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LAST HIRED, FIRST FIRED LAYOFFS
AND TITLE VII

Title VII of the Civil Rights Act of 1964\(^1\) prohibits discrimination by employers, employment agencies, and labor unions on the basis of race, color, religion, sex, or national origin. Although the main focus of the Act is on the elimination of discrimination, the congressional debates indicate significant concern with the high rate of minority unemployment.\(^2\) It was thought that Title VII would tend to equalize unemployment rates for minority and nonminority workers by ensuring nondiscriminatory selection of new employees. However, in periods of economic downturn, nondiscrimination alone may not increase minority employment or promote the integration of work forces.

Due to the current recession, many employers who had only recently hired significant numbers of minority employees have been forced to lay off workers.\(^3\) Often collective bargaining agreements between the employer and the union contain a last hired, first fired clause providing that employees with least seniority be laid off first.\(^4\) The application of such a clause frequently results in the layoff of a disproportionate number of minority workers, that is, the percentage of minority workers in the group laid off exceeds their percentage in the work force. In the past two years numerous suits have been brought challenging such layoffs.\(^5\)

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\(^2\) See 110 Cong. Rec. 7204, 7222 (1964) (remarks of Senator Clark); id. at 7240 (remarks of Senator Case).
\(^3\) See N.Y. Times, Nov. 10, 1974, § 3, at 1, 5; Wall Street Journal, Nov. 5, 1974, at 1, col. 6.
\(^4\) See P-H IND. REL., UNION CONTS. ¶ 53520 (1970).
Courts have reached conflicting results on whether such layoffs violate Title VII. 6

This Note will examine whether last hired, first fired layoffs violate Title VII. In section I it is argued that principles developed in cases dealing with other aspects of seniority systems are applicable to layoffs, but that last hired, first fired layoffs discriminate against only some minority employees. A means of determining which employees are entitled to relief is proposed. In sections II and III, theories which have been suggested to justify more extensive relief are examined and rejected.

I. SENIORITY AND THE PERPETUATION OF PAST DISCRIMINATION

A. The Theory of Liability

The first case to hold that last hired, first fired layoffs violate Title VII was Watkins v. Steel Workers Local 2369. 7 In Watkins, over one-half the work force at the Continental Can Company's Harvey, Louisiana plant had been laid off under a collective bargaining agreement which provided that both layoff and recall be made on the basis of seniority. Because the company had not hired substantial numbers of blacks before 1967, all but two blacks were laid off. 8 The court properly directed its inquiry to whether the layoff was discriminatory. The court noted that the prior exclusion of blacks from the work force prevented them from acquiring sufficient seniority to avoid layoff. Applying the principle that present neutral practices which perpetuate the effects of past discrimination are prohibited, the court concluded that the use of seniority to allocate layoffs violated Title VII. 9

8 Id. at 1223-24.
9 Id. at 1225-26. The court also held, see id. at 1230, that the layoff violated 42 U.S.C. § 1981 (1970), which provides:
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Supreme Court held that 42 U.S.C. § 1982 (1970), which like § 1981 is derived from the Civil Rights Act
The court's reasoning can at most establish that the last hired, first fired layoff discriminated against some black employees—those who might have been hired earlier absent the employer's past hiring discrimination. The court did not limit relief to these blacks; rather, the court granted a remedy which benefited black employees regardless of whether they were discriminated against by the layoff. The court ordered that a certain percentage of the laid off black employees be recalled so that the racial balance of the plant would not be substantially altered by the layoff. In granting the broader remedy the court relied on cases ordering preferential hiring of minority workers. However, the court failed to consider whether the justification for remedying racial imbalance by accelerated hiring of minority workers is applicable to preserving racial balance by limiting layoffs of minority workers.

The principle that facially neutral practices which perpetuate past discrimination violate Title VII was first developed in 1866, ch. 31, 14 Stat. 27, prohibits racial discrimination in the sale or rental of housing by private individuals. The Act as interpreted was held a valid exercise of congressional power under the thirteenth amendment.

Following this lead, numerous lower courts have held that § 1981 bars racial discrimination by private employers. See, e.g., Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3rd Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970). Arguments that Title VII repealed § 1981 by implication were rejected. These cases have allowed plaintiffs to bring suit under § 1981 where some of the procedural prerequisites to a Title VII action were not met. However, the substantive law developed under Title VII has been applied in § 1981 cases. See 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); Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1231 (E.D. La. 1974), appeal docketed, No. 74-2604, 5th Cir., June 17, 1974. Divergence in the law of § 1981 and Title VII would be particularly inappropriate where the case involves the definition of discrimination and a determination of whether a practice is discriminatory.

10 See pp. 1552–54 infra.


13 See pp. 1563–70 infra.
departmental seniority and union hiring hall cases. The departmental seniority cases involved plants which had hired blacks in the past but which had maintained segregated work forces. Typically the plants were divided into separate departments or lines of progression with blacks assigned to jobs in the lower paying, less desirable departments or lines of progression. Furthermore, minorities were prohibited from transferring into the white departments. Seniority for purposes of promotion and layoff was calculated from the time the employee began to work in his department. Even when segregation of the departments was ended, black employees transferring into the formerly white departments could not carry over seniority rights accumulated prior to their transfer. Thus blacks who wished to transfer were required to accept a greater risk of layoff and a smaller likelihood of promotion than whites who had worked for the employer for a shorter time.

The first case challenging a departmental seniority system was *Quarles v. Philip Morris, Inc.*, where the court found the disparity between the opportunity of blacks and whites to obtain positions in the more desirable, formerly white departments to be discriminatory. Since white employees were assigned to these departments at the time they were first hired, their departmental seniority was approximately the same as their plant seniority, that is, their total length of service at the plant. Because black employees had been assigned only to the less desirable departments, their departmental seniority in the more desirable departments was dated only from the time of their transfer; thus they would have far less departmental than plant seniority. Since promotion was governed by departmental seniority, blacks would not be

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18 Id. at 513.

19 Id.
able to compete successfully with whites within the formerly white departments. This difference was a result of the discrimination which occurred before the effective date of Title VII rather than a result of differences in qualifications. Because the use of departmental seniority would perpetuate the past practice of preferring whites over blacks in the more desirable departments, this use of seniority was held a violation of Title VII. The court ordered that blacks hired into the formerly black departments before the employer ceased discriminatory hiring be allowed to compete for future vacancies in the more desirable departments on the basis of their plant seniority.

A similar theory has been applied in cases dealing with referral rules in craft unions which previously excluded minority tradesmen. Collective bargaining agreements in the construction trades often establish referral systems in which the unions operate hiring halls to assign tradesmen to the available jobs. The unions often classify tradesmen into priority groups for referral with first priority given to tradesmen with a certain amount of experience on jobs covered by the collective bargaining agreement. Even where blacks were eventually allowed to use the hiring halls, their prior exclusion prevented them from acquiring experience under the collective bargaining agreement. Thus they would be placed in the lower priority groups even if they had an equivalent amount of experience on nonunion jobs. Courts have uniformly held that such referral rules violate Title VII since present decisions among workers are determined by discrimination in the past. The unions were ordered to modify their referral rules so that any tradesman with the requisite amount of experience would be placed in the first priority group regardless of whether his experience was gained on union or nonunion jobs.

The legislative history of Title VII is a major obstacle to reforming seniority systems under the theory that present employment decisions based on criteria which reflect past discrimination are prohibited. Several members of Congress expressed concern that the Act would destroy seniority systems by requiring employers to attain racial balance in their work forces.

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20 Id. at 517-19.
21 Id. at 519-21.
22 See cases cited note 15 supra.
24 See, e.g., id. at 131.
25 See cases cited note 15 supra.
26 See, e.g., United States v. Sheet Metal Workers Local 32, 416 F.2d 123, 133 (8th Cir. 1969).
Porters of the Act denied that it would have this effect. Senator Clark, who with Senator Case was floor manager of Title VII in the Senate, submitted a memorandum prepared by the Department of Justice which stated that Title VII would not affect existing seniority rights. The memorandum indicated that no differences in the treatment of employees based on seniority—and in particular, last hired, first fired layoffs—could be taken to violate the Act. In addition, Senators Clark and Case prepared a memorandum which noted that the Act was prospective, not retrospective, and that employers were required only to act in the future on a nondiscriminatory basis, but not required to alter existing seniority rights.

The force of this history is not clear, however, because there are some indications that where Congress realized that nondiscrimination in the future could not be accomplished without frustrating the expectations of white employees, the goal of nondiscrimination was to prevail. The memorandum prepared by Senators Clark and Case states that seniority systems would be

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28 Id. Cong. Rec. 7207 (1964). The relevant portion of this memorandum is as follows:

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.

29 See id. Senator Clark submitted a memorandum which answered various questions concerning the Act which had been raised by Senator Dirksen. Id. at 7216-17. Among the questions and answers are:

Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

Answer. Seniority rights are in no way affected by this bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be the "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.

30 Id. at 7212-15. The relevant portion of this memorandum is as follows:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)
unaffected by Title VII but adds that an employer could not base hiring decisions on waiting lists compiled on a discriminatory basis before the effective date of the Act. However, to base employment decisions on seniority where minority employees were prevented from acquiring seniority is analogous to basing hiring decisions on length of time on a waiting list from which minority applicants were excluded. That Congress disapproved of discriminatory waiting lists, but seemed to authorize seniority systems, may indicate that Congress was insufficiently aware of the problems posed by the latter.

During the course of the Senate debates, a substitute version of the entire Act, which was eventually adopted, was introduced. Section 703(h) of the substitute bill provided that it would not be unlawful for an employer to treat his employees differently pursuant to a bona fide seniority system. Neither section 703(h), nor its legislative history, seeks to define "bona fide," leaving unclear the relationship between section 703(h) and the earlier statements in the legislative history concerning seniority. It is perhaps not unreasonable to conclude, therefore, that Congress chose to leave the resolution of the problems posed by seniority to the courts rather than codify in the Act the concerns expressed in the Senate debates.

In order to hold that the departmental seniority system in Quarles violated Title VII, the court had to deal with this legislative history. Although the legislative history appears to authorize seniority systems generally, the court noted that Congress did not appear to have considered the peculiar problem posed by

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31 Id.
33 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 . . . .
34 Senator Dirksen's remarks merely paraphrase the provision. See 110 Cong. Rec. 12818-19 (1964). Senator Humphrey noted only that the provision "does not narrow application of the title, but merely clarifies its present intent and effect." See id. at 12723. There was no other discussion of the effect of § 703(h) on seniority systems. The ambiguity of § 703(h) is heightened by the fact that different treatment of employees pursuant to a bona fide seniority system is permitted only where "such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h) (1970).
departmental seniority systems. More generally, the court argued that the legislative history was not controlling because "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." 

Hence the court concluded that a seniority system which incorporates differences between employees resulting from past discrimination is not a bona fide seniority system within the meaning of section 703(h).

In other situations where courts have found that strict adherence to the legislative history of Title VII would thwart the goal of nondiscrimination, the legislative history has been disregarded. In *Griggs v. Duke Power Co.*, the Supreme Court held that an employer may not require a high school diploma or a passing grade on an intelligence test as a condition of employment or promotion where fewer blacks than whites can meet this requirement and where possession of such qualifications is not essential to successful performance of the job. However, in order to reach this result the Court had to disregard explicit language in the legislative history stating that an employer could set his qualifications as high as he liked even if this meant that fewer blacks than whites would receive jobs or promotions.

The legislative

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37 Id.

38 Id. at 517.


40 See 110 Cong. Rec. 7213 (1964) (Clark-Case memorandum) ("An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications and he may hire, assign and promote on the basis of test performance."). Concern in the Senate about testing was prompted by a hearing examiner's decision under the Illinois Fair Employment Practices Act that an employer could not base hiring decisions on a general intelligence and aptitude test because it was obsolete and culture biased. (The decision is reprinted at 110 Cong. Rec. 5662-64 (1964)). Reaction in the Senate was uniformly adverse to this decision. See, e.g., id. at 5999-6000 (remarks of Senator Smathers); id. at 7013 (remarks of Senator Holland).

The Supreme Court read the legislative history to suggest only that Congress approved job-related tests, see Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971), drawing support for this conclusion from a memorandum submitted by Senator Case stating that Title VII preserved an employer's "right to insist that any prospective applicant . . . must meet the applicable job qualifications," 110 Cong. Rec. 7247 (1964). However, the Senate debates do not indicate that Congress drew any distinction between testing for general aptitude and intelligence and testing for job ability. Rather, the debates indicate that Congress considered general aptitude and intelligence tests proper measures of job ability. See, e.g., id. at 7014 (remarks of Senator Hill); id. at 9599-600 (1964) (remarks of Senator Fulbright). See generally Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 Va. L. Rev. 844, 852-58 (1972).
history concerning testing is clearly no less adverse to the result reached in Griggs than the legislative history dealing with seniority is to the application of the perpetuation principle to seniority systems. The example set by the Supreme Court in Griggs suggests that courts should look to how the congressional goal of nondiscrimination can best be accomplished without feeling overly constrained by statements made during the debates on Title VII.

Although the legislative history does not, therefore, control the interpretation of Title VII, the extent to which elimination of discrimination requires seniority systems to be reformed depends on the relation of past discrimination to present decision-making. Title VII was intended to operate only prospectively. Congress chose not to undo the existing allocation of employment even though discrimination may have produced that allocation. Rather, Congress sought to make a clean break with the past and ensure that in the future all employment decisions would be made on a nondiscriminatory basis. However, many rules for making choices among employees look to the employees' past. Where employment decisions are based on seniority, choices among employees are determined by the employees' past, that is, by their length of service in the unit. Consequently where seniority rules are applied without modification, the break between the past and future which Congress sought to bring about will not be achieved.

41 Although Title VII does not explicitly state that it operates only prospectively, this may be inferred from the fact that Title VII became applicable to employers of decreasing numbers of employees at successive yearly intervals. See Act §§ 701(b), (e), 42 U.S.C. §§ 2000e(b), (e) (1970). There are explicit statements in the legislative history that Title VII is not retroactive. See 110 Cong. Rec. 7213 (1964) (Clark-Case memorandum), quoted at note 30 supra; id. at 7217 (Clark memorandum), quoted at note 29 supra. The courts have uniformly concluded that Title VII is not retroactive. See, e.g., Local 189, Papermakers v. United States, 416 F.2d 980, 987 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

42 See 110 Cong. Rec. 7213 (1964) (Clark-Case memorandum), quoted at note 30 supra.

43 While many rules for making choices among employees look to the employees' past, and thus may incorporate differences affected by past discrimination, seniority rules seem particularly subject to attack on this ground. If employment opportunities are granted to those most able to perform the jobs, the employer will usually look to the employees' past to predict their ability to perform the jobs. An employment opportunity might also be granted as a reward for especially meritorious service in the past. In either case, one looks to the past because the content of the past is relevant to the standard used in granting the opportunity. Seniority rules are past-oriented in a different sense. Seniority rules base employment decisions not on the content of the past but on the mere passage of time in the relevant unit. Where minority employees have been excluded from the unit they will be deprived of present and future opportunities. However, this deprivation is not due to the fact that they were prevented from acquiring necessary qualifications but only because they were denied jobs in the past.
To effectuate the congressional purpose of ensuring nondiscriminatory employment decisions, differences among employees which are the result of past discrimination must not be allowed to determine present decisions. This requires that an attempt be made to determine what a minority employee's seniority would have been absent discrimination against him. Thus, in the departmental seniority cases had there been no segregation of departments in the past, blacks would have been assigned to the formerly white departments at the time they were first hired. Had this been done, their departmental seniority in the more desirable departments would have been approximately equal to their plant seniority. Allowing blacks to use full plant seniority once they have transferred into formerly white departments enables them to compete effectively with white employees in that department; therefore decisions will no longer incorporate differences between employees based on discrimination in the past. This approach does not compensate black employees for the years spent in the less desirable jobs to which they were assigned because of their race, but allows them to compete for more desirable jobs in the future.

Even if there had been no segregation of departments, some black employees would presumably have been assigned to the less desirable jobs. Thus, allowing all blacks to transfer and carry over seniority may place some of the black employees in better positions than they would have held even if there had been no discrimination in the past. However, there is no way to determine which black employees would have been assigned to the less desirable departments. Courts have properly preferred to tolerate some overinclusiveness in the definition of the class of black employees to be benefitted by the decrees since this is necessary to afford full relief for the discrimination which has occurred. See, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652, 660 (2d Cir. 1971).

Although the departmental seniority cases deal principally with promotions and transfers, the analysis has also been applied in situations where revision of the seniority system results in the layoff of incumbent nonminority employees. In Guthrie v. Colonial Bakery Co., 6 Fair Empl. Prac. Cas. 662 (N.D. Ga. 1973), the employer had limited women to the lowest paying jobs in a single department. The employer then discontinued operations in this department. Under the departmental seniority system in effect at the plant, the female workers were not allowed to use plant seniority to bump into other departments. Thus all of the women were laid off while many male employees with less plant seniority were retained. The district court held the departmental seniority system unlawful, and ordered that the laid off female employees be recalled, displacing male employees with less plant seniority. See also United States v. Jacksonville Terminal Co., 6 Empl. Prac. Dec. ¶ 8829 (M.D. Fla. 1973) (minority employees who had transferred to more desirable jobs pursuant to court order holding departmental seniority system unlawful allowed to use full plant seniority to bump junior employees when jobs to which they had transferred were abolished).

Prohibiting present and future decisions from incorporating differences which are the result of past discrimination does not redress deprivations suffered in the
The approach to seniority developed in the departmental seniority cases can also be used in layoff cases where the employer's past discrimination against minorities often consisted of their total exclusion from the work force prior to the effective date of Title VII. In such a situation, layoff decisions based on the last hired, first fired principle turn on a qualification, length of service in the plant, which the employer's past discrimination has prevented some minority workers from acquiring. Had the employer not discriminated, some of the current minority employees could have been hired earlier and would, therefore, have accrued sufficient seniority to avoid layoff. Just as departmental seniority systems perpetuate the past segregation of the plant, last hired, first fired layoffs perpetuate the past exclusion of minority workers from the plant. However, since Title VII requires only that decisions among employees not be determined by discrimination in the past, a last hired, first fired layoff discriminates only against those present minority employees who could have been hired earlier absent discrimination.

While the perpetuation principle developed in the departmental seniority cases therefore seems applicable to layoff cases, there is language in some of the departmental seniority cases suggesting that the principle cannot be so applied. In Local r89, Papermakers v. United States the Fifth Circuit concluded that the legislative history insulating seniority systems applied to plant seniority but not to departmental seniority. The court said that an employee who was denied a job because of his race could not, if later hired, claim to have greater seniority than white employees hired after his original rejection. In explaining this assertion, the court noted that

It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs.

Thus, the distinction drawn is that it is permissible to grant full credit to earned seniority but it is impermissible to grant fictional seniority for the time the employee was prevented from working because of the employer's discrimination.

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48 Id. at 987-88, 994-95.
49 Id. at 994.
50 Id. at 995 (emphasis in original).
51 The distinction between earned and fictional seniority has been rejected by
The distinction between earned and fictional seniority seems to respond to a moral perception that it is improper to grant seniority credit to one who did not work to acquire it. Such a distinction might seem justified if the comparison were between two persons both of whom could have worked, but one of whom did not. However, where minority applicants were refused jobs and thus prevented from acquiring seniority in the usual manner, no fault can attach to their failure to do so. It seems anomalous to hold that the seniority of minority workers subjected to partial discrimination, that is, those who were hired but assigned to less desirable jobs, must be recomputed but that the seniority of minority workers who were entirely excluded from the work force cannot be recomputed.52

The Local 189 court's characterization of the relief in the departmental seniority cases as giving full credit to minority employees' earned seniority is somewhat misleading. The relief in the departmental seniority cases is designed to eliminate from the Equal Employment Opportunity Commission (EEOC). See EEOC Decision No. 71-1447, 3 Fair Empl. Pract. Cas. 391 (1971). The EEOC ruled that an employer could not base promotions on seniority where some of his black employees had been prevented from acquiring seniority by the employer's past hiring discrimination. The EEOC rejected the position taken in Local 189, arguing that it would be improper to grant relief to those subjected to partial discrimination (by assignment to less desirable jobs) but not to those subjected to complete discrimination (by exclusion from all jobs). See id. at 393 & n.70.

52 The earned-fictional distinction was a significant factor in leading the first court of appeals faced with the issue to conclude that last hired, first fired layoffs do not violate Title VII. See Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1319-20 (7th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064). Furthermore the Fifth Circuit, relying solely on the earned-fictional distinction, ruled that application date seniority may not be awarded as a remedy to blacks who applied for jobs and were rejected because of their race. See Franks v. Bowman Transp. Co., 495 F.2d 398, 417-18 (5th Cir. 1974), cert. granted, 43 U.S.L.W. 3510 (U.S. March 24, 1975) (No. 74-728).

Other cases have required modification of seniority systems or enjoined the use of seniority altogether where minority employees were prevented from acquiring seniority by past hiring discrimination. In a number of cases brought under the fourteenth amendment and 42 U.S.C. §§ 1981, 1983 (1970), the use of seniority in awarding promotions in police and fire departments was held unlawful because past exclusion of minorities from the forces prevented them from acquiring seniority. See Afro-American Patrolmen's League v. Duck, 8 Fair Empl. Pract. Cas. 1124 (6th Cir. Sept. 26, 1974); Shield Club v. City of Cleveland, 8 Empl. Pract. Dec. § 9606 (N.D. Ohio July 6, 1974); Harper v. Mayor & City Council of Baltimore, 359 F. Supp. 1187 (D. Md.), modified on other grounds and aff'd sub nom. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971), aff'd per curiam, 446 F.2d 122 (5th Cir. 1972), cert. denied, 407 U.S. 909 (1973). See also Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972) (employer's attempt to justify failure to promote blacks on basis of their lack of experience rejected where blacks could not gain experience because of prior hiring discrimination).
present and future decisions the effects of past discrimination. The mechanism for granting such relief is best seen as an attempt to recompute black employees' seniority as if they had not been excluded from the more desirable departments. Plant seniority can be used for this purpose not because this is the seniority which black employees have earned, but because plant seniority is a convenient approximation of what the black employees' departmental seniority would have been absent discrimination in the past. Thus seen, the effort in departmental seniority cases is precisely to grant fictional seniority — the seniority which black employees would have had if they had initially been assigned to the more desirable departments.

The contrast between earned and fictional seniority, therefore, cannot be used to distinguish departmental from plant seniority systems. Thus the Local 189 court's use of that distinction to infer that the legislative history concerning seniority insulated plant but not departmental seniority systems from the reach of Title VII is also invalid. Departmental and plant seniority systems present the same problem — present and future employment decisions cannot be made on a nondiscriminatory basis without disturbing the expectations of incumbent white employees. Since nothing in the Act suggests that Congress intended to distinguish between these two types of seniority systems, their status under the Act should be the same.

Last hired, first fired layoffs discriminate against those employees who would have been hired earlier and thus would have acquired sufficient seniority to withstand layoff absent the discrimination in the past. The legislative history of Title VII does not preclude modification of seniority as a remedy for those discriminated against in this way. In order to avoid the discrimina-

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53 Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973), illustrates that relief in departmental seniority cases is designed to recompute minority workers' seniority as if there had not been past discrimination. The case involved a departmental seniority system in the trucking industry. Blacks had been hired only as city drivers and were not allowed to transfer to better paying jobs as over-the-road drivers without losing seniority earned as city drivers. The court noted that the employer had required one year of driving experience for appointment to road driver positions. Seniority thus could not be dated as of the time the employee was first hired as a city driver since he may not have been qualified as a road driver at that time. The court ordered that transferees be granted seniority dated as of the time they became eligible by reason of experience to transfer to road driver positions provided the employer was hiring over-the-road drivers at that time. This is the seniority they would have had absent discrimination in the past.

tory effects of layoffs, seniority must be recomputed as if the past discrimination had not occurred.

B. Constructing a Remedy

Implementation of a remedy under the perpetuation theory of Title VII requires that a class of employees who are discriminated against by the layoff be defined. The class should include only those current minority employees who could have been hired earlier absent discrimination. Furthermore, a method of recomputing seniority of class members must be devised.

The simplest case for creating such a remedy is that of a minority employee who was previously rejected for a job because of his race. Where the date of his previous application is known, his seniority could be recomputed as of that time. Without recomputation, a last hired, first fired layoff clearly discriminates against such a person for, absent discrimination, he would have begun to accrue seniority at the time of his application.

The person who applied and was discriminatorily rejected may, however, be the unusual case, since the fact that an employer refused to hire minority workers may have dissuaded these workers from making futile applications. Persons who were dissuaded from applying by the employer’s reputation are discriminated against just as much by the layoff as those who actually applied and were rejected. That the fact of application is irrelevant in determining the membership of the class to be remedied has been recognized in numerous cases.55 In the first cases challenging union referral rules, for example, evidence was introduced showing that there were specific qualified tradesmen in the area who sought to use the hiring hall and were refused referral because of their race.56 In such cases, the remedy ordered was that these

55 In Bing v. Roadway Express Inc., 485 F.2d 441 (5th Cir. 1973), a departmental seniority case, the defendant argued that minority employees should be granted seniority only from the time that they applied for transfer and were rejected because of their race. The court stated that the defendant’s argument “fails to account for the realities of entrenched employment discrimination. If an employee realizes full well that blacks simply are not hired [for positions in the more desirable department], why should he bother to apply?” Id. at 451; accord, Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 63-64 (5th Cir. 1974); cf. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971) (fact that minority workers have not applied for jobs does not rebut inference of discrimination since it is probable that minority workers knew they would not be hired); Cypress v. Newport News News Gen. & Nonsectarian Hospital Ass’n, 375 F.2d 648, 653 (4th Cir. 1967) (same); Lea v. Cone Mills Corp., 302 F. Supp. 97, 102 (M.D.N.C. 1969), aff’d in pertinent part, 438 F.2d 86 (4th Cir. 1971) (same). Contra Thornton v. East Texas Motor Freight, 497 F.2d 416, 421 (6th Cir. 1974).

specific persons be offered immediate referral. In *United States v. Sheet Metal Workers Local 36* the court went further and granted relief even though there had been no showing that particular persons had applied for and been refused referral. The court observed that, where there were qualified black tradesmen in the area who were aware that the union would not allow blacks to use the hiring hall, it would be unrealistic to expect blacks to apply for referral. The union was ordered to place all qualified black tradesmen with the necessary amount of experience in the first priority group regardless of whether they had previously applied for referral. Thus, there is precedent for including in the class of current minority employees who are discriminated against by last hired, first fired layoffs not only those who previously applied, but also those who never applied but could have been hired earlier if the employer had not discriminated.

The first criterion to be used in defining this class is the age of the current minority employees. The largest possible class includes only those who are old enough to have been in the job market at the time of the employer's past discrimination. Those young minority workers who are recent entrants into the labor market should not be included since they could not have been hired during the period of discriminatory hiring. A second criterion is the residence of the current minority employees. Only those who were living in the area at the time of discriminatory hiring should be included since only they could have been hired earlier. The use of these two criteria should not pose difficult problems of proof and will define the group of current minority workers who, but for the discrimination in the past, would have been hired by the employer.

Age and residence would not seem to limit adequately the class to those who could have been hired earlier if some of the employees did not possess adequate skills for the job at the earlier time or if some of them had equivalent or better jobs at that time. In either of these circumstances, the layoff would not discriminate against them since they would not have been hired earlier.

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57 See, e.g., *id.* at 450–51.
58 416 F.2d 223 (8th Cir. 1969).
59 *Id.* at 131–32.
60 *Id.* at 133.
61 The relevant area should be defined as the area from which the employer's work force was drawn at the time of the past discrimination.
62 It is true that the present minority employees may not be the specific persons who would have been hired earlier absent discrimination. However, since the present minority employees were eventually hired, it is not unreasonable to assume that they would have been hired earlier but for their race. Toleration of this degree of imprecision is necessary if adequate relief is to be granted. The same approach has been adopted in departmental seniority cases. See note 45 supra.
even if the employer had not been hiring on a discriminatory basis. Except in special circumstances, the group of current employees is unlikely to include such persons. Since in many industrial plants, employees are initially hired for unskilled entry level positions and receive on the job training, the level of qualifications necessary for initial hiring will often be very low. Only where the jobs require special skills not possessed by most workers is it necessary to require some indication that the current employees also possessed these skills at the earlier time. Persons who held equivalent or better jobs at the time of the discriminatory hiring are also generally unlikely to be included in the class. Since an employee would be unlikely to leave one job for another unless he were moving to a better job, such persons will be in the group only where a plant offering better jobs has closed down or laid off workers. Where this may have happened, an examination of the workers' employment history would be necessary to define more precisely the group to be remedied. Since neither of these circumstances are sufficiently likely to warrant modification of the class, it will generally be proper to define the class by age and residence alone.

Having defined the class of present minority employees to be benefitted by the decree, a mechanism for recomputing the seniority of class members must be devised. Since the class will include persons who did not apply for jobs during the period of discriminatory hiring, seniority cannot be computed from the date of application. An attempt might be made to determine when class members might have applied absent discrimination, but this is likely to be very difficult. Considerations of administrative convenience suggest that it would be preferable to recompute the seniority of the members of the class on the basis of age. Seniority credit could be awarded such that class members would have seniority equal to the average seniority of nonminority workers of the same age. This approach will closely approximate the

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64 Since an employee who changes employers must forfeit seniority rights built up at his previous plant and begin anew at the bottom of the seniority roster in the new plant the burden of changing jobs is very great.

65 Because it is generally unlikely that the use of ability or employment history data would significantly alter the class, the burden should be on the defendant to put in issue the relevance of this data for definition of the class. Once the employer has shown that he required a significant level of skill for entry level positions, the burden should shift back to the plaintiff to show that he met that requirement at a prior date. However, since it is inherently unlikely that the plaintiff switched from a better job to his present job, the burden should be on the defendant to establish this.

66 Cf. Cooper & Sobol, supra note 35, at 1636 (suggesting age-seniority computation for purpose of promotion).
seniority which minority employees would have had absent the discrimination in the past since it is reasonable to assume that absent such discrimination class members would have been hired at the same time as nonminority workers of the same age.\textsuperscript{67} Once seniority has been recomputed for class members the layoff will not be discriminatory if based on the last hired, first fired principle.\textsuperscript{68}

II. THE APPLICATION OF \textit{Griggs v. Duke Power Co.} TO LAYOFF CASES

In \textit{Watkins v. Steel Workers Local 2369},\textsuperscript{69} the court found that the last hired, first fired layoff was discriminatory because it perpetuated the effects of past discrimination. While this analysis established discrimination only against some blacks,\textsuperscript{70} the court granted a remedy which benefitted black employees regardless of whether they were discriminated against by the layoff.\textsuperscript{71} However,\textsuperscript{67} If this approach is adopted, it should also be applied to class members who did apply for jobs during the period of discriminatory hiring for reasons of administrative convenience and to avoid inequitable treatment of different members of the class. Furthermore, where it was well known that the employer was discriminating, the date of actual application may be an inaccurate measure of when application would have been made absent discrimination.

\textsuperscript{68} Where the layoff is extensive some of the class members may be laid off even if their seniority is recomputed. In some situations it may be possible to grant a remedy to class members without displacing incumbent nonminority workers. In \textit{Watkins v. Steel Workers Local 2369}, 8 Fair Empl. Prac. Cas. 729 (E.D. La. May 14, 1974), supplementing 369 F. Supp. 1221 (E.D. La. 1974), \textit{appeal docketed}, No. 74-2604, 5th Cir., June 17, 1974, the court ordered that a percentage of the laid off black employees be reinstated and that no additional white employees be laid off. Available work was to be shared and all employees were to receive a full week's pay. \textit{See id.} at 730-31. Similarly, a court could allow the layoff of only those minority workers who would be laid off if recomputed seniority were used and only those nonminority workers who would be laid off if normal seniority were used. This procedure has the advantage of placing the burden of rectifying the discrimination on the employer rather than on other employees. This procedure will be practicable only where the employer is financially able to bear the cost of retaining a larger work force. In a case such as \textit{Watkins} where the plant involved is just one plant of a larger corporation, it is likely that this procedure can be followed without jeopardizing the solvency of the company. The layoff in \textit{Watkins} began in 1971 and continued through 1973. \textit{See Watkins v. Steel Workers Local 2369}, 369 F. Supp. 1221, 1224 (E.D. La. 1974), \textit{appeal docketed}, No. 74-2604, 5th Cir., June 17, 1974. The employer, Continental Can Company, reported earnings of $72,931,000 in 1971, $80,807,000 in 1972, and $95,169,000 in 1973. A dividend of $1.60 per share was paid in each of these years. \textit{See 1973 Continental Can Co., Inc. Annual Report.} \textsuperscript{69} 369 F. Supp. 1221 (E.D. La. 1974), \textit{appeal docketed}, No. 74-2604, 5th Cir., June 17, 1974. \textit{See pp. 1545-46 supra.} \textsuperscript{70} \textit{See pp. 1552-54 supra.} \textsuperscript{71} \textit{See Watkins v. Steel Workers Local 2369}, 8 Fair Empl. Prac. Cas. 729 (E.D.
an alternative theory seeking to justify a broad remedy in layoff cases has been advanced by the Equal Employment Opportunity Commission (EEOC). The EEOC has argued on the basis of Griggs v. Duke Power Co. that any employment practice which has a disparate impact on minority workers violates Title VII unless the practice "is sufficiently job-related to be justified by business necessity." While the Supreme Court in Griggs used this form of analysis to invalidate the use of a high school diploma and general intelligence test requirement for hiring and promotion, the application of this analysis to seniority layoffs is problematic.

Under Griggs if it is found that an employment practice has a disparate impact on minority workers, a close examination of the criteria upon which the practice is based is required. Where such an examination reveals that the criteria used do not accurately reflect permissible grounds for making the employment decision, that decision is discriminatory. Thus in Griggs, use of tests and high school diplomas as hiring criteria was held unlawful only because such criteria did not accurately measure job ability, the only permissible grounds for hiring decisions identified by the Court. The Court derived its conclusion that job ability was the only permissible criterion for hiring decisions from its reading of Title VII, however it did not consider which criteria are per-
missible for other employment decisions.\textsuperscript{79} Nothing in Title VII suggests that layoffs must be governed by job ability; in fact, Congress appears to have authorized the use of seniority to allocate layoffs.\textsuperscript{80} Therefore, layoffs need not be justified under a job-relatedness test, since such a standard is relevant only where job ability is the sole permissible criterion.

Section 703 (h) of Title VII,\textsuperscript{81} which authorizes the use of bona fide seniority systems, is also an impediment to the EEOC's interpretation of \textit{Griggs} as invalidating last hired, first fired layoffs. To meet this objection, the EEOC has argued\textsuperscript{82} that a seniority system which perpetuates the effects of past discrimination is not bona fide. Thus where minority workers were prevented from acquiring seniority by their prior exclusion from the work force, the EEOC has concluded that seniority may not be used to allocate layoffs and that some procedure must be devised which does not have a disparate impact on minority workers.\textsuperscript{83}

Since only some minority workers were prevented from acquiring seniority, the seniority system could be rendered bona fide by recomputing the seniority of these employees.\textsuperscript{84} If, as the EEOC has argued, disparate impact is the discrimination to be remedied, rather than actual discrimination against identifiable employees, then the resulting invalidation of seniority, while not required by the Act, is not inconsistent with the EEOC's approach. Hence, the EEOC's approach might lead to broad relief in a case such as \textit{Watkins}. However, the EEOC's assumption that any employment decision that has a disparate impact on minority

measure job qualifications, however defined, and exclude a disproportionate number of minority applicants.

\textsuperscript{79} While there is language in \textit{Griggs} suggesting broad application of the job ability standard, see 401 U.S. at 431 ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). the Court was considering only test and high school diploma requirements for hiring and promotion. The problems presented by the use of other criteria for different types of employment decisions were not before the Court.

\textit{Cf.} 85 \textit{Harv. L. Rev.} 1482, 1485-87 (1972) which suggests that in applying the \textit{Griggs} case to a company rule that employees would be discharged if garnishments were often made on their wages, the \textit{job} ability criterion is inappropriate. \textit{Id.} at 1486.

\textsuperscript{80} See pp. 1548-50 & notes 27-33 \textit{supra}.

\textsuperscript{81} 42 U.S.C. § 2000-2(h) (1970), quoted at note 33 \textit{supra}.


\textsuperscript{83} See Briefs cited note 82 \textit{supra}.

\textsuperscript{84} See pp. 1557-60 \textit{supra}.
workers violates Title VII unless the decision is based on job ability, is an unwarranted extension of the Griggs holding.

III. LAYOFFS AND THE USE OF REMEDIES TO MAINTAIN RACIAL BALANCE

In Watkins, the court concluded that the last hired, first fired layoff violated Title VII and ordered that a percentage of the black employees laid off be recalled. The percentage was not based on the number of the present black employees who might have been hired earlier. Furthermore, no attempt was made to ensure that the recalled blacks were those who were discriminated against by the layoff. Such relief is designed not to ensure that the seniority system operates in a nondiscriminatory manner, but rather to ensure that there will continue to be black workers at the plant.

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85 See Watkins v. Steel Workers Local 2369, 8 Fair Empl. Prac. Cas. 729 (E.D. La. May 14, 1974), supplementing 360 F. Supp. 1221 (E.D. La. 1974), appeal docketed, No. 74-2604, 5th Cir., June 17, 1974. The percentage of the black employees to be reinstated was to equal the percentage of the original work force which remained after the layoff. Id. at 730. Since the court ordered that no incumbent employees be laid off at the time of the reinstatements, see id. at 731, the racial composition of the work force would be slightly changed by the layoff. Work was to be shared among the entire work force and all employees were to receive a full week’s pay regardless of the number of hours actually worked. Id. The court limited relief to nonprobationary employees, see id. at 730–31, with the result that only seven black employees were ordered to be reinstated, see Brief for Appellees at 38, Watkins v. Steel Workers Local 2369, No. 74–2604, 5th Cir., June 17, 1974.

Other courts which have ordered remedies for last hired, first fired layoffs have also limited the number of minority employees who may be laid off to a certain percentage of the work force. In Jersey Central Power & Light Co. v. IBEW, 8 Fair Empl. Prac. Cas. 690 (D.N.J. Sept. 5, 1974), supplemented, 8 Fair Empl. Prac. Cas. 959 (D.N.J. Sept. 23, 1974), vacated and remanded, Lab. Rel. Rep. (9 Fair Empl. Prac. Cas.) 117 (3rd Cir. Jan. 30, 1975), the district court ordered that layoffs be allocated on the basis of the proportion of minority and nonminority employees in the work force before the layoff. In Loy v. City of Cleveland, 8 Fair Empl. Prac. Cas. 614 (N.D. Ohio March 29, 1974), dismissed as moot, 8 Fair Empl. Prac. Cas. 617 (N.D. Ohio June 4, 1974), the court ordered that the percentage of women in the group laid off be limited to the percentage of women in the group hired during the previous year.

86 The remedy ordered in Watkins cannot be justified as a matter of administrative convenience. Considerations of administrative convenience may justify toleration of a certain degree of imprecision in the definition of the class to be remedied, but the Watkins order abandons entirely any attempt to limit relief to those individuals who were discriminated against by the layoff.

87 The Watkins court impliedly recognized this.

[1] In this case, the relief ordered by the Court will not be designed to compensate the blacks who were not hired by the company between 1945 and 1965. It will be designed to insure that, because the Company hired no
The *Watkins* court found support for its remedy in cases ordering preferential hiring quotas. In *Rios v. Steamfitters Local 638*, a construction union was found to have discriminated against nonwhites by refusing them membership in the union, discriminating in referral, and participating in a discriminatory apprenticeship program. These discriminatory practices continued through the time of the suit. The Second Circuit affirmed the district court’s order that the union be required to admit enough minority workers into the union and its apprenticeship program so that by 1977 minority representation in the union would approximate the percentage of minorities in the labor force. The court justified such relief on the grounds that once a violation of Title VII is established courts have broad equitable power not only to ensure nondiscrimination in the future but also to eradicate the effects of discrimination in the past.

Preferential hiring quotas are not remedies for discriminatory practices in the usual sense in which a court remedies a wrong by blacks for twenty years, the plant will not operate without black employees for the next decade. *Watkins v. Steel Workers Local 2369*, 369 F. Supp. 1221, 1231 (E.D. La. 1974), *appeal docketed*, No. 74-2604, 5th Cir., June 17, 1974.

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88 See p. 1546 & note 12 supra.

89 See *Watkins* at 1221.

90 See *Rios* F.2d 622 (2d Cir. 1974). This opinion was handed down after *Watkins* was decided. *Rios* is discussed herein as an example of the line of cases on which *Watkins* relied because the Second Circuit’s opinion is one of the clearest statements of the argument in such cases.

91 See id. at 625-27, 632-33. The Second Circuit remanded the case for redetermination of the percentage of minority members the union was to achieve. *Id.* at 633.


It should be noted that the courts’ use of the phrase “effects of past discrimination” is unrelated to the principle developed in departmental seniority cases that present neutral practices which perpetuate the effects of past discrimination violate the Act. The perpetuation principle is designed to ensure that present and future decisions among employees will not be determined by differences among them which are the result of past discrimination. The application of this principle will only ensure nondiscrimination in the future; no attempt is made to alter the racial composition of the work force caused by past discrimination. The “effects of past discrimination” referred to in preferential hiring cases can only be the racial imbalance of the work force or union. The courts are seeking not merely to ensure nondiscriminatory selection of employees in the future but also to speed up the integration of the work force or union by requiring minority workers to be hired in numbers greater than would result from future nondiscriminatory selection.
Making whole the persons who were harmed. The individual victims of the discriminatory practices will rarely and only by chance be the beneficiaries of hiring quotas. Moreover, the burden of such relief falls not on those who are responsible for the discrimination but on nonminority applicants. Preferential hiring quotas are remedial only in the sense that they seek to correct the racial imbalance caused by past discrimination. Thus, where preferential hiring quotas are ordered, the courts are making implicit judgments that integration of work forces should proceed more rapidly than is possible through nondiscriminatory hiring.\textsuperscript{94}

The willingness of the courts to issue decrees in hiring cases designed to ensure the rapid integration of work forces may suggest that layoff cases should be treated similarly.\textsuperscript{95} Where employers have only recently begun to hire substantial numbers of minority workers, last hired, first fired layoffs will largely undo the progress made toward integration of the work forces. While the policy of ensuring rapid integration of work forces may be applicable to layoff as well as hiring cases, the question remains whether the occurrence of a last hired, first fired layoff which exacerbates racial imbalance is, by itself, a sufficient reason for imposing broad relief.\textsuperscript{96}

The legal foundations of granting broad relief have not been elaborated with any precision. At the outset, the granting of preferential quotas to minority members must contend with section 703(j) of Title VII which appears to prohibit quotas.\textsuperscript{97} Courts


\textsuperscript{95}A decree designed to maintain an integrated work force by limiting layoffs of minority employees will have a significant adverse impact on incumbent non-minority employees. Nonminority employees who would otherwise have retained their jobs will have to be laid off. However, the impact of such a decree differs only in degree from the impact of a hiring quota which diminishes the job opportunities of nonminority applicants.

\textsuperscript{96}Where an employer has continued the discriminatory practices which produced the racial imbalance in his work force, the courts may have reason to limit the number of minority employees who may be laid off. If the scope and nature of the violations established are such that the court would feel justified in ordering preferential hiring, the court could also limit the percentage of minority workers to be laid off. In such a situation, the layoff rules would be altered not because the last hired, first fired layoff is discriminatory. Rather the court, having determined to ensure the racial balance of the work force, would be using limitations on layoffs as a means of effecting racial balance much as preferential hiring quotas are used for that purpose.

\textsuperscript{97}42 U.S.C. § 2000e-2(j) (1970). This section provides that:

\begin{quote}
Nothing contained in this subchapter shall be interpreted to require an employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color,
have characterized section 703(j), however, as a prohibition against finding a violation of Title VII where there is racial imbalance without identifiable discrimination. But, where imbalance results from discriminatory practices, courts have not read section 703(j) as an impediment to ordering preferential hiring quotas.\(^\text{98}\) The distinction between imbalance itself and imbalance caused by discrimination is not clear;\(^\text{99}\) nor have courts articulated limitations on the types of violation needed to invoke broad equitable relief. Nonetheless, the analysis courts have employed seems to require some nexus between the type of violation and the grant of broad relief.\(^\text{100}\) As the Supreme Court has noted, in

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\(^{98}\) See United States v. Lathers Local 46, 471 F.2d 408, 473 (2d Cir.), cert. denied, 472 U.S. 939 (1983) ("[W]hile quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not."); accord, Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974); Rios v. Steamfitters Local 638, 501 F.2d 622, 630-31 (2d Cir. 1974). As a matter of statutory interpretation this is hardly persuasive; however, support for this interpretation can be found in the legislative history of the 1972 amendments to Title VII. An amendment to strengthen the antipreference provision was defeated, see 118 Cong. Rec. 706 (daily ed. Jan. 28, 1972). One of the principal objections to the amendment was that it might prohibit court-ordered preferential hiring decrees to remedy past discrimination, see id. at 693-94 (remarks of Senator Javits); id. at 705 (remarks of Senator Williams). See generally Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723, 753-57 (1972).

\(^{99}\) This distinction seems to collapse in employment discrimination cases following Griggs, where the mere unrebutted showing of disparate impact is sufficient to find discrimination.

\(^{100}\) For example, courts have refused to order preferential quotas where, by the
"any equity case, the nature of the violation determines the scope of the remedy." 101

In hiring cases this connection between violation and remedy can be found. Typically, the racial imbalance was caused by the hiring practices which the court found to violate Title VII, and these violations had continued until the time of the suit. 102 On the other hand, in layoff cases the nexus is less clear. Where the discriminatory practices which caused the racial imbalance have ceased, and the only practice before the court affecting the racial composition of the work force is the layoff, it cannot plausibly be argued that a decree designed to ensure racial balance is a remedy for discriminatory practices. A broad remedy cannot be regarded as a remedy for the layoff since the layoff discriminates


It may also be significant that most of the cases in which preferential hiring quotas have been ordered involved public employers, chiefly police and fire departments, or building trade unions. See Slate, Preferential Relief in Employment Discrimination Cases, 3 Loyola U. Chi. L.J., 318-20 nn.8-10 (1974). There may be a significant social interest in ensuring minority representation on police forces, since policemen occupy highly visible positions and are placed in positions of authority particularly susceptible to charges of racial bias. See Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973). Moreover there is some interest in integrating the staff of public agencies generally so that they may better respond to the problems of minorities. See Slate, supra, at 329-30. See generally Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), cert. denied, 402 U.S. 944 (1971) (school department). The building trades also offer highly visible and highly paid positions in metropolitan areas. See Gould, The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry, 26 Stan. L. Rev. 773, 774-75 (1974). Hence it may be desirable to devote particular attention to integrating these trade unions. Since the building trades unions have rather poor records of providing opportunities to minority workers, see id. at 733-77; 1961 COMMISSION ON CIVIL RIGHTS REPORT, bk. 3, EMPLOYMENT 128-31, the courts may believe that remedies less drastic then preferential quotas will be ineffective.
against only some of the present minority workers.\textsuperscript{103} While the layoff may exacerbate the racial imbalance at the plant, it has this effect only because of past hiring discrimination. Had the employer not discriminated in the past, minority employees would not be concentrated at a low level of seniority and, therefore, the layoff would not affect the racial composition of the work force. To regard a limitation on the layoff of minority workers as a remedy for discontinued past hiring discrimination makes the layoff irrelevant, and transforms the case into a postponed hiring discrimination suit.\textsuperscript{104} Otherwise, a limitation on minority layoffs would have to be regarded as a remedy for the imbalance itself—a result which courts have indicated is barred by section 703(j).

Considerations of prudence and administration also suggest that remedies designed to effect racial balance are less appropriate in layoff, than in hiring cases. The primary reason for preferential hiring quotas is that a decree limited to enjoining future discrimination will correct the racial imbalance only over a long period of time, as the work force is replaced through normal attrition and new hiring. Preferential hiring quotas accelerate this process by requiring minority workers to be hired in numbers greater than would be produced by mere nondiscrimination. Unlike preferential hiring cases, layoff cases do not involve situations where a remedy limited to enjoining discrimination would delay the integration of the work force for a generation or longer. When the economic circumstances of the employer improve, the laid off minority workers will be recalled thus restoring the degree of integration achieved before the layoff.\textsuperscript{105}

\textsuperscript{103} See pp. 1552-54 supra.

\textsuperscript{104} Since in cases such as Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1223-24 & n.4 (E.D. La. 1974), appeal docketed, No. 74-2604, 5th Cir., June 17, 1974, the hiring discrimination may have occurred largely before the effective date of Title VII and since Title VII is not retroactive, see note 41 supra, the past hiring discrimination may not be within the courts' remedial power. It is possible that a court could find the power to remedy pre-Title VII hiring discrimination in 42 U.S.C. § 1981 (1970), discussed at note 9 supra. However, the statute of limitations may prevent the court from granting a remedy for past hiring discrimination. The courts have held that the statute of limitations which applies to the most analogous state action applies to § 1981 actions. See, e.g., Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 994 (D.C. Cir. 1973) (3 years); Waters v. Wisconsin Steel Works, 427 F.2d 476, 488 (7th Cir.), cert. denied, 400 U.S. 911 (1970) (5 years). In any event, to base a broad remedy in a layoff case on discontinued discriminatory hiring practices the court would have to acknowledge that the decree is designed simply to correct racial imbalance.

\textsuperscript{105} Assuming that all positions eliminated in the layoff are ultimately refilled through a recall, and assuming that minority workers do not forfeit their recall rights in numbers disproportionately greater than nonminority workers, then the layoff and recall will, at least, recreate the racial composition which existed prior
In hiring cases, relief designed to benefit individual victims of discrimination may not be practicable either because the victims of discrimination will not be identifiable or because they will no longer be seeking employment. However, in layoff cases, it is possible to devise a remedy which benefits all those who are discriminated against by the layoff since their identity is known and their seniority can be recomputed. Since it is possible to give complete relief to the victims of discrimination in layoff cases there is less reason for extending the decree for the benefit of other minority workers.

Another difficulty with granting a remedy not limited to those minority employees discriminated against by the layoff is the legislative history of Title VII. While the legislative history concerning seniority should not be read to preclude modification of a seniority system to prevent present and future discrimination, upsetting a seniority system to redress racial imbalance caused by prior discrimination is less consonant with the legislative history. 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.

Courts have at times granted relief in employment discrimination suits which benefits persons other than the victims of discrimination in order to promote the integration of work forces. However, this has been done only where the present violations were sufficiently related to the racial imbalance that the broad relief could be justified as a remedy for the discriminatory practices established. Only by characterizing such decrees as remedies for discriminatory practices have courts avoided confronting to the layoff. If some nonminority employees who were hired during the period of discriminatory hiring forfeit their recall rights, then nondiscriminatory hiring to fill these positions will actually increase minority representation in the work force. However, if all positions are not ultimately recreated, then the layoff may skew the composition of the work force for a significant period.

106 See pp. 1557-60 supra.
108 See pp. 1549-52 supra.
109 See p. 1548 & note 27 supra.
110 See 110 Cong. Rec. 7213 (1964) (Clark-Case memorandum), quoted at note 30 supra.
the serious statutory objections to racial quotas. Since the only violation which can be established in the last hired, first fired layoff cases is not causally related to racial imbalance, it is unlikely that courts can find justification for remedies not limited to those persons discriminated against by the layoff.

IV. CONCLUSION

Although the courts should not use Title VII to remedy racial imbalance in layoff cases, they should ensure that seniority systems do not allocate layoffs in a discriminatory fashion. Where an employer has in the past excluded minority employees from his work force, a plant seniority system may now operate in a discriminatory fashion. Those minority employees who might have been hired earlier have been prevented from acquiring seniority by past discrimination. If layoffs are based on the last hired, first fired principle, present decisions between employees will depend on differences which are the result of past discrimination. In these circumstances courts should require modification of the seniority system. Those minority employees who are likely to have been in the labor force at the time of the past hiring discrimination should have their seniority recomputed to what it would have been had they been hired earlier. Such modification will allow the seniority system to operate in a nondiscriminatory manner. While it is likely that even under a modified seniority system a disproportionate number of minority employees will be laid off, Title VII does not provide a basis for remedying this impact.