system perpetuated the effects of past hiring discrimination, but declared: "Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect that they might have."[51] Permeating the court's opinion is its concern that any remedy it might devise would contravene sections 703(h) and (j) by creating "fictional seniority" or requiring "reverse discrimination," thereby destroying the stabilizing values of the seniority principle. "Congress did not intend the chaotic consequences that would result from declaring unlawful all seniority

[50] 508 F.2d 687 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182).

[51] 508 F.2d at 706.

systems which may disadvantage females and minority group persons . . . ."[52]

The court of appeals in *Watkins v. Steel Workers Local 2369*[53] had before it the district court's attempt to devise an alternative to the "last hired, first fired" rule. The court of appeals saw in the remedy ordered displacement of senior white incumbents by junior blacks and establishment of a quota system based on racially segregated seniority lists. This ran too directly against sections 703(h) and (j). In addition, the court of appeals saw junior black employees who had not even reached the age of employment when the employer ended its discriminatory hiring policies displacing senior white employees who had not been responsible for, and may not have benefited from, that discrimination. Rather than confront the conflicting principles, as the Third Circuit in *Jersey Central* had done, the Fifth Circuit seized upon the specific facts of the case and declared that because none of the plaintiffs themselves could have been victims of the company's discrimination, no perpetuation of past hiring discrimination could be found as to them.[54]

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[52] *Id.* at 708.

[53] 516 F.2d 41 (5th Cir. 1975), *rev'g* 369 F. Supp. 1221 (E.D. La. 1974).

[54] In promotion cases, relief has been limited to those who *could* have been victims of past discrimination. Employees hired after the employer has ceased the practice of hiring into segregated lines of progression, or after he removed the barriers to transfer, are not "affected employees" covered by the remedial orders; they are not given the right to bid on vacancies across seniority unit lines. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3305 (U.S. Nov. 6, 1975) (No. 75-672); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652, 657 n.4 (2d Cir. 1971). The "affected employees," however, do include all who *could* have been victims of past discrimination. To be an "affected employee," it is not necessary to show that the minority employee would have been hired or assigned to a different line of progression but for the discrimination, United States v. Bethlehem Steel Corp., *supra*; United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1971); nor to show that he would have bid on a vacancy in a different line of progression but for the discrimination, United States v. Navajo Freight Lines, Inc., 11 FEP Cas. 787 (9th Cir. 1975); United States v. Bethlehem Steel Corp., *supra*. Indeed, employees have been included in the protected class even though there may be substantial reasons for believing that they would not have sought promotion or would not have had better qualifications than other applicants. Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975); Rodriguez v. East Texas Motor Freight Co., 505 F.2d 40 (5th Cir. 1974); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971). It is not necessary to show actual individual discrimination; it is enough to show that but for past discriminatory practices the employee *might* have bid or applied for the position and been so assigned. If the present seniority system could have the effect of disadvantaging some minority employee who had been discriminated against, then it is treated as perpetuating the effects of past discrimination as to all who possibly could have been discriminated against.

The Seventh Circuit in *Waters v. Wisconsin Steel Works*[55] was less thoughtful and less subtle. It sought to deny the existence of the problem by asserting what was palpably untrue—that "the 'last hired, first fired' principle does not of itself perpetuate past discrimination"—but then betrayed its reason for denying the obvious: "To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer."[56]

Emerging from these cases is the courts' clear acceptance of the principle that employment practices that perpetuate the effects of past discrimination run counter to the purposes of the Act and should be remedied. The remedy, however, must not do violence to the limiting principles of sections 703(h) and (j), and must meet the test of business necessity by providing a suitable alternative. The determination that an employment practice violates the statute and the finding of an appropriate remedy are but opposite sides of the same coin, the coin of business necessity. If the court cannot find a suitable alternative, then it cannot

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Following this rationale in a layoff case, a last hired, first fired seniority rule will disadvantage any minority employee who might have applied for a job and been hired at an earlier date, but for the past discrimination. As to all such employees, the seniority system perpetuates the effects of past discrimination. In the *Watkins* case the court of appeals found, however, that the plaintiffs were too young to have applied for a job at the earlier date, when they might have been discriminated against. These plaintiffs were, therefore, in the same position as white workers hired contemporaneously and those minority employees in the promotion cases who were hired after the employer's discriminatory practices had ended. *See* Poplin, *supra* note 11, at 225-30. Despite the court's obvious reluctance to challenge the last hired, first fired rule, it reserved the question of the rights of the minority employees who could show that their failure to obtain earlier employment was because of exclusion of minority employees from the work force. Relying on this express reservation, a district court in the Fifth Circuit has granted relief against a last hired, first fired rule in the case of an employer who only recently had abandoned his discriminatory practices. Southbridge Plastics Div. v. Local 759, United Rubber Workers, 11 FEP Cas. 703 (N.D. Miss. 1975).

For a proposal to construct a remedy in layoff cases by recomputing individual seniority dates on the basis of when an individual minority employee could have been hired, but for past hiring discrimination, see Harvard Note, *supra* note 11. For a flat rejection of the rationale that the "affected class" entitled to protection is limited to those who could have been victims of the employer's past discrimination, see Blumrosen & Blumrosen, *supra* note 12, at 1103-04. For the Blumrosens it would be enough that the plaintiffs be members of the racial, ethnic, or sexual class previously discriminated against.

One obvious problem with the personalized theory is that it provides an employer desirous of keeping its seniority system intact an incentive for preferring young black job applicants over older ones, thus further tipping the scales against individuals who may in fact have been victims of the employer's past discrimination.

[55] 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064).

[56] 502 F.2d at 1320.

determine that the employer's practice fails to meet the test of business necessity and therefore violates Title VII. Once it is shown that an employment practice perpetuates the effect of past discrimination, the inquiry necessarily focuses on whether there is a suitable alternative to that practice which the court can appropriately order.

The courts have been unable to find a suitable alternative to the "last hired, first fired" rule for determining the order of layoff. When choices are made to determine who shall work and who shall not, all of the values of seniority are at stake; to abrogate the order of layoff defeats not only the employees' expectations of continued employment but all of their expectations of accrued values in vacations, pensions, and other benefits which increase with length of service. The courts quite understandably have been unwilling to destroy those expectations and values, particularly in the face of section 703(h), when they have no suitable alternative ordering principle. Unable to develop a satisfactory remedy, the courts have felt compelled to find that there has been no violation.

B. *"Suitable" Remedies in Promotion and Job Referral Cases*

1. The Promotion Cases

In promotion cases the courts are also confronted with a clash between the broad principle that employment practices, though neutral on their face and in their intent, cannot be allowed to perpetuate the effects of past discrimination, and the three limiting principles of sections 703(h) and (j)[57] and the business necessity test.[58] But because the discriminatory impact grows out of the special structure of seniority used, rather than the use of the seniority principle itself, and because promotion rather than layoff is involved, the courts are able to devise suitable alternatives.

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[57] 42 U.S.C. § 2000e-2(h) & (j) (1970). The courts reconciled the invalidation of seniority systems, neutral on their face and in their intent, with § 703(h) by reasoning that Congress intended to immunize only "employment seniority" and not departmental seniority. *See* Papermakers Local 189 v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968). The distinction between a departmental seniority system and an employment seniority system has no support in the legislative history. *See* Note *Seniority*, *supra* note 11, at 365.

[58] *See generally* notes 39-47 *supra* & accompanying text.

In the promotion cases the original discrimination consists of creating segregated departments and lines of progression, with blacks denied original employment in, or later promotion into, "white" departments and lines of progression. Even though discrimination in hiring and transfer have been eliminated, retention of the old departmental or line of progression seniority has the effect of continuing to bar senior black employees from the better "white" jobs, because to be eligible for those jobs, the black employees have to go to the bottom of the white progression line. The remedy ordered by the courts generally includes permitting black employees to bid on vacancies in the formerly white lines on the basis of employment rather than departmental seniority, allowing transfer with full employment seniority and wage rate retention and the right to return to one's former position if the transfer does not work out, and requiring the employer to provide training to enable black employees to fill jobs commensurate with their employment seniority.[59]

Certain characteristics of the remedy should be noted, for they underline distinctions between the promotion and layoff cases. First, the remedy does not reject but affirms the principle of seniority. The instrument of discrimination is the special form of departmental or line of progression of seniority; the remedial alternative that replaces it is employment seniority, which provides an objective ordering principle which is responsive to the sense that rights should depend on length of service and which is not disruptive of other benefits that accrue with length of service.

Second, the remedy does encroach on the expectations created by the existing seniority system. Employees in the white line of progression who expected, because of their departmental seniority, to fill vacancies in better jobs, find blacks from other departments filling those vacancies, so that expected promotions are delayed. But the encroachment is a limited one. No employee is displaced from a present job, because employment seniority can be used only to fill vacancies, not to bump incumbents out of jobs; and no employee is put on the street or deprived of other rights accumulated by length of service.[60]

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[59] *See* Gardner, *The Development of the Substantive Principles of Title VII Law: The Defendant's View*, 26 ALA. L. REV. 1, 19-42 (1973); Stacy, *supra* note 11, at 499-502.

[60] United States v. Navajo Freight Lines, Inc., 11 FEP Cas. 787 (9th Cir. 1975); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). In certain circumstances this prin-

Third, the present effects of past discrimination are not entirely eradicated. A black employee who was in a dead-end line of progression because of past discrimination is not entitled to claim a job that he would have occupied "but for" the discrimination, if that job is already filled. He has to continue in his dead-end job until a vacancy that he is qualified to fill occurs in a white line, and that vacancy may well be a less desirable job than one then held by a white employee with less employment seniority. Furthermore, the black employee is given only one opportunity to use employment seniority to bid into another line of progression, because this provides him a chance to take his "rightful place"[61] while preventing the plant from being thrown into a "chaotic game of musical chairs."[62]

Although the theory used by the courts is termed the "rightful place" theory,[63] it does not always guarantee the employee his rightful place but frequently perpetuates in some measure the effects of past discrimination. It could more accurately be entitled the "escape hatch" theory, because the courts' concern is that the minority employee not be locked into the status quo but rather that he have an opportunity to share in available promotions in the future.

Fourth, although the remedy is limited by the business necessity test, it still places a substantial burden on the employer. No employee is entitled to a job he cannot perform properly, regardless of seniority, but employers can be required to provide training programs to substitute for the training an employee would obtain in the line of progression,[64] and to pay a "red

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ciple may not be as immutable as it seems. What constitutes a "vacancy" may itself be uncertain when nonminority employees are on layoff and the jobs they previously held become available again and are to be filled by recalling laid-off workers. *See* Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); Poplin, *supra* note 11, at 208-12; Stacy, *supra* note 11, at 502-05.

[61] United States v. Hayes Int'l Corp., 456 F.2d 112, 117 (5th Cir. 1972).

[62] United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971).

[63] The theory originated in Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967), was enshrined in the judicial lexicon by Judge Wisdom in his opinion in Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), and still remains the talismanic term. *See, e.g.*, United States v. Navajo Freight Lines, Inc., 11 FEP Cas. 787 (9th Cir. 1975); United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 317-18 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3305 (U.S. Nov. 6, 1975) (No. 75-672).

[64] U.S. v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3305 (U.S. Nov. 6, 1975) (No. 75-672); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975).

circle" rate when an employee bids into the line on a job that pays a lower rate than his former job.[65] The employer cannot meet the test of business necessity by showing bad past experience with transfers,[66] morale problems of employees,[67] or union threats to strike.[68]

As noted above, the remedy ordered in the promotion cases does not wholly avoid perpetuating the effects of past discrimination, nor does it wholly avoid encroaching on expectations created by the seniority system or giving preference on the basis of race. By substituting employment seniority for departmental seniority, however, and by limiting application of the new seniority to future vacancies, the courts can utilize an alternative that significantly alleviates the effects of past discrimination, preserves seniority as an ordering principle along with its central core of values, causes a limited encroachment on expectations, and imposes a limited burden on the employer who is, after all, responsible for the past discrimination.

2. The Job Referral Cases

In the job referral cases,[69] in which unions operating hiring halls discriminate in admission to membership or referral to jobs, the clash of principles is less easy to reconcile. But those cases do not pose problems of the same dimension as layoff cases. If a court orders a union operating a hiring hall to admit members or to refer workers to jobs on a nondiscriminatory basis, it is simply ordering equal opportunity for future jobs. If a court orders a union to credit minorities for work experience outside the union when it refers workers on the basis of work experience, the remedy is substantially equivalent to replacing departmental seniority with employment seniority.[70]

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[65] Pettway v. American Cast Iron Pipe Co., 494 F.2d 398 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 375-76 (8th Cir. 1973).

[66] Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249-50 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

[67] United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

[68] Robinson v. Lorillard Corp., 44 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[69] *E.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1973); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Plumbers Local 73, 2 FEP Cas. 81 (S.D. Ind. 1969).

[70] United States v. Plumbers Local 73, 2 FEP Cas. 81 (S.D. Ind. 1969).

The more difficult problem arises when a court orders a union to observe specified quotas for admission to membership, acceptance into apprenticeship programs, or referral to jobs.[71] The primary clash is with section 703(j),[72] which the courts have brushed aside with surprising ease.[73] If the number of workers ordered by the court admitted to membership or to the referral list is no greater than the demand in the relevant industry can bear, the expectations and job opportunities of those previously employed will not be affected.[74] Whatever the court's order in a referral case, it will lack two crucial elements present in the layoff cases. First, the order will not displace an incumbent from a job presently held, but will at most affect opportunities to obtain other jobs in the future.[75] More importantly, seniority normally plays a much less significant role in hiring hall employment than in other employment, so the court order will be less disruptive of expectations and vested rights.

C. *Work Sharing as a "Suitable" Alternative to Layoff*

The precedents in the layoff and promotion cases support the use of work sharing as a remedy when layoffs on the basis of seniority would have a disproportionate adverse impact on minority group employees or women because past discrimination in hiring had relegated them to vulnerable positions on the seniority list.

Employment practices that perpetuate the effects of past discrimination, even though they are neutral on their face and in their intent, are prima facie violations of Title VII. Such practices will be enjoined if remedies are available that conform to the limiting principles of sections 703(h) and (j) and meet the

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[71] Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (membership and apprenticeship); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1973) (issuance of work permits); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (membership); United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

[72] 42 U.S.C. § 2000e-2(j) (1970).

[73] *See* Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047, 1053-54 (5th Cir. 1969); note 33 *supra*.

[74] *See* Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[75] *See* text accompanying notes 34-37 *supra*. The effect of requiring the union to admit additional minority workers into membership or to add minority workers to the referral list will be to impose on the regularly employed non-minority workers a form of work sharing with the minority workers. *See* Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971).

business necessity test of providing a suitable alternative. Because laying off on a "last hired, first fired" basis inevitably perpetuates the effects of past hiring discrimination, it should be enjoined if a suitable alternative is available.

The underlying business condition causing an employer to contemplate layoff is a lack of enough work to keep all of his employees fully employed. His first employment decision is whether to reduce the number of hours his employees work or to reduce the number of employees working. Only if he decides to reduce the number of employees rather than the number of hours is he confronted with the question of the order of layoff. The layoff cases make quite plain that when there has been past hiring discrimination, there is no method of ordering layoff that will not frustrate one or another of the purposes of the statute, either by perpetuating the effects of past discrimination or by defeating the values of seniority which Congress sought to preserve by section 703(h).

Because there is no suitable method of ordering layoff in such cases we are forced to focus on the antecedent decision to lay off; it is that decision which results in giving present effect to past hiring discrimination. When we focus on the antecedent decision to lay off, the question is whether the decision to reduce the number of employees was required by business necessity, or whether reducing the number of hours each employee worked would be a suitable alternative. This is the legal question that the decisions in the layoff cases fail to pose, much less to answer.

Work sharing, that is, reducing the number of hours each employee works, presents none of the forbidding problems associated with layoff. It eliminates the present effects of past hiring discrimination by having all employees share equally in work opportunities regardless of whether they were victims or beneficiaries of past discrimination. Because it avoids layoff, it avoids any need to recompute seniority or create "fictional" seniority. The principle of seniority as a method of making choices between employees is left intact because work sharing lets the employer avoid the need to make a choice; no junior employee moves ahead of or displaces a senior employee because all employees continue to work on the jobs to which their seniority entitles them.

Work sharing does encroach on the expectation of some senior employees that they will continue to work full-time even

when work becomes slack.[76] To the extent that their hours are reduced, that expectation is disappointed. In all other respects all the other values earned by length of service are preserved, because all employees remain employed and are able to exercise their seniority for purposes of promotion, transfer, shift preference, and other priorities, and can continue to enjoy the longer vacations, accumulated sick leave, increased pensions, and other benefits earned by past service. Work sharing's limited encroachment on expectations cannot be said, in light of the promotion cases, to be barred by the general endorsement of seniority in section 703(h).

The only substantial legal question posed by work sharing is whether requiring an employer to reduce the number of hours rather than the number of employees imposes such an added burden on him that it cannot be considered a suitable alternative under the "business necessity" test. The practicalities of various forms of work sharing will be explored in the next section,[77] but two basic propositions should be emphasized here. First, under the business necessity test, the burden should be on the employer to show there is no suitable alternative to the employment practice that has the discriminatory impact. The employer must persuade the court that no form of work sharing proposed by the plaintiff is a viable alternative.[78] Second, the business necessity test is not met by the employer's showing that the alternative imposes some added costs. In promotion cases the remedial costs are often substantial in terms of administrative burden, extra wages, training expenses, and lowered efficiency. To impose a substantial burden on the employer is not to penalize an innocent party, because it is the employer's past discrimination

[76] That expectation is not necessarily justified, because a contractual provision that layoffs shall be by inverse order of seniority only governs the order of layoff and not whether there shall be a layoff at all rather than a reduction in hours of work. Arbitrators are divided on the issue, but this seems to be the weight and trend of opinion. Only when the seniority clause is accompanied by other provisions and practices do artibrators find an implied prohibition of work sharing. Note 32 *supra* & accompanying text. If the contract contains a so-called "guaranteed work week" clause, then the expectation is justified; but many such clauses expressly permit limited work sharing by allowing reduction of the work week to 32 hours.

[77] Text accompanying notes 86-140 *infra*.

[78] Although the issue has not been completely resolved, the best approach would impose on the plaintiff the burden of going forward by proposing a reasonable alternative; but then the burden of persuasion would shift to the employer to demonstrate that the suggested alternative would be unworkable or too costly in proportion to the layoff's impact on minority employees. *See* Comment, *supra* note 47, at 113-14.

that necessitates seeking an alternative employment practice which will not perpetuate the effects of the employer's wrongful conduct.

The usefulness of focusing on the employers' decision to reduce the number of employees as the statutory violation, rather than on the use of seniority to implement that decision can be illustrated by examining the three layoff cases recently decided by the courts of appeals. In *Waters v. Wisconsin Steel Works*,[79] the employer engaged in a series of layoffs and rehires. Beginning in the fall of 1964, thirty bricklayers were laid off in what the company described as a "fundamental change" in the steelmaking process. During the next year, however, the company found that it had "underestimated" its bricklayer requirements and began recalling those it had laid off. By March of 1967 nearly all had been recalled. Two months later some employees, including the plaintiff, were laid off again in a "temporary reduction," and in August the plaintiff was recalled. Because layoffs and recalls were by seniority, a disproportionate burden of the shortage of work fell on minority employees. The court raised no question about the propriety of the employer's practice of laying off and recalling employees as prospects of available work changed; it did not require the employer to demonstrate that such a "yo-yo" staffing practice was a business necessity. If the court had asked the proper question, it might well have discovered that this management practice had no substantial justification, and that business needs could have been accommodated as well by adjusting the number of hours bricklayers worked. Because the court failed to ask this question, the answer to which might have provided the basis for an appropriate remedy, it was presented with the subsequent question of the order of layoff, which it could not answer in a way that would protect minority employees. The court found that the employer's past hiring discrimination now placed it in a "racially precarious position"[80] but never asked whether it was necessary for the employer to place himself in that position. Because the court was unable to find any alternative to seniority for determining the order of layoff, it permitted the employer to perpetuate the effects of his past hiring discrimination. The proper

[79] 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1075) (No. 74-1064).

[80] 502 F.2d at 1321.

and answerable question for the court was whether the layoff was necessary, not whether seniority was necessary for ordering an unnecessary layoff.

In *Jersey Central Power & Light Co. v. Local 327, IBEW*,[81] the company decided to lay off four hundred out of four thousand employees because of "economic considerations." The company sought a declaratory judgment as to its obligations under two contracts, one a collective agreement with the union requiring layoff by seniority and the other a conciliation agreement with the Equal Employment Opportunity Commission committing the employer to increase the number of women and minorities in its work force. Although layoff by seniority would have a disproportionate impact on minorities, the court declared that the contract did not conflict with the conciliation agreement because by its literal terms the conciliation agreement related only to hiring new employees and did not reach layoffs. The court also found no conflict with Title VII because the seniority system, being neutral on its face and in its intent, was "bona fide." The court's conclusion was to permit the employer to proceed with layoffs which wiped out all the gains in minority employment achieved by compliance with the statute and the conciliation agreement. The court reached the wrong answer because it asked the wrong question—whether the seniority system was bona fide. The antecedent question that should have been asked was whether the employment practice of laying off employees rather than sharing the work violated both the conciliation agreement and the statute when its inevitable consequence, given the seniority rule, was to decrease the number of minority employees in the work force.

Declaring the seniority rule bona fide in no way validated the decision to reduce the number of employees when the alternative of reducing the number of hours was available. The court failed to require the employer to present evidence that work sharing was not a suitable alternative, even though work sharing would have fulfilled the purposes of the conciliation agreement without any significant encroachment on the seniority provision of the collective agreement. There was no reason to believe that some form of work sharing could not have been devised which would have been suitable for the business of the employer.

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[81] 508 F.2d 687 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182).

Watkins v. United Steel Workers Local 2369[82] presents a more difficult fact situation for devising an alternative to layoff. The number of employees at Consolidated Can's Harvey plant was reduced from 410 to 152 in two years and there was little prospect of substantial recall. Sharing the work available at the Harvey plant among all Harvey employees would most likely have been impractical. Such an arrangement would not have been the only possible alternative, however, because Harvey was not Consolidated Can's only plant, and an inquiry could have been directed toward the possibility of distributing work from the other plants rather than displacing workers at one plant. To prove the business necessity for such massive layoffs at Harvey,[83] the company could have been required to show whether similar layoffs occurred at other plants making similar products, whether the shifting of production from other plants to Harvey would have been practical, and whether Harvey employees could have been transferred to other plants. It may have been that there was no practical alternative to mass layoffs at Harvey; but the district court never requested such proof. Instead, the court tried to protect the gains in minority employment by reordering layoffs with quotas drawn from separate black and white seniority lists.[84] The court of appeals properly rejected this drastic answer,[85] but never asked the right question—whether there was a business necessity for laying off workers at the Harvey plant without providing them an opportunity to transfer to other plants. The

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[82] 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975); *see* text accompanying notes 1-10 *supra*.

[83] This assumes that there was a prima facie violation of the statute. As pointed out at note 54 *supra* & accompanying text, the age of the plaintiffs foreclosed them from being possible victims of past discrimination; the employer's use of seniority for layoff therefore did not perpetuate any past discrimination as to them.

[84] There were intimations that the court was going to adopt a broader approach to remedy in Judge Cassibry's opinion of January 14 stating that the company might "utilize a larger work force, possibly with some reduction in working hours, until normal attrition reduces the work force to its most efficient level," and that "the primary burden for correcting the discrimination [should be placed on the] Company, rather than a few white employees . . . ." 369 F. Supp. at 1232. However, in the subsequent order of May 14, 1974, 8 FEP Cas. 729 (E.D. La. 1974), the court adopted the narrower quota approach, which had also been mentioned in the January 14 opinion, 369 F. Supp. at 1232. Had the district court order been upheld, the consequence would have been that the white workers would have had to bear the full brunt of their employer's prior discrimination by losing seniority rights. White workers would have been penalized under the court's remedy by having to sacrifice recall rights as well. 8 FEP Cas. at 731.

[85] 516 F.2d 41 (5th Cir. 1975).

court of appeals allowed the company to perpetuate the effects of its past hiring discrimination and deprive minority employees of their gains under the statute, without placing the burden of proving the absence of a suitable alternative on the company.

III. Practical and Administrative Aspects of Work Sharing and Other Alternatives to Layoff

In the previous sections of this Article we have argued that when a proposed layoff would have a disproportionately heavy impact on women or minority employees because of the employer's past hiring discrimination, the decision to lay off must meet the test of business necessity. The burden should be on the employer to show that there is no suitable alternative, and alternatives can be deemed suitable even though they may impose some added costs on the employer.

The purpose of this section is to explore some of the various alternatives that may be available, their usefulness and their costs, and also whether the courts are competent (in the sense of appropriateness and ability) to impose such remedies. Admittedly, the exploration here can only be preliminary, because the devices and variations on them that may be invented under the pressure of judicial action can not be foreseen; nor can the full impact of such devices be measured short of their application to concrete cases. Preliminary exploration, however, may at least serve to foster further consideration of the possibilities and problems.

A. Devices Short of Work Sharing

When an employer is confronted with the need to reduce the number of labor-hours worked, there are a number of devices which avoid layoff by seniority[86] and work sharing,[87] which

[86] Under many collective agreements temporary layoffs, which may stem from minor inventory adjustments, customer cancellations, breakdowns, or emergencies beyond the control of management, need not be in reverse order of seniority. The length of such layoffs is strictly limited, however, often to thirty days or less, and temporary layoffs cannot be used to avoid permanent layoffs in situations of a long-term reduction in the required labor force. BLS, Layoff, *supra* note 14, at 43.

[87] Restrictions on overtime might be viewed as a form of mandatory work sharing, because they require reduction of the work week to forty hours for all employees before employees of low seniority can be laid off. Restrictions on overtime, to avoid or minimize layoffs during slow periods, were found in 7% of the BLS sample, most of them in machinery (except electrical), primary metals, and apparel industries. *Id.* 8. In

can be, and often are, used. Reduction in the work force may be achieved by natural attrition, through quits, discharge for cause, retirement, or death. Some contracts require the use of attrition[88] or limitations on new hiring,[89] rather than layoffs, when reductions are necessary. Attrition may be accelerated by encouraging early retirement through supplemental pension payments.

Employees may also be encouraged to take voluntary layoffs by the existence of supplemental unemployment benefit (SUB) plans.[90] Some Auto Workers contracts provide an option for voluntary layoff in reverse order of seniority because SUB payments guarantee virtually full salary for those of long seniority.[91] Some senior employees so covered may prefer layoff to placement in comparatively undesirable or low-paying jobs.

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contrast, only 2% of the major agreements studied by BLS for the 1954-55 period contained such restrictions. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1209 ANALYSIS OF LAYOFF, RECALL AND WORKSHARING PROVISIONS IN UNION CONTRACTS 7 (March, 1957). It is not clear whether the employer's interest in being able to schedule overtime or the employees' interest in being able to work it has been the more important factor in the apparent disinclination to limit it. It may be significant that the Executive Committee of the AFL-CIO, at its meeting in February, 1975, urged Congress to require double time for all overtime work as part of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1970), "not to increase individual earnings but to reduce unemployment." The Committee noted that employers continue to schedule overtime while laying off workers "because they find it less costly." 88 LAB. REL. REP. 156. The Committee also called for restrictions on new hires, a 35-hour week to provide more jobs, and additional benefits for workers on layoff.

[88] Although attrition clauses are relatively common in the railroad industry, only a few contracts in the BLS survey contained such clauses, and they were generally limited to protect only very senior employees. BLS, LAYOFF, *supra* note 14, at 18, 19.

[89] Thirty-five percent of the contracts in the BLS sample limited or prohibited hiring during slack or layoff periods. The majority of such clauses were limited to situations of actual layoffs. *Id.* 11-13.

[90] Supplemental unemployment benefit (SUB) plans are designed to provide weekly supplements to state unemployment insurance benefits. Most plans include benefits for partial unemployment. Many SUB plans also provide moving allowances, separation pay, and health insurance coverage. As of 1963 there were 174 separate SUB plans in operation, covering 1.9 million workers, or about 25% of workers covered by major agreements. These plans are concentrated in the metal and transportation equipment industries. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-3, SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLANS AND WAGE-EMPLOYMENT GUARANTEES 4 (June, 1965). The attractiveness of voluntary layoffs has been considerably reduced, at least in some companies, by the exhaustion of SUB funds. *See* 98 BLS MONTHLY LAB. REV. 57 (July, 1975).

[91] The 1970 United Auto Workers contract with the Deere Company provides that those with ten or more years of seniority may elect to be laid off first, and that they will not be recalled until their SUB benefits expire. In Bales v. General Motors Corp., 9 FEP Cas. 234 (N.D. Cal. 1975), the court denied injunctive relief from a layoff in part because of the plaintiffs' failure to establish that "irreparable injury" would result from the layoff: Under the UAW-negotiated SUB plan the laid-off employees were to receive "approximately 95% of their takehome pay." *Id.* at 235.

These devices of accelerated attrition or induced voluntary layoffs help protect recently hired minorities and women from involuntary layoff, but they are probably not alternatives that the courts could order. The costs of the supplemental pensions and supplemental unemployment benefits are so substantial that the necessary funds must be accumulated over a long period of time as a part of the general wage package. Under the business necessity test, the burden on the employer would be greater than he could be required to bear.

Collective agreements also commonly restrict subcontracting when employees are laid off.[92] Where these restrictions exist the courts could require that they be followed to protect the jobs of recently hired minorities. A court could, on its own, impose such a restriction to avoid layoff when it would be practical for the employer to undertake the work, and the burden would be on the employer to show that subcontracting was a business necessity.

Where reductions in force are required in one of the employer's departments or plants, but vacancies exist in other departments or plants, many collective agreements require that employees be allowed to transfer and often provide for retraining periods to enable laid-off employees to fill those jobs.[93] There would seem to be no reason why a court could not order such transfers and even retraining in appropriate cases to avoid layoffs that would perpetuate the effects of past discrimination. The burden on the employer would be no more, and perhaps even less, than the burden imposed on employers in promotion cases who have to pay "red circle" rates to transferred employees and to provide them with training programs. For purposes of devising a remedy, the employer's entire enterprise, rather than the single department or plant, is the relevant entity.[94]

Although some of the devices short of work sharing, particularly interdepartmental and interplant transfers, may appropriately be ordered by the courts as alternatives to layoff, their reach is obviously limited. They are wholly inadequate to protect the employment gains of minorities against substantial reductions in force.

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[92] BLS, LAYOFF, *supra* note 14, at 9-10.

[93] Nearly a third of the 1,845 agreements in the BLS sample contained clauses specifically requiring an employer to transfer or consider transferring employees to open jobs as an alternative to layoff. Some provided a training period for employees who might not be qualified for the job at time of transfer. *Id.* 17-18.

[94] *See* note 117 *infra*.

B. *Work Sharing*

Work sharing is not a novel notion in American industry, but is one of the traditional methods of coping with reductions in available work.[95] Although its appeal has declined because of unemployment insurance and other income supplements available to laid-off employees,[96] collective agreements continue to contain provisions for distributing available work, particularly in highly seasonal and piece-work industries where layoffs might otherwise be a recurring fact of life.[97]

Work sharing devices developed by industrial practice or by collective bargaining take a variety of forms adapted to the particular needs of the industry, the production process, and the enterprise. In industries such as the garment, leather, and textile industries, where piecework systems emphasize units produced rather than hours of work, collective agreements provide for distribution of available work as a substitute for layoff.[98] All employees are thereby assured of a share of the work during slack periods. In other industries, the most common form of work sharing is reduction in the hours per shift or the number

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[95] In 1941, Sumner Slichter reported that of 388 agreements negotiated between 1923 and 1929, 28% had provisions calling for the application of seniority and 6% had provisions calling for equal division of work in the event of a need to lay off. S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 104-05 (1941) [hereinafter cited as UNION POLICIES]. Of 400 agreements negotiated between 1933 and 1939, 42% included provisions calling for the application of seniority, and 11% called for equal division of work. *Id.* 106-07. Slichter noted the large proportion of contracts that contained no restrictions on layoff and the great increase in such provisions during and after the depression. He believed that the greater frequency of seniority restrictions than work sharing provisions was attributable to the absence from his sample of agreements from the needle trades and to the prevalence of "informal arrangements . . . to divide the work down to a certain point even where the agreement provides for layoff only through seniority. Consequently, [he concluded] it is safe to say that the equal-division-of-work principle is far more prevalent than these tables seem to indicate." *Id.* 104.

[96] The "share-the-work" principle has less ready acceptance, especially among junior employees, who reason that a 32-hour week provides little more remuneration than state unemployment compensation plus negotiated supplementary benefits during a layoff. Some employees doubt whether it is worth working four days a week for only slightly more than they would receive if they did no work at all.

Similarly, senior employees question the wisdom of sharing work with their juniors when the latter can get a reasonable good week's pay without working.

SLICHTER, *supra* note 23, at 152-53.

[97] The Bureau of Labor Statistics reported in 1972 that just under 25% of the contracts in their sample, (which covered 36% of the work force) contained provisions for work sharing. BLS, LAYOFF, *supra* note 14, at 3.

[98] *Id.* 6-7.

of shifts per week. Contractual provisions for such reductions are most common in the primary metals, communications, and transportation equipment industries.[99] This form of work sharing, however, may not be workable in continuous process operations, or in service industries where the hours of operation depend on customer demand. Where business and production needs preclude division of work or reduction of hours, work can be shared by rotation of employment, with employees sharing, through rotation, the job slots to be filled. Provisions for such rotation are less common in collective agreements,[100] but employers have had substantial experience with rotation, used by itself and in conjunction with other devices.

The fact that these various work sharing devices have been institutionalized by collective agreements is evidence that at least some unions and employers find them preferable to layoff. Experience with these provisions also provides the courts with some guidance as to the range and practicality of various work sharing devices as alternatives to layoff. Before analyzing the acceptability of these devices and the burdens they may place on employers and employees, it is necessary for purposes of comparison to call attention to some of the burdens of layoff according to seniority, apart from the hardship imposed on those laid off. It is against these costs of layoff that courts must measure the suitability of work sharing as an alternative when layoffs impose the added social costs of wiping out minority gains in employment.

If an employer decides to lay off a certain proportion of his work force because of cutbacks in production he cannot, under most seniority provisions, lay off the least senior employee in each job classification or on each operation, leaving his work force otherwise undisturbed. Instead, he must lay off those with the lowest company, plant, or divisional seniority without regard

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[99] Reduction in hours clauses are by far the most common of the various work sharing devices, appearing three times as often as other methods in the BLS study. *Id.* 3.

Reduction in hours clauses generally limit the level and duration of the reduction. Thirty-two hours is the most common minimum below which reductions may not go without either further consultation with the union or layoffs. Of the 347 agreements in the BLS sample that referred to reduced hours, more than a third limited the number of weeks the reduction could continue. *Id.* 4-5.

[100] Only about 5% of the agreements containing work sharing provisions provided for rotation of employment, and it sometimes appeared as an optional procedure, alternative to reduction in hours or layoff. *Id.* 8.

to the job slots needed to be filled. This sets off a chain reaction of employee transfers from one job to another until the needed job slots are filled in accordance with seniority.[101] The number of transfers may outnumber the number of layoffs several times over. Even though employees may be able to exercise seniority only to claim jobs that they have previously performed or for which they are "qualified," their productivity will suffer for at least a time; reconstituted work groups will have to develop patterns of cooperation; and the whole production process will suffer a measure of disruption. When employees are recalled the problem of transfer, readjustment to jobs, and disruption are repeated. For the employer, a layoff according to seniority can be a complex and costly process.

Layoffs also impose burdens on many of those employees who are not laid off. Those who are required to transfer normally find themselves in lower paying, less desirable jobs which they must learn or relearn. Those who are near the bottom of the seniority list of remaining employees after the layoff feel the impending threat that soon they, too, may be on the street.

It is against this background of costs of layoff that the suitability of work sharing as an alternative under the business necessity test must be measured. For purposes of analysis it is useful to divide work sharing devices into two broad categories—those which share by reducing the employees' work week, either by division of work, shortening the work day, or reducing the days worked per week; and those which rotate employment on a weekly, monthly, or longer time period.

1. Reducing the Work Week

For the employer, there can be advantages in reducing the work week rather than laying off employees, because certain overhead costs may be reduced by having the plant open only six hours a day or four days a week. The added cost to the employer, which is common to all work sharing devices, is that he will be burdened with labor costs that relate to employees as individuals and not to the hours they work or the work they perform. Thus the costs of group medical and life insurance, and in some cases holiday pay, vacation pay, and accumulation

[101] For a glimpse into the complexity of seniority provisions, see U.S. BUREAU OF LABOR STATISTICS, DEP'T LABOR, BULL. NO. 1425-14, ADMINISTRATION OF SENIORITY (1972).

of sick leave, will remain the same regardless of whether an employee works thirty or forty hours each week.[102] The employer's obligation to cover these costs could be proportioned to the average hours worked per week, but few collective agreements do so. These added costs are relatively insubstantial, however, and should not ordinarily amount to a business necessity justification when layoffs would have a disproportionate impact on minority group employees. In such cases the burden is more appropriately placed on the employer, whose past discrimination is the source of the problem, than on the employees. If the court believed the costs to be substantial, at least holiday pay, vacation pay, and sick leave accumulation could be ordered adjusted in proportion to the work week.

The major objection to reduced work weeks comes not from the employer but from the employees, because none of the wage loss is made up by unemployment compensation. Under most state laws no unemployment benefits are paid for any week in which a person works three days or more.[103] The result is that the total income of the work group from wages and unemployment benefits is less if all employees work a reduced week than if some work full time and some are laid off. This loss to the group of employees results in a saving to the employer, because his unemployment insurance rates are generally tied to the amount of benefits collected by his employees. In some cases unions have resisted reduced work weeks initiated by an employer on the ground that the employer was trying to save unemployment insurance premiums at their expense.[104]

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[102] With respect to employees earning more than $15,000 a year and working full-time, there may also be some added costs in Social Security taxes if work is shared for a substantial portion of the year.

[103] All state unemployment benefit programs, with the exception of Montana's, extend to partial unemployment, but only when "underemployment" reaches a certain stage. Few states allow the employee to collect more in wages and benefits, however, than what would otherwise be the maximum weekly benefits for total unemployment. *See* U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 3-41 (rev. ed. Jan. 1975). Montana treats anyone who works fewer than 12 hours a week as totally unemployed. *Id.* 3-42.

[104] *See, e.g.*, Statement of the International Union of Electrical Workers (IUE) in Opposition to Government Mandated Work-Sharing (Memorandum from Paul Jennings, IUE President, to all local IUE unions, March 31, 1975). The IUE Executive Committee "vigorously opposes" the notion that "the goal of equal opportunity in employment should be achieved by requiring that employees share the available work and pay rather than [by the government's] creating more jobs." Work sharing is said to "victimize the innocent employee" and "benefit the wrongdoer" employer by lowering employee benefits, unemployment compensation contributions, overtime payments, and cost of turn-

This objection to reducing the work week could be overcome by redefining benefit rights when partial unemployment is a result of work sharing. It has been argued that employees who agree to share the burden of unemployment should be entitled to share the unemployment benefit that would have been due had some been laid off.[105] Thus if five employees share four jobs to avoid having one laid off, the five should share the amount of one full unemployment benefit. There would seem to be no authority for a federal court in a Title VII case to order state unemployment systems to pay such benefits to make work sharing a more suitable remedy, but federal legislation could impose this requirement as a minimum standard for an approved state unemployment system.[106]

The reduced work week has another disadvantage from the viewpoint of the employees because it may not give them useful added time in which to take a temporary or part-time job to replace lost income, nor may it provide the time or incentive for employees to search for other full-time jobs. Against these disadvantages for the employees, the reduced work week offers the advantage of avoiding the hardships of total unemployment such

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over. The memorandum stresses that the IUE does not oppose work sharing per se, but only government-mandated work sharing.

Union opposition to work sharing is in part a product of internal political forces. Senior employees who will remain on the job during a slack period outnumber junior employees who will not.

Moreover, rotating layoffs agreed to by the employees, or by the union on their behalf, may be treated by some states as voluntary quits without good cause, disqualifying employees from benefits. *See* Department of Labor and Indus. v. Unemployment Compensation Bd. of Review (Appeal of Lybarger), 418 Pa. 471, 211 A.2d 463 (1965) (employees laid off in work sharing plan denied benefits); Blakeslee v. Administrator, 25 Conn. Supp. 290, 203 A.2d 119 (Super. Ct. 1964) (employees agreeing to two-weeks-on, one-week-off schedule rather than layoff denied benefits for the week off); O'Donnell v. Unemployment Compensation Comm'n, 53 Del. 162, 166 A.2d 720 (Super. Ct. 1961) (employee, held to have voluntarily surrendered job in intra-union bumping agreement, denied benefits). Other states have interpreted "voluntary" more generously in terms of the underlying economic forces affecting the employees' willingness to go on layoff. *See* Employment Security Comm'n v. Doughty, 13 Ariz. App. 494, 478 P.2d 109 (Ct. App. 1970) (divorced claimant did not terminate employment voluntarily by electing to permit married son with children to retain sole employment when business had to lay off all but one employee) (dictum); Larson v. Michigan Employment Security Comm'n, 2 Mich. App. 540, 140 N.W. 2d 777 (Ct. App. 1966) (because economic pressures motivated voluntary agreement to quit, benefits awarded).

[105] Wettick, *Modifying Unemployment Compensation Acts to Remove Obstacles to Work-Sharing*, 15 LAB. L.J. 702 (1964).

[106] The Internal Revenue Code levies a payroll tax on employers and then grants a credit of up to 90% against the tax to employers who contribute to an unemployment fund under a "certified" state unemployment compensation act. A state law is certified only if it meets specified standards as to entitlement to benefits. Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-05 (1970).

as limited payments from unemployment insurance and lack of medical insurance coverage.[107]

This leads to an additional legal uncertainty. From the standpoint of the employer, the reduced work week would seem to be a suitable alternative to layoff within the "business necessity" test. Under the present unemployment insurance structure in most states, the reduced work week might even give the employer a substantial net financial gain. The primary burden would be on the group of employees because they would have reduced earnings without compensation from unemployment benefits. Until now, the business necessity test has focused on the costs to the employer, not to the employees as a group. No cases have discussed whether an employer can reject an alternative because of its prospective burden on his employees.

It would seem that an employer should be able to assert an interest in the welfare of his employees, whether that interest is prompted by economic or humane considerations. More importantly, the union should be able to object to an alternative it considers unsuitable because of the burden it places on the employees, because the union has a right to bargain about the choice of alternatives and any court order would circumscribe the choices for which the union could bargain. The court should surely consider the costs to the employees as a group, therefore, in determining the suitability of a proposed alternative to layoff. A union could reasonably argue that a reduced work week was not a suitable alternative to layoff because the loss of unemployment benefits in the amount that would have been paid to those laid off would be too substantial.[108]

Because the employees' loss of unemployment benefits gives the employer a windfall in contributions he does not have to make, the employer could properly be required to distribute that

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[107] At least some employee groups have judged these advantages to be significant. In December, 1974, employees at the Washington Star agreed voluntarily to a four-day week at a 20% salary reduction as an alternative to layoffs; any fifth-day employment was to be paid on a straight-time basis and rotated. 98 BLS MONTHLY LAB. REV. 86 (Feb., 1975). In May, 1975, the Telephone Traffic Union agreed to a similar proposal from the New York Telephone Company, as an alternative to laying off 400 operators. N.Y. Times, May 16, 1975, at 1, col. 1.

[108] Unemployment compensation benefits are determined on the basis of a percentage of weekly wages earned, commonly 50-60% during a given prior period which varies from state to state. A maximum weekly benefit is established, in most states between $95 and $100. Seventeen states have a maximum amount of more than $100 a week, and six of more than $120, including allowance for dependents. 1B CCH UNEMPLOYMENT INS. REP. ¶ 3001.

windfall to those of his employees who are placed on a reduced work week. Even so, some burden will remain on the employees, particularly if the use of a reduced work week lasts for an extended period.

2. Rotating Employment

Instead of reducing the work week, the employer can reduce the number of full-time jobs, as if he were to order a layoff, but rotate the employees filling those jobs. If, for example, an employer needed to cut back production twenty percent, he could schedule one-fifth of the employees to be off each week in rotation so that each employee would be off one week out of every five. This device can be used in continuous process operations, service industries, and other situations in which production and business needs make the reduced work week impractical.

Such job rotation on a weekly basis has a significant advantage over the reduced work week in not depriving the employee group of unemployment benefits. In most states an employee is entitled to benefits for any week in which he is totally unemployed, so that during the week an employee was scheduled off he would receive a full week's benefits.[109] In a regular layoff a constant one-fifth of the employees would receive benefits each week; in a rotating layoff a different fifth of the employees would receive benefits each week. The employees' benefits would not be barred by the common requirement of a one-week waiting period, because after an employee has served the waiting period once, during the following twelve months he is entitled to benefits for the first week of any period of unemployment.[110]

Job rotation would reduce the total amount of unemployment benefits for the group only to the extent that the waiting week would apply to all employees rather than to only one-fifth of them. But the employee group would gain if the cutback extended over a long period, because their benefits would never be exhausted. Long before any employee had received twenty-six benefit payments, his continued employement would requal-

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[109] Even rotating layoffs may be treated by some states as voluntary quits which disqualify employees from receiving benefits if the employees, or the union on their behalf, agree to the rotation. 1B CCH UNEMPLOYMENT INS. REP. ¶ 1910 (1971); *see generally* note 104 *supra*.

[110] U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 3-5, 3-6 (rev. ed. Jan. 1975).

ify him for additional weeks of benefits.[111] On the other side, the employer would gain from the increased number of waiting weeks at the outset, but if the cutback extended more than twenty-six weeks he would lose because of additional charges against his account.[112] The differences between a regular layoff and a rotating layoff in terms of unemployment benefits and costs are relatively small, however.[113] Those differences would not seem to be sufficiently substantial to meet the "business necessity" test so as to justify the insistence of the employer or the union on using a regular layoff rather than rotating employment when rotation would avoid perpetuating the effects of past discrimination.

There are other considerations to recommend rotation. Although it reduces the number of employees working at one time, it avoids the chain of employee transfers to different jobs and enables the employer to retain the same ratio of skills in his work force. For the employees, a full week off every four, five, or six weeks would give them more usable free time than reduced work weeks. Supplemented by unemployments benefits for that week, the reduction in income will, for most, be more manageable.

3. Periodic Shutdowns

A total shutdown of operations for one or more weeks at a time has the same effect in terms of sharing the work as a rotat-

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[111] To qualify for benefits, an employee must work a minimum number of weeks or earn a minimum amount of wages in the preceding calendar year, but the minimum is commonly less than 30 weeks of work or less than half the regular earnings. 1B CCH UNEMPLOYMENT INS. REP. ¶¶ 1960, 3001. Therefore, an employee who was off one week out of three would continually requalify for benefits. *See generally* G. ROCHE, ENTITLEMENT TO UNEMPLOYMENT BENEFITS 29-47 (1973).

[112] Although employees may be entitled to extended benefits during periods of recession for up to 39 additional weeks, the employer's account or merit rating is not charged beyond the basic 26 weeks. Emergency Compensation and Special Unemployment Assistance Extension Act of 1975, 26 U.S.C.A. § 3304 (Supp. Oct. 1975). *See generally*, M. MURRAY, THE DURATION OF UNEMPLOYMENT BENEFITS 27-68 (1974).

[113] This would be true in most states that use "reserve ratio" or "individual account" methods of merit rating, in which the employer's contribution rate is based on the amount paid out to his account for laid-off employees. In some states such as Connecticut, however, in which the employer's contribution rate is based on "compensable separations," a rotating layoff would multiply the number of compensable separations. This would result in an increase in contributions by employers who would not otherwise be paying at the maximum rate. 1B CCH UNEMPLOYMENT INS. REP. ¶ 1120. In most cases in which the employer's cutback was substantial enough to require use of a rotating layoff, however, his contribution rate would probably be pushed up to the maximum by a seniority layoff.

ing layoff. Depending on production needs, operations can be totally shut down every third, fourth, fifth, or sixth week. The consequences for unemployment benefits will be the same as with a rotating layoff; no employee will receive benefits for the first week, but all will receive benefits for subsequent weeks, of the shutdown. Periodic shutdowns may involve a reduction in fixed overhead costs and for that reason may be more acceptable, from the employer's point of view, than some of the work sharing devices discussed above.

4. Summary

Devices for avoiding layoff have been sketched in only their simplest forms; they are capable of nearly infinite variations and combinations. When cutbacks in production become necessary, some portion may be absorbed by early retirement or by layoff by reverse seniority to take advantage of supplemental employment benefits. An additional amount may be absorbed by reducing the work week, and a further amount by rotating employment or shutting down periodically. Different departments or operations can use different combinations of devices to meet particular production needs or employee desires. The devices need not be applied uniformly throughout the plant; they can be applied only to those departments or operations that would otherwise be affected by a layoff. On the other hand, work sharing can be distributed beyond departmental or even plant boundaries to the extent that employees or production processes are transferable.

C. *The Limits of Work Sharing*

At least in theory, work sharing devices can be used as a substitute for layoff, regardless of how extensive the layoff might be. If the cutback were fifty percent, for example, reducing the work day to four hours would be intolerable in most circumstances for the employer and employees alike. Reducing the work week to two or three days might be practical for the employer but intolerable for the employees, whose earnings and partial unemployment benefits would amount to no more than what they would receive if they did not work at all. A schedule on which all employees were to work full force every other week, however, or on which the employees were to rotate on jobs every other week, maintaining plant operations at half force, might be tolerable for the employer and acceptable to the employees as an

alternative to massive layoffs. Cutbacks even beyond fifty percent could probably be absorbed by work sharing.

There are limits, however, beyond which work sharing may not be practical for the employer or tolerable for the employees, particularly for extended periods. Those limits cannot be clearly delineated, because the employer's added costs of maintaining a large number of part-time employees on the payroll, and the consequences to employees of being tied to a part-time job, vary according to industrial and business operations and the general employment situation. Some collective agreements expressly require work sharing until the work week is reduced to thirty-two hours, a reduction of twenty-five percent.[114] Reduction beyond one-third, even with a rotation system, would seem in most situations to raise substantial objections from both employers and employees.

In considering the limits of work sharing, it is necessary to remember the continuing impact of attrition through death, retirement, and voluntary quits. As work sharing becomes more substantial, attrition will increase as employees on reduced income become more willing to retire and more energetic in seeking jobs that will provide full-time employment. Even when the cutback is permanent, the need for substantial work sharing may be relatively short term.

D. *The Competence of the Courts to Design the Remedy.*

Section 706(g)[115] of the statute "give[s] the courts wide discretion [in] exercising their equitable powers to fashion the most complete relief possible."[116] If a court finds that work sharing is a suitable alternative to layoff by seniority that perpetuates past hiring discrimination, there is ample statutory authority for the court to impose it as a remedy.[117] The question is whether the

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[114] Note 99 *supra*.

[115] 42 U.S.C. § 2000e-5(g) (Supp. III, 1973), *amending id.* (1970).

[116] 118 CONG. REC. 7168 (1972) (section-by-section analysis of the Equal Employment Opportunity Act of 1972) (introduced by Senators Williams & Javits).

[117] The language of § 706(g), 42 U.S.C. § 2000e-5(g) (Supp. III, 1973), *amending id.* (1970), tracks and expands upon § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970). Under the National Labor Relations Act employers have been ordered to reemploy employees laid off as a result of subcontracting, Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); to cease reducing stocks of merchandise and otherwise causing the business to decline and to offer reinstatement to former employees, Stiffler Stores, Inc. v. Retail Clerks Union, 218 N.L.R.B. No. 2 (1975); to offer employees jobs in other plants, Arnold Graphics Indus., Inc. v. NLRB, 505 F.2d 257

court is competent, in practical terms, to design and administer a remedy that reaches into the employer's business decisions by ordering him to distribute the available work among his employees rather than to lay some of them off.

In ordering work sharing the court's intervention in the employer's business decisions is limited. The employer remains completely free to decide the level of production or service he will maintain, the number of labor hours required to achieve that level, and the mixture of skills or tasks that will most efficiently achieve it. Work sharing does not require an employer to assign any employee to a job the employee has not previously performed, or to which he would not be entitled under the seniority provisions of the collective agreement; nor does work sharing require the employer to pay any employee other than the regular rate for the job he performs. Work sharing only restricts the employer's freedom to decide how many different employees will be used to provide the necessary labor, that is, among how many employees the amount of work the employer wants performed will be distributed; and he has available to him a variety of devices which he may use to accommodate his business needs.

Against this limited judicial intervention should be contrasted the extensive judicial involvement in the promotion cases under Title VII.[118] In promotion cases the courts must prescribe the conditions under which employees in one line of progression can bid into another line of progression,[119] how many times they can exercise that right,[120] the job level at which they can bid into the other line,[121] and the conditions under which an employer can return employees to their original jobs.[122] If the job in the other line pays at a lower rate than the original job, the employer

(6th Cir. 1974); Darlington Mfg. Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); to pay employees' expenses of moving to other plants, Royal Norton Mfg. Co., 189 N.L.R.B. No. 71 (1971); Bermuda Knitwear Corp., 120 N.L.R.B. 332 (1958); and to reinstate employees laid off discriminatorily in a production cutback, NLRB v. Midwest Hanger Co., 474 F.2d 1155 (8th Cir.), *cert. denied*, 414 U.S. 823 (1973).

[118] For a discussion of the extent of judicial intervention evidenced by the remedies awarded in the promotion cases, see Gardner, *supra* note 59.

[119] United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 560-66 (W.D.N.C. 1971).

[120] United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971).

[121] United States v. Hayes Int'l Corp., 456 F.2d 112, 117-19 (5th Cir. 1972).

[122] United States v. Jacksonville Terminal Co., 451 F.2d 418, 459 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

is required to pay the employee his former rate, which may be substantially higher than the regular rate for the job performed.[123] The court must also prescribe the length of time, or "residence," the employee must occupy in one job before being allowed to bid on a higher job in the progression,[124] and decide which jobs in the progression are functionally related and which steps can be skipped.[125] After determining promotion rights, the court must prescribe bumping and recall rights when there is a reduction in force and recall of laid off employees, and this may present problems even more complex than the promotions.[126]

The courts in the promotion cases break down established departmental seniority systems, imposing or substituting plant-wide seniority rules of their own design.[127] In addition, the courts have ordered special compensatory training programs, specifying which employees are entitled to what kind of training at what time to enable them to qualify for their "rightful place."[128]

In the hiring hall cases, court intervention has penetrated even more deeply into internal union processes and the job referral procedures established by collective agreements.[129] Unions have been ordered to admit to full membership minority workers who do not meet the admission requirements of the union constitution and to develop objective trade-related standards for admission to the union.[130] Unions have also been ordered to

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[123] United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971); United States v. Virginia Elec. & Power Co., 327 F. Supp. 1034, 1044 (E.D. Va. 1971); Griggs v. Duke Power Co., 3 FEP Cas. 129, 130 (M.D.N.C. 1970).

[124] United States v. Papermakers Local 189, 301 F. Supp. 906, 918, 920 (E.D. La.), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[125] United States v. H.K. Porter Co., 296 F. Supp. 40, 89-91 (N.D. Ala. 1968).

[126] Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1205 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Hayes Int'l Corp., 456 F.2d 112, 119 (5th Cir. 1972).

[127] United States v. United States Steel Corp., 371 F. Supp. 1045, 1056-57 (N.D. Ala. 1973), *modified*, 520 F.2d 1043 (5th Cir. 1975). An earlier portion of the decree is reported at 5 FEP Cas. 1253 (N.D. Ala. 1973).

[128] United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 309-10 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 1116 (1973); Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108, 1124-25 (N.D. Ala. 1972).

[129] Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974).

[130] Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443

determine the size of their membership objectively by reference to the number of skilled employees needed in the industry,[131] to grant a minimum number of work permits annually, and to grant those permits on a fixed ratio of black-to-white employees.[132] The courts have ordered union hiring halls to maintain separate referral lists for black and white workers,[133] required referrals to be made on a "first unemployed, first referred" basis,[134] required referrals without regard to experience under the collective agreeement,[135] established quotas for referral,[136] and otherwise comprehensively overseen the referral and hiring procedures of both unions and employers.[137] To work out the details of these remedies and to exercise continuing supervision, the courts have appointed administrators as special masters[138] and "Advisory Committees" composed of representatives from the union, the employers, minority groups, and governmental agencies.[139] These administrators and committees have collected employment data, instituted new procedures, heard and decided complaints and claims of violations, and made recommendations as to changes in the underlying decrees.[140]

F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D. Ind. 1969).

[131] Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047, 1053-55 (5th Cir. 1969); United States v. Wood Lathers Local 46, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

[132] United States v. Wood Lathers Local 46, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

[133] Vogler v. McCarty, Inc., 2 FEP Cas. 491, 495-96 (E.D. La. 1970).

[134] United States v. Ironworkers Local 86, 315 F. Supp. 1202, 1239 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Plumbers Local 73, 314 F. Supp. 160, 165 (S.D. Ind. 1969).

[135] United States v. Ironworkers Local 86, 315 F. Supp. 1202, 1236 (W.D. Wash. 1970), *aff'd*, 443 F.2d 444 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

[136] United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir. 1972), *cert. denied*, 404 U.S. 984 (1971).

[137] United States v. Wood Lathers Local 46, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 444 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Vogler v. McCarty, Inc., 2 FEP Cas. 491 (E.D. La. 1970).

[138] United States v. Steamfitters Local 638, 360 F. Supp. 979 (S.D.N.Y. 1973), *modified*, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971).

[139] United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 444 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). In United States v. United States Steel Corp., 5 FEP Cas. 1253 (N.D. Ala. 1973), an "Implementation Committee," composed of one union representative, one management representative, and one black employee selected by the court from nominees of the parties, was ordered to assist in the implementation of the court's degree. 5 FEP Cas. at 1255-56.

[140] For a discussion of the operation of these devices see Harris, *supra* note 129.

The work sharing remedy is much less complex and much less intrusive, with regard to both management and the collective agreement, than the promotion or hiring hall remedies. Work sharing leaves the seniority structure undisturbed, avoids rather than requires transfers, and does not touch the union admissions or hiring process. The primary question is which device or combination of devices of work sharing can best accommodate the needs of the employer and the employees. To answer this question the court can ask the plaintiffs, the employer, and the union to make recommendations, jointly if they can agree or separately if they cannot. When necessary, administrators or advisory committees can be named by the court to work out details and provide continuing supervision. Any agreement between an employer and union regarding work sharing should be adopted if it fully protects recently hired minorities from adverse consequences, because it has been reached by the preferred method of collective bargaining.

Without discounting the complexity of problems that may arise, or be generated by recalcitrant employers and unions, there is no reason to believe that courts will be any less capable of designing and administering work sharing procedures in layoff cases than they have been in designing and administering remedies in the promotion and hiring hall cases. Indeed, the task would seem to be much simpler.

IV. Beyond the Limits of Work Sharing

As has been argued earlier, in most situations work sharing will not impose on the employer or the employee group a burden substantial enough to justify use of layoff as a business necessity. In most cases the burdens will not even compare, in terms of disruption of established seniority systems, intrusions into management decisions, or financial costs, to those imposed by courts in promotion cases. Special situations may arise, however, in which work sharing in any form will impose unusually heavy burdens, particularly when economic conditions require permanent reductions of half or more of the work force. How heavy the burden must become to meet the test of business necessity need not, and cannot, be defined here, because the courts have not yet articulated clear standards in cases in which the test has been applied.[141]

[141] *See* note 104 *supra*. The courts have gone little further than to say that business necessity may be absent even when the costs are "not insubstantial," Jones v. Lee Way

When work sharing reaches its limits as a suitable alternative, and layoff meets the test of business necessity, then there must be some order for deciding who shall continue to work and who shall not. When that point is reached, and the collective agreement provides that the order of layoff shall be in accordance with seniority, the court has no suitable alternative to the application of contractual seniority.

Selecting employees for layoff on the basis of "merit and ability" would risk arbitrariness to which minorities and women would be particularly vulnerable without intensive policing by the court or the imposition of quotas. To make financial need a touchstone would require inquiries into marital status, family responsibility, number of wage earners in the household, and general economic circumstances. We have no accepted standards for measuring need that a court could apply to judge relative entitlement to employment.[142] Use of chronological age or even a lottery would provide a "neutral" criterion but would not respond to any social values.[143]

The values of seniority in preventing arbitrariness and enabling employees to earn more than daily wages by their work have already been stated. More than that, the prevalent use of the seniority principle in our society, particularly in the industrial community, expresses a consensus that length of service should count when choices must be made between employees.

Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). Costs resulting from strikes or threats of strikes or from loss of morale of white employees because of disappointed seniority expectations are not to be considered. *See* Comment, *supra* note 47, at 115 n.70.

[142] In many European countries such considerations are routinely factored into the layoff process, *see* R. MARTIN & R. FRYER, REDUNDANCY AND PATERNALIST CAPITALISM 112-14 (1973); and the International Labour Conference has recommended that such factors be considered in the layoff process, *see* INTERNATIONAL LABOUR OFFICE, REPORT OF THE FOURTY-SIXTH SESSION OF THE I.L.O., TERMINATION OF EMPLOYMENT (DISMISSAL AND LAYOFF) 38 (1962).

Although a few union-negotiated agreements provide special seniority protection for aged and physically handicapped workers, these provisions are considered exceptional. Only *one* of the 1,845 contracts in the BLS sample mentioned "family status" as a consideration in determining order of layoff. BLS, LAYOFF, *supra* note 14, at 34.

To the extent that such criteria were ever formally taken into account in determining order of layoffs in this country, union efforts to eliminate all potential means of employer arbitrariness soon ended the practice. Of "107 agreements negotiated between 1923 and 1929 which restricted layoffs solely by a seniority clause, 101 provided for so-called 'straight' seniority, that is, seniority not modified by ability" or other factors. UNION POLICIES, *supra* note 95, at 116. By 1960 the transition had effectively been made from "layoff by criteria to tailor-made layoff systems" based on length of service, which were entirely self-administering. SLICHTER, *supra* note 23, at 155.

[143] *See* text accompanying notes 48-49 *supra*.

Seniority reflects community values and expectations and has acquired a moral claim; to discard that standard and substitute another to determine who should be laid off would create a strong sense of injustice in the entire community. Title VII gives voice to these values; when there is no suitable alternative to layoff, the letter and spirit of Title VII counsel the court to give recognition to established seniority rules.