The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company’s discriminatory practices. After the victims have been identified, the court must, as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination. . . . This process of recreating the past will necessarily involve a degree of approximation and imprecision.”


Courts have interpreted International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), as requiring each member of the plaintiff class to go through an individualized hearing before receiving any backpay award under Title VII. At this hearing, the employer is given the opportunity to defeat the class member claim by showing that the class member would not have been hired or promoted even in the absence of discrimination. The author argues that individualized hearings are not mandated by Teamsters and are often time-consuming, expensive, and a waste of judicial resources. According to the author, courts should adopt a more flexible interpretation of Teamsters. The Article points out that
some courts, such as the D.C. Circuit in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), have moved in this direction. In Segar, the D.C. Circuit has apparently established that it will not require individualized hearings when it is impossible to reconstruct what effect an illegal practice had on a particular class member and where requiring such a determination may lead to a denial of all relief. Nevertheless, the author maintains that individualized hearings are appropriate in certain circumstances: for example, when it is clear from the evidence at the liability stage of the trial that a substantial number of members of the plaintiff class may not have been injured by the discrimination or where there is a substantial risk of injustice if a class-wide procedure is used. The author concludes his argument by discussing factors courts should consider in deciding whether to adopt individualized hearings.

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INTRODUCTION

One of the most difficult phases of class action litigation under Title VII of the Civil Rights Act of 1964 involves the design and implementation of back pay remedies. The statute specifically provides for back pay and the Supreme Court has held that back pay should routinely be awarded in Title VII cases.\(^1\) Despite the central importance of the back

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3. [G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes [of Title VII] of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

pay remedy, however, the procedures established by the courts to implement that remedy have proven in many cases to be complicated, time-consuming and expensive for both plaintiffs and defendants. Much of this complication results from the courts' decisions, reinforced by a narrow reading of the decision of the Supreme Court in *International Brotherhood of Teamsters v. United States*, to require each member of a plaintiff class to go through an individualized hearing before a judge or special master in order to receive any back pay award. This Article considers how federal courts have implemented the *Teamsters* procedure and suggests the need for a flexible interpretation of that decision's language.

Part I of this Article discusses the cases arising prior to the 1977 *Teamsters* decision, while Part II explores the *Teamsters* decision itself. Part III explains the way in which post-*Teamsters* courts have taken several different approaches in establishing back pay procedures, and explains how the reasons the courts have adopted one procedure rather than the other in a particular case are rarely articulated and are often unclear. One group of cases, discussed in Part III.A of this Article, requires each class member to come forward and show that he or she was personally a "victim" of discrimination and demonstrate the loss that he or she suffered; the defendant's total financial liability then depends on the cumulative total of the separate injuries proven by those claimants. A second group of cases, discussed in Part III.B, reverses the procedure. In the second group, courts have required the calculation of a lump sum equivalent to the back pay lost by the entire class; each class member can then be entitled to a share of that lump sum by showing she was a "victim."

The two approaches have significantly different practical effects on both plaintiffs and defendants. However, both approaches share one important feature: under either procedure, the defendant is given an opportunity, usually at an individual "Teamsters hearing," to defeat any class member's claim by showing that he would not have been promoted or hired without discrimination. That is, in both types of cases, the courts

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5. The discussion in this Article is based principally on study of the case law reported in the federal reporters and services such as the Bureau of National Affairs Fair Employment Practices Cases. This restriction is significant, because orders setting forth the details of remedial schemes are frequently unpublished. The published decisions therefore rarely reflect the final disposition of the cases, which may be set forth in a consent decree or an order approving the report of a special master. The author has written to plaintiffs' counsel in many of the cases cited in the Article in an attempt to construct a more complete record of the results of the cases. Some of that correspondence has yielded detailed information on procedures and outcomes and is referred to in the Article. A more complete study, comparing the reported decisions with the actual results of the cases and assessing the impact of the litigation on the parties, should be undertaken in the future.
allow the defendant to show that the company's discrimination did not injure an individual claimant even though that claimant was a member of the class against which the defendant discriminated. The reported decisions, and preliminary research into the actual results of the cases, suggest that either procedure may lead to a complex series of mini-trials at which each claimant's job history is reconstructed and individual financial losses are calculated. Unless carefully designed and closely monitored by the court, this process can be burdensome to the parties and the court and delay relief to victims of employment discrimination.

Until recently, the only exception to the requirement of individualized hearings arose in those few cases, discussed in Part III.C, where the proof of discrimination during the liability phase of the case conclusively demonstrated that every class member was a victim of a specific, identifiable practice, and that the defendant could not possibly show that a claimant was not affected by the defendant's actions. In those cases, the courts have found individualized Teamsters hearings unnecessary.

Part IV of the Article discusses several recent cases which reexamine the need for each individual class member to come forward and establish her status as a victim of discrimination. The first of those cases, Segar v. Smith, is especially significant. In Segar, the D.C. Circuit concluded that Teamsters does not require individual hearings in every case even if the court cannot find that every class member was in fact a "victim." One district court has already relied on Segar in concluding that Teamsters does not compel individual back pay hearings in all cases. These cases are discussed against a background of recent Supreme Court decisions on affirmative action, which suggest that highly individualized relief must be provided to class members in order to achieve Title VII's goal of "making whole" the victims of discrimination. In Part V, the Article discusses some of the factors and policy judgments identified in Segar and other cases which courts may be asked to consider in structuring proceedings for monetary relief.

I

INDIVIDUAL HEARINGS BEFORE TEAMSTERS

The Supreme Court has held that once the courts have established an employer's liability for discrimination, back pay is an appropriate "make whole" remedy which district courts may deny only in very special circumstances. The potential complexity and length of the back pay

8. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975). The Court in Albemarle held that the lack of "bad faith" on the part of the employer did not justify denial of back pay to the
calculations in class action cases, however, have led courts to bifurcate Title VII litigation. That bifurcation divides cases into Stage I (the liability proceedings) and Stage II (the remedial proceedings). While Stage II may also include proceedings relating to the structure of injunctive provisions, its principal feature is the determination of defendant's monetary liability and the distribution of back pay (and front pay) to the plaintiff class. This process has generally required an inquiry into the circumstances of each member of the plaintiff class.

While these procedures for individualized back pay determinations have become known as Teamsters hearings, such procedures were already commonly used well before Teamsters v. United States was decided by the Supreme Court on May 31, 1977. A series of cases in the Fifth Circuit, beginning in 1974 with Johnson v. Goodyear Tire & Rubber Co., fully addressed the nature of these procedures. In Johnson, Judge Gewin concluded that approximately fifty employees had been subject to racially discriminatory testing and educational requirements, and that the seniority transfer system locked in the effects of past discrimination.

While Judge Gewin spoke in terms of the need for "class-wide back pay" in order to remedy the effects of this discrimination, he also stated:

Our holding does not necessarily mean that every member of the class is entitled to back pay. Individual circumstances vary and not all members
of the class are automatically entitled to recovery. There should be a separate determination on an individual basis as to who is entitled to recovery and the amount of such recovery.  

The court explained that the defendant must be allowed “to show by convincing evidence that other factors would have prevented [a claimant’s] transfer regardless of the discriminatory employment practices.”

Noting that “[o]ur directives here are meant only as guideposts in the thorny path which must yet be traversed,” the court of appeals remanded the case to the district court to calculate the back wages owed to the class members.

One month after Johnson, a different Fifth Circuit panel decided Pettway v. American Cast Iron Pipe Co., and reversed a district court decision which had denied a back pay remedy. Pettway involved findings that a manufacturer’s testing and educational requirements for hiring, promotion and entry into training programs had an adverse impact on blacks. Judge Tuttle’s majority opinion discussed in some detail the problems of calculating individual back pay awards in a large class action employment discrimination case:

There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system [sic], and apprentice and on-the-job training programs had not been in existence. Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability at that time. This process creates a quagmire of hypothetical judgments.

This “quagmire” of back pay calculations based on reconstruction of an individual claimant’s hypothetical work history, absent discrimination, is not only “imprecise but impractical.” In light of this, the court urged the district court to find on remand a class-wide procedure for calculating the amount of back pay due each of the class members.

Judge Tuttle’s opinion in Pettway suggested that the district court

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13. Id.
14. Id. at 1380.
15. Id.
16. Id. at 1382. The court expressed its confidence in the competence of trial courts to resolve the issues:

It is at the trial level that courts can more effectively resolve the tantalizing, exacting and wearisome issues presented in cases of this nature. Historical facts, emotional claims and biased contentions often accentuate and fructify the nebulous character of evidence adduced to establish the truth in a heated contest dominated by financial considerations.

Id. at 1380.
17. 494 F.2d 211 (5th Cir. 1974).
18. Id. at 260.
19. Id. at 262.
should consider two calculation procedures previously used by other courts. In one of the procedures, the court calculates average pay rates for the actual position or pay groups from which the class has been known to be excluded. Each member is then awarded back pay based on this average rate according to the number of years he or she was employed, less the amount of interim earnings.\textsuperscript{20} The second procedure utilizes a comparability or representative employee earnings formula, rather than focusing on specific jobs from which individuals were known to be excluded. Under this procedure, the court compares the employee class to "a group of employees, not injured by the discrimination, comparable in size, ability, and length of employment."\textsuperscript{21} It then awards back pay based on the wage differential of the two groups.\textsuperscript{22} Judge Tuttle also referred to a similar comparability formula suggested by the Equal Employment Opportunity Commission that divides the total award for each job position into pro rata shares among similarly situated class members without having to determine which one of those class members would have actually obtained the position.\textsuperscript{23}

While the majority opinion in \textit{Pettway} stated that individualized calculation of back pay is impractical and unnecessary, Judge Tuttle did not suggest that a "class-wide" procedure would eliminate the need for each class member to establish that she was a victim. In discussing the burdens of proof in establishing a claim for back pay, Judge Tuttle, quoting from \textit{Johnson}, explicitly recognized that the employer would have an opportunity to challenge particular class members' entitlement to back pay.\textsuperscript{24} In a concurring opinion, Judge Bell stated that he did not perceive the holding in \textit{Pettway} to go beyond that in \textit{Johnson}, and quoted the language from \textit{Johnson} which stated that there should be an individual determination for each class member to determine whether or not he is entitled to recovery.\textsuperscript{25}

\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 262-63 (referring to Bowe v. Colgate, Palmolive Co., 489 F.2d 896 (7th Cir. 1973) and U.S. v. Wood, Wire & Metal Lathers Int'l Union, Local Union 46, 328 F. Supp. 429 (S.D.N.Y. 1971)).
\textsuperscript{23} \textit{Id.} at 263 & n.154 (referring to the EEOC's \textit{amicus} brief).
\textsuperscript{24} \textit{Id.} at 259-60.
\textsuperscript{25} \textit{Id.} at 267 (quoting language set forth \textit{supra} text accompanying note 13). Judge Bell's insistence on individualized hearings rested, in part at least, on constitutional grounds:

Damage awards must be individualized to avoid constitutional problems which would arise in taking the property of one for another without a showing of loss to the particular recipient.

\textit{Id.} This concern led Judge Bell to condemn any lump sum approach which would compare the total remuneration to one class with that of another "allocating the difference amongst the class suffering the discrimination regardless of individual financial loss." \textit{Id.} The extensive litigation in \textit{Pettway} is summarized in Pettway v. American Cast Iron Pipe Co., 721 F.2d 315 (11th Cir. 1983), \textit{cert. denied}, 467 U.S. 1243; \textit{cert. dismissed}, 467 U.S. 1247 (1984).
Judge Gewin reiterated these views initially expressed in *Johnson* in *Baxter v. Savannah Sugar Refining Corp.*,26 and the Fifth Circuit reached a similar result the next year in *United States v. United States Steel Corp.*,27 which involved the rights of over 3000 black steelworkers. In *United States Steel*, the court (including Judge Morgan, who was on the panel which decided *Johnson*) again enjoined a district court to reconsider an overly narrow back pay order. The court suggested that the district court should strive to the fullest practical degree to award back pay by reconstructing hypothetical work histories for each claimant. However, it recognized that this approach calls forth the "quagmire of hypothetical judgment," and left the district court free to consider the class-wide approaches suggested in *Pettway* or any other reasonable methods for making the affected class whole.28 The court still recognized that even if it used some sort of "class-wide" procedure, the court might have to make many individualized determinations in identifying the eligible employees, and that it would have to allow the defendant an opportunity to argue that any individual employee was not entitled to share in the award.29

Thus, by the time *Teamsters* was decided in 1977, the Fifth Circuit had established that back pay was available on a class-wide basis, and that each class member was entitled to a presumption of entitlement in seeking monetary relief. The Fifth Circuit had also stated that individualized hearings, at which each class member's work history would be reconstructed, were the preferred method of determining how much back pay, if any, class members should receive. Recognizing the problems inherent in such individualized hearings, the Fifth Circuit had also said that district courts should consider a range of procedures involving more generalized, and if necessary, hypothetical, calculations of injury. In either event, however, the Fifth Circuit had established that courts should give the defendant an opportunity to rebut each individual's claim and to prove that a particular claimant would not have been promoted or hired even in the absence of racial discrimination.

Another group of pre-*Teamsters* cases in the Fourth Circuit reached results similar to those in the Fifth Circuit. In *United Transport Union*

27. 520 F.2d 1043 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).
28. Id. at 1055.
Local 974 v. Norfolk & Western Railway,\textsuperscript{30} the plaintiff proved that the defendants maintained two racially separate railroad yards, and that there was less opportunity for work and for promotion, and a greater possibility of layoff, at the yard reserved for black employees. In deciding that members of the plaintiff class were entitled to claim back pay, the Fourth Circuit explicitly adopted the Fifth Circuit’s approach.\textsuperscript{31} The court of appeals directed the district court to calculate the economic consequences of hypothetical employment in the positions denied to plaintiffs, calculate the economic consequences of each person’s actual employment, and award the difference to the claiming employee.\textsuperscript{32} Each claimant was required to show he was a member of the plaintiff class, his actual income, and the nature of his job.\textsuperscript{33}

Significantly, the employer was granted very broad rebuttal rights:

The employer then should be afforded the opportunity to present proof that any particular class member is not entitled to back pay, for whatever reason: e.g., lack of qualifications, free and voluntary decision to forego higher-paying work opportunities, lack of higher-paying work opportunities, and the like.\textsuperscript{34}

The United Transport Union opinion does not mention the possibility of a lump sum or pro rata distribution approach and apparently contemplated individualized hearings for each claimant. District courts in the Fourth Circuit reached results similar to those in United Transport Union in Sledge v. J.P. Stevens & Co.,\textsuperscript{35} Patterson v. American Tobacco Co.,\textsuperscript{36} and Younger v. Glamorgan Pipe & Foundry Co.\textsuperscript{37}

Pre-Teamsters cases in other circuits also considered the issue of back pay remedies in Title VII cases and adopted procedures similar to those approved in the Fifth and Fourth Circuit cases.\textsuperscript{38} These cases re-
quire highly individualized procedures;\(^3\) they suggest that the courts did not hesitate to steer the parties into the quagmire of hypothetical judgments against which Judge Tuttle warned in \textit{Pettway} (or down the "thorny path" mentioned by Judge Gewin in \textit{Johnson}).\(^4\) However, the reported decisions rarely reveal whether the exploration of the quagmire was successful or even undertaken at all; very few of the reported pre-\textit{Teamsters} cases indicate whether individualized hearings actually occurred.\(^4\)

\section*{II

\textbf{THE TEAMSTERS DECISION}}

\textit{International Brotherhood of Teamsters v. United States}\(^4\) was one of a series of cases involving the trucking industry and the exclusion of minorities from over-the-road line driver (as opposed to city driver) positions. The case is generally considered significant because of its interpretation of section 703(h) of the Civil Rights Act of 1964,\(^4\) which the Court held to insulate "bona fide" seniority systems even if they per-

\footnotesize

\(^{39}\) See, e.g., \textit{Rios v. Enterprise Ass'n Steamfitters}, 400 F. Supp. 988, 993 (S.D.N.Y. 1975), aff'd in part, rev'd in part, sub. nom. \textit{EEOC v. Enterprise Ass'n Steamfitters}, 542 F.2d 324 (7th Cir. 1976), cert. denied, 431 U.S. 911 (1977), holding that a claimant would have to show, inter alia, that "he was discriminatorily denied admission" to a particular job. It is not clear from the opinions of either the district court or the court of appeals whether each claimant had to establish discrimination de novo or whether each claimant had the benefit of certain presumptions such as those adopted in the other circuits. In any event, the procedures in the Second Circuit seem to have been highly individualized and can be construed to reflect some hostility towards class action back pay awards. See discussion of Local 28, \textit{Sheer Metal Workers' Int'l Ass'n v. EEOC}, 106 S. Ct. 3019 (1986), \textit{infra} notes 179-86 and accompanying text.

\(^{40}\) An important exception, in light of certain post-\textit{Teamsters} cases discussed \textit{infra} notes 116-22 and accompanying text, is \textit{Laffey v. Northwest Airlines}, 374 F. Supp. 1382 (D.D.C. 1974), aff'd, 642 F.2d 578 (D.C. Cir. 1980), cert. denied, 472 U.S. 1021 (1985). \textit{Laffey} involved claims by female airline stewardesses that they had been denied pay and other benefits equal to those provided to male pursers who performed similar work. The court ordered the airline to pay each class member back pay to remedy this discrepancy, and apparently did not permit the defendant to question any individual class member's entitlement to that relief. \textit{Laffey} is therefore similar to other equal pay cases arising after \textit{Teamsters} and discussed below in Part III.C.

\(^{41}\) The author of this Article has attempted to assemble additional data concerning the actual disposition of the cases by contacting the attorneys who represented the plaintiffs. While that data is not complete, some responses already received, and discussed below in Part III, suggest that the potential burdens of an order to carry out individual hearings were so great that they created a substantial incentive to settle.


petuate the effects of pre-Civil Rights Act discrimination. However, the case also involved post-Act discrimination in the denial of applications for transfer to line driver positions, and it was necessary to devise a remedy for that discrimination. The case therefore discusses the procedure for determining which class members are entitled to individual relief, and it is that discussion which is of principal importance to an analysis of back pay proceedings.

In *Teamsters*, a partial consent decree, which did not constitute an adjudication on the merits but which did provide for a lump sum cash settlement of any back pay obligations, had settled the question of the defendant's financial liability. From the lump sum, individual payments were to be made to alleged "individual and class discriminatees" identified by the government. The consent decree provided for further proceedings to determine other equitable relief. The district court interpreted this provision as requiring it to determine whether there was a "general plan and practice" of discrimination, whether there was discrimination against a person either as an individual or as a member of the class, and what relief should be given to each discriminatee. The government's proof of discrimination had been both statistical and anecdotal, based on the small percentage of minority line drivers as compared to the overall percentage of minority employees and over forty specific instances of discrimination. The district court concluded that the defendants had engaged in a pattern or practice of discrimination against the minority drivers. After the finding of liability, the court went on to resolve all of the remedy issues, relying on the evidence presented in proving liability; it did not adopt a bifurcated trial procedure.

In structuring the seniority relief, the district court divided the class into three principal groups. The first group of thirty persons consisted of those individuals who had presented the most convincing evidence at trial concerning specific acts of discrimination against them. A second group of four persons included individuals who had not presented evidence.

44. 431 U.S. at 348-55. This aspect of the *Teamsters* decision and later cases applying its interpretation of § 703(h) have generated substantial scholarly writing and criticism. See e.g., Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. REV. 943 (1984).


46. *T.I.M.E.-DC, Inc.*, 6 Fair Empl. Prac. Cas. at 692. The consent decree "narrowed the scope of the litigation, but the District Court still had to determine whether unlawful discrimination had occurred. If so, the court had to identify the actual discriminatees entitled to fill future job vacancies under the decree. The validity of the collective-bargaining contract's seniority system also remained for decision, as did the question whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." 431 U.S. at 330-31 n.4.

47. 6 Fair. Empl. Prac. Cas. (BNA) at 694.

48. *Id.* at 695.
dence sufficient to show clear and convincing specific instances of discrimination but had shown that they were “very possibly the objects of discrimination.”\textsuperscript{49} These two groups were given preferences in bidding on future vacancies and retroactive seniority to either July 2, 1965 (the effective date of Title VII) or January 14, 1971 (the date the suit was filed).\textsuperscript{50}

The largest group created by the district court consisted of over 300 persons who were class members but as to whom no evidence of specific discrimination had yet been presented.\textsuperscript{51} Those persons received no retroactive seniority at all; they were to receive preference for some future openings, but their competitive seniority as line drivers would begin only with the date they were actually hired in the future.\textsuperscript{52}

The court of appeals substantially revised the district court’s remedy. It noted that there was little reason to assume that the 300 persons for whom no retroactive seniority was granted were any less “victims” than the 30 or 40 persons whose testimony was presented at the trial. The court therefore granted retroactive seniority to the entire class of minority employees, based on a “qualification date” formula; i.e., each class member’s seniority was made retroactive to the date on which (1) a line driver position was vacant and (2) the particular class member met the qualifications for it.\textsuperscript{53}

In the Supreme Court, the defendants attacked the court of appeals’ remedy, claiming that each class member should be required to prove that he had individually been discriminated against using the procedure set forth in \textit{McDonnell Douglas Corp. v. Green},\textsuperscript{54} a case which was not a class action. The defendants argued that since the government had introduced specific evidence of discrimination against only forty of several

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. The district court also identified another smaller group of persons, originally listed in Appendix D to the opinion, who “were clearly not injured by the discrimination.” Id. The district court’s opinion does not explain why it reached this conclusion. Those persons initially were to receive no relief of any kind. The district court later amended its order to include these individuals among the large group of 300 entitled to a preference for future positions. Id. at 703.
\textsuperscript{53} United States v. T.I.M.E.-D.C., 517 F.2d 299, 318-19 (5th Cir. 1975). \textit{vacated sub nom. Teamsters, 431 U.S. 324.}
\textsuperscript{54} 411 U.S. 792 (1973).

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

\textit{Id.} at 802. The court then gives the complainant an opportunity to show that the reason stated by the employer is pretextual.
hundred employees, the district court had properly refused to award retroactive seniority to the remainder of the class of minority incumbent employees. Although the Supreme Court agreed with defendants' contention that some sort of additional proceedings would be necessary to determine the scope of relief, it rejected defendants' argument that each class member would have to prove his claim all over again using the *McDonnell Douglas* procedure.

After an extended discussion of the rights of persons who may not have actually applied for positions because of the deterrent effect of the employer's policy, the Court considered the procedures the district court should follow on remand in deciding which of the minority employees were actually victims of discrimination. Examples of the "lawful reasons" which an employer could adduce to defeat an employee's claim would be that other more qualified persons would have been chosen for the vacancy or that the claimant's stated qualifications were insufficient. The Court recognized that the district court's task would not be a simple one, and that it would involve "approximation and imprecision."

Consistent with the earlier cases, *Teamsters* thus allows "class-wide" relief, in that it recognizes that each member of the class is entitled to come forward to claim retroactive seniority, and that each class member is entitled to certain favorable presumptions in presenting her claim. *Teamsters* also holds that mere class membership does not automatically entitle each class member to recover, and that the defendant should be provided an opportunity to show that any particular claimant was denied transfer for nondiscriminatory reasons.

*Teamsters* involved retroactive seniority and not monetary relief, but the case has frequently been cited as requiring individualized pro-

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55. *Teamsters*, 431 U.S. at 357.
56. Id. at 361.
57. The Court concluded that the plaintiffs' proof at the liability stage does not dissipate at the remedial phase:

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Id. at 362 (footnote and citation omitted).
58. Id. at 362-67. The Court held that a nonapplicant could claim such relief if he met the "not always easy burden" of proving that he would have applied and was deterred from doing so by the employer's discriminatory practices. Id. at 368.
59. Id. at 369 n.53.
60. Id. at 371-72.
ceedings in calculating back pay. However, the language and the particular factual circumstances of Teamsters suggest that it should not be read too broadly. The Court recognized that it could not (or perhaps should not) formulate a rigid rule, since it stated "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." Further, there were particular factors present in Teamsters, which may not be present in other cases, which suggested that the class-wide relief ordered by the court of appeals was not appropriate.

First, the fact that Teamsters involved seniority rights led the Court to proceed cautiously in granting relief. Where the remedy is seniority, rather than damages, there may be a greater risk of creating injustice: the award of seniority to a minority person may interfere with the legitimate expectations of a nonminority person who is an innocent bystander to the employer's discriminatory practices.

Second, the defendants emphasized that the district court had found that some class members were in fact not victims. Since the district court's opinion disposed of both liability and remedy issues at the same time, the court did conclude (although the opinion does not explain why) that some class members were "not injured by being a member of the class." This finding, even if unexplained, must have affected the Supreme Court's decision not to grant relief to every class member without further inquiry.

Third, and most significantly, the Court was clearly concerned about evidence that all class members may not have thought that the transfer from city driver to line driver was desirable. The Court identified certain disadvantages that might result from a transfer to line driver, such as less regular hours and more hazardous working conditions. The Court was not willing to assume that each class member would have opted to choose a line driver job even had he been given a nondiscriminatory opportunity to do so. Given this evidence, the court of appeals' award of relief to every class member without further proof seemed especially inappropriate.

62. 431 U.S. at 361 (emphasis added).
63. This theme is reiterated in the Supreme Court's later decisions in Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984), and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).
64. Brief for Petitioner, International Bhd. of Teamsters at 45-46, Teamsters 431 U.S. 324 (No. 75-636).
65. Supra note 52.
66. 6 Fair Empl. Prac. Cas. at 694.
67. 431 U.S. at 369-71 ("the desirability of the [line-driving] job is not so self-evident as to warrant a conclusion that all employees would prefer to be line drivers if given a free choice) Id. at 370.
CLASS ACTION REMEDIES

Teamsters should therefore not be considered to compel the use of individualized hearings in every back pay case. The special factors present in that case, and possibly the absence of any strong argument that the use of individual hearings during Stage II would be unacceptably time-consuming or burdensome to the parties or the courts, influenced the Court's conclusion. The government's brief did not argue that the reconstruction of job histories would be especially difficult, and neither the government nor the Court seems to have considered the warnings about "quagmires" and "thorny paths" raised in earlier cases such as Johnson and Pettway.

III

THE ROLE OF INDIVIDUAL HEARINGS IN POST-TEAMSTERS DECISIONS

The courts might have read Teamsters as leaving lower courts considerable flexibility in deciding whether to rely on individual hearings for awarding monetary relief. However, while some courts have attempted to simplify the remedial stage of the cases confronting them, virtually all post-Teamsters cases have, until very recently, allowed the defendant an opportunity to defeat individuals' claims. The post-Teamsters cases, and some of the procedures they have required, are reviewed and categorized in this Part.

A. The Individual Calculation Approach

After Teamsters, most federal courts have continued to order individualized Stage II proceedings in order to provide back pay relief. In some cases, the courts specifically acknowledged the problems which may arise from detailed individual proceedings, recognizing the impossi-

68. The government did argue that requiring proof of individual claims during Stage I—the liability phase—would be wasteful of judicial resources. Brief for United States and Equal Employment Opportunity Comm'n at 53-54, Teamsters (No. 75-636).
69. Despite its assertion that the district court's task would not be an easy one, the Court may have believed that the task of determining when each person would have become a line driver would not be too difficult. The D.C. Circuit's opinion in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), discussed in detail below in Part IV, suggests that the individualized hearings in Teamsters would not have been particularly complex, since they "were to involve a single determination as to whether individual plaintiffs had applied and were qualified for particular line driver positions..." 738 F.2d at 1290. The principal complexity referred to by the Court in Teamsters arose from the need to balance the equities in allocating a limited number of vacancies among class members and adjusting "the remedial interests of discriminatees and the legitimate expectations of other employees innocent of wrongdoing." 431 U.S. at 372. Such adjustments might have been necessary even if more generalized class-wide retroactive seniority had been provided. As noted below, the Court's later decisions in the affirmative action area, Stotts, 467 U.S. 561, and Sheet Metal Workers International Association v. EEOC, 106 S. Ct. 3019 (1986), discuss the need for proof of individual discrimination in order to receive a Title VII remedy, but do not discuss the practical problems which would result from inflexible application of such a requirement.
bility of accurately reconstructing where each class member would have been absent discrimination. Relying on the language of such pre-
Teamsters cases as Pettway and Stewart v. General Motors Corp., those courts suggested various procedures for devising a hypothetical work history which would demonstrate how much a "typical" employee could earn in the absence of discrimination. That amount could then be compared to the amount actually earned by a discriminatee class member to determine the back pay award.

While these cases seek more generalized formulas for back pay awards, they do not dispense with individualized proceedings altogether. Even if the court calculates an individual's potential recovery on a hypothetical or averaging basis, so that she does not have to prove precisely what monetary loss occurred, that claimant must still come forward and show her basic eligibility (usually by filing a claim form). Then, again following the procedure referred to in Teamsters, the court gives the defendant an opportunity to show that the claimant was not promoted or hired for some nondiscriminatory reason.


73. For a full discussion of the use of claim forms, see Seymour, Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 CONN. L. REV. 920 (1978).

74. Some courts have limited defendants to a few fairly specific defenses to individual claims. See, e.g., Smith v. Union Oil Corp., 18 Fair Empl. Prac. Cas. (BNA) 1183, 1184 (N.D. Cal. 1978) (defendant can defeat claim only by showing either that the claimant: (1) did not meet "non-discriminatory and job-related qualifications actually used by the employer;" or (2) "was not available for employment during a time when there was a vacancy"). Others have allowed defendants a broad range of rebuttal opportunities which could open up an entirely new series of mini-trials. See, e.g.,
One of the most thorough discussions of the reconstruction of hypothetical work histories, and the course of individualized back pay proceedings, is that provided by Judge Higginbotham in *Carter v. Shop Rite Foods, Inc.* In *Carter*, the plaintiff class of women showed that the defendant had discriminated against them on the basis of their sex by denying them promotions to managerial positions within its supermarkets. After notice to the class, 24 claims were filed. One of the 24 withdrew her claim, two claims were severed and disposed of by stipulation, and four other claimants failed to appear to testify concerning their work history. The district court itself heard evidence concerning the remaining 17 claims, and found that all but one of the claimants was entitled to back pay. The court's decision suggests that the defendant resisted each claim, presenting various reasons why each claimant was not promoted.

After determining which claimants were entitled to some amount of back pay, the court appointed a special master to calculate the back pay for each person. The special master's report is interesting and informative for several reasons. First, the report (which consumes fifty-four pages of the Federal Supplement) describes the complications of calculating back pay for even a small number of claimants. The report explains the problems confronted in reconstructing the hypothetical job histories for the sixteen claimants referred to the master by the district court. Among the issues with which the master dealt were: how to

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Wattleton v. Ladish, 29 Fair Empl. Prac. Cas. (BNA) 1307 (E.D. Wis. 1981) (defendant allowed to present "any competent evidence" as to "any other legitimate defenses it advances"); Ivey v. Western Elec. Co., 23 Fair Empl. Prac. Cas. (BNA) 1028, 1033 (N.D. Ga. 1978) (defendant allowed to show claimant not qualified or that "there was no discrimination in the selection of the person who filled the position"). As noted supra text accompanying note 34, in one of the pre-Teamsters cases, the Fourth Circuit allowed the employer to present proof that a class member was not entitled to back pay "for whatever reason." United Transp. Union v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975), cert. denied, 425 U.S. 934 (1976).

While most courts do not appear to have addressed specifically the standard of proof which defendant must meet in rebutting individual claims, in the D.C. Circuit the standard is one of "clear and convincing evidence." McKenzie v. Sawyer, 684 F.2d 62, 76 (D.C. Cir. 1982). The courts have generally stated that any doubts about an individual claimant's eligibility should be resolved against the defendant, "a proven discriminator." *Id.* at 77; see also Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 n.149 (5th Cir. 1974).

75. 470 F. Supp. 1150 (N.D. Tex. 1979), 503 F. Supp. 680 (N.D. Tex. 1980) (approving report of special master). The latter decision includes the detailed report of the special master appointed to calculate the amounts to be paid to each individual.

76. The court found that one of the 17 claimants had not established a prima facie case that she wanted, would have accepted, and was qualified for a promotion. 470 F. Supp. at 1168.

77. 503 F. Supp. at 694-747.

78. The special master apologized to the court for delay in preparation of his report, citing as two of the reasons "[a] reluctance on the part of counsel to follow the lead of the undersigned—a reluctance soundly founded, we must add, on the correct perception that he had no real idea where in the world he was going," and "the nature of the beast—this is a matter better suited to the common sense deliberations of the jury room subject to control of the Court, but one which Title VII places exclusively in the Judge's lap." *Id.* at 694.
decide which claimant might have been promoted to which vacancy; how to determine how long a person would have remained in a particular position had she actually been promoted into it; how to identify comparable male and female groups; and how to calculate median salaries, bonuses, interest and the effect of taxes.  

Second, the special master's task was difficult, and the burdens on the parties substantial, even though Carter was, for a number of reasons, a relatively simple case. As noted above, the district court itself heard the individual claims of eligibility, rather than referring them to the special master; the special master's task was to calculate the actual amount of monetary relief to be awarded to each person. Further, there appear to have been far more vacancies than there were potential claimants. The special master was therefore able to avoid the troubling question of how to deal with claims of several class members for the same position. Finally, since the district court had already determined who was entitled to back pay, the defendant could not reduce its liability by challenging the eligibility of individual class members before the special master; its arguments were limited to challenges to various aspects of the basic assumptions and methodology used by the master for calculating the amount owed.

Despite these simplifying features and the small number of actual claimants, the special master's task was complicated and time-consuming. The special master's fee was $17,864, and was borne equally by plaintiffs and defendant. Plaintiffs' attorneys spent 294.75 hours, plus paralegal time, in connection with the proceedings before the special master, after spending 609.20 hours in connection with the individual eligibility hearings before the judge. The plaintiffs' attorneys thus spent over 900 hours obtaining back pay relief for sixteen people. Plaintiffs' total monetary award, after subtracting half of the master's costs, was $321,325.

Another case involving some hypothetical reconstruction of claimants' work histories and individualized proceedings to determine eligibility, and illustrating the potential complexity of the back pay process, is Kyriazi v. Western Electric Co. While Carter involved twenty four

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79. Id. at 683-84.
80. 470 F. Supp. at 1161-70.
81. 503 F. Supp. at 685.
82. Id. at 692.
83. Id. at 693.
claimants, *Kyriazi* involved 10,000 potential claimants. The court found that defendant Western Electric had discriminated against female employees, applicants and former employees in the areas of hiring, promotion, participation in job training programs, layoffs, wages and opportunities for testing. The court discussed various approaches to the computation of back pay awards, citing *Pettway, United States Steel, Bowe v. Colgate-Palmolive Co.*, *Stewart* and *Stamps v. Detroit Edison Co.*, and decided on what it described as an individual approach. Following the district court's decision establishing the special master procedure, four special masters began hearing claims of those class members who were rejected applicants. Each of those hearings consumed two to three hours, and required counsel preparation time ranging from several hours to two days. Between late 1979 and June 1980, 108 final judgments were entered, involving monetary awards totaling $234,271.25. Thereafter, the parties agreed to a settlement of all the remaining claims for the sum of seven million dollars, less the $234,271.25 already awarded.

*Kyriazi* illustrates the courts' willingness to continue to undertake extraordinarily extensive Stage II proceedings. That case, however, is not unique. For example, as of September 1984, plaintiffs' counsel in *Sledge v. J.P. Stevens* was litigating 3768 back pay claims filed by approximately 3200 claimants. In *Kraszewski v. State Farm Insurance*
Co., the court ordered, at plaintiffs' request and over defendant's objection, individual hearings for over 1000 claims that could take two to three years to complete. Further correspondence with counsel in similar cases would presumably disclose additional examples of cases in which large numbers of claims are being considered. Even in those cases in which far fewer claims are to be heard, however, the evidence already available suggests that the individual Teamsters hearing process is time-consuming and expensive for all parties.

B. The Lump Sum Calculation Approach

While many courts have ordered individualized proceedings, others have attempted, in varying degrees, to reduce the need for them. In one group of cases, the courts have opted to calculate a lump sum award, prior to establishing the eligibility of any individual claimants, and then distribute that award among all eligible class members using a pro rata or other formula. Even in these lump sum cases, however, the eligibility of class members to share in the distribution of the lump sum is established only after some form of individualized hearing or other procedure focusing on each person's qualifications, and only after the defendant has had an opportunity to rebut each person's claim.

Hameed v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 396 illustrates this approach to the lump

96. Cf. Romasanta v. United Air Lines, 31 Fair Empl. Prac. Cas. (BNA) 551 (N.D. Ill. 1982), a sex discrimination case in which the parties apparently agreed on a lump sum back pay award to be distributed pro rata, but engaged in a very lengthy series of individual hearings to determine which of 1800 class members were entitled to reinstatement as airline stewardesses. The individual hearings phase of the case was discussed in The 17-Year Furlough, The American Lawyer, February, 1984, at 79. That article explains that the individual hearings involved six special masters and over 40 attorneys and that from January to December 1983, 341 cases had been decided. Id. at 79-80.
97. The burden of such hearings on plaintiffs' counsel, at least, is reduced if counsel receives fully compensatory attorneys' fees for the time spent in representing each claimant. The issue of whether counsel is entitled to compensation for each separate Teamsters hearing, even if the claimant is not actually successful in obtaining back pay, is indirectly discussed in Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743, 791 (W.D. Va. 1976), and was the subject of post-liability litigation in both Chewning v. Schlesinger, 471 F. Supp. 767 (D.D.C. 1979), and McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982). See McKenzie v. Kennickell, 645 F. Supp. 427, 432 (D.D.C. 1986) (ordering defendant to pay fees and costs incurred by individual claimants in proceedings before special master "except where the claims are found to be frivolous or vexatious").
99. 637 F.2d 506 (8th Cir. 1980).
sum procedure. In *Hameed*, the court of appeals extensively revised a limited back pay order entered by the district court, after concluding that the defendant's selection procedures had a disparate impact on black applicants for union apprenticeship programs. The court found that blacks should have been represented among apprentices at a ratio equal to the ratio at which they were represented among applicants from 1965 to 1973. Using this method, the court concluded that the union had denied black applicants, as a class, forty-five positions over the eight year period. The court then calculated the pay allocable to those forty-five positions by determining how many of those positions should have gone to black employees in each year and extrapolating the pay for those positions forward through the back pay period. The lump sum thus calculated for each year of the back pay period would then be allocated among the black applicants for that year on a pro rata basis "or in a more equitable manner as determined by the district court." The maximum any one claimant could recover was the amount due if he were an actual discriminatee, and the maximum liability of the defendant union was the aggregate amount of back pay that would be due forty-five actual discriminatees. While the court suggested that the defendant might have a difficult task in showing that a particular applicant was rejected for lawful reasons, it nevertheless contemplated that the defendant should have that opportunity.

While a lump sum case like *Hameed* is similar to cases such as *Carter*, *Kyriazi*, and the other cases discussed above, in that it contemplates some type of individual proceedings to establish which class members are eligible to receive back pay, there are important theoretical and practical distinctions between the two types of cases. First, the class-wide lump sum cases such as *Hameed* look explicitly to the injury to the
entire class against which discrimination has been found. It is the entire class of plaintiffs, and not necessarily any single member of that class, which is to be made whole. The courts' calculations are therefore based on an analysis of the number of positions which the group discriminated against would have held in the absence of discrimination.\(^{107}\)

In contrast, cases such as Kyriazi do not attempt to calculate the injury to the entire group of class members, but rather look to the injury to each individual class member. While the courts may not explicitly recognize the theoretical implications of this choice of procedure, that choice suggests that Title VII monetary remedies must be tied to losses sustained by identifiable individuals, not to the hypothetical losses of a class of persons. There is also a significant practical distinction between the two types of cases. By definition, the lump sum approach limits the defendant's total liability to an amount equal to the amount of pay that should have gone to the class of victims had no discrimination occurred. While this method sets a maximum amount for the defendant's liability, it also may set a minimum; if there are sufficient numbers of potential claimants, the disqualification of individual claimants will not reduce defendant's liability, but rather will simply increase the value of the shares of other claimants.\(^{108}\) If the defendant concludes that individual hearings are not likely to reduce its liability, it may not request the court to order them and will simply allow the plaintiffs to divide up the lump sum as they wish.\(^{109}\)

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107. For example, in Thompson v. Boyle, 499 F. Supp. 1147 (D.D.C. 1979), aff'd sub nom. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982), the district court found that the applicant pool for the positions from which women had been excluded was approximately 50% women and 50% men. The court reconstructed the actual promotions which took place during the relevant time period and assumed that women should have filled 50% of those positions. Id. at 1170-71. The court assumed that the class members would share in the amount so calculated on a pro rata basis, in part at least because the defendant waived its right to claim that any class members should not be eligible to share in the award.

108. The defendant could reduce its liability only if it were able to disqualify so many claimants that the value of the remaining claimants' shares exceeds the amount they would have received absent discrimination. If enough claimants are disqualified, the shares of the remaining claimants may become so great that those claimants are more than made whole; i.e., the monetary value of the shares of the remaining claimants may exceed the amount they could have earned even had there been no discrimination at all. In that situation, the amount of the lump sum would have to be reduced to avoid over-compensation.

To illustrate this point, assume that absent discrimination, class members would have received promotions to 10 positions, each of which pays an additional $20,000 per year. The lump sum available to the class for a given year would therefore be $200,000. If the class consists of 50 persons, each of whom is to share the lump sum pro rata (i.e., each will receive $4000), the defendant would have to disqualify 41 of the 50 class members before reducing its total liability at all. If 41 persons are disqualified, the remaining 9 would be more than made whole if the lump sum is not reduced (i.e., they would receive $22,222 rather than the $20,000 they would have received had they not been discriminated against).

109. As noted, supra note 98, this appears to be precisely what occurred in Thompson, where the defendant "took the position that it did not care how the pay award was shared among the plaintiff class." Thompson v. Sawyer, 678 F.2d 257, 286 (D.C. Cir. 1982).
Under a procedure focusing on individual recoveries, the limits of the defendant's liability are defined not by a lump sum established in advance, but rather by the number of class members who can come forward and show their entitlement. A defendant may therefore find it difficult to calculate either its maximum or minimum liability in advance. While the defendant may be able to obtain a general sense of its maximum liability (by multiplying the number of potential claimants by a series of pay differentials for all positions that could be claimed), its minimum liability will depend on the outcome of the individual proceedings—the disqualification of an individual class member will reduce the defendant's liability by precisely the amount which that class member would have otherwise recovered.

Even if the court uses the individual calculation approach, the actual impact of disqualifying a class member will depend on the details of the particular procedure adopted in each case. If the procedure established by the court truly contemplates making each class member whole, all of the claims will be calculated independently of the others and the disqualification of one class member will definitely reduce the defendant's monetary exposure. In *Kyriazi*, for example, the court explicitly concluded that the defendant should make each class member whole, even if there were fewer actual vacancies than there were claimants. The court ruled that if more than one class member could establish her eligibility for a single position, the defendant would have to pay each of those class members in full for that position; it explicitly rejected defendant's argument that two persons establishing their eligibility for one position should share the back pay for that position.110 Under those circumstances, the defendant has a significant incentive to resist each claim.111 The same result would obtain, of course, in a case like *Carter*, where there were more positions than there were claimants, and no question of sharing the recovery for the same position arose.

If, on the other hand, there are more claimants than there are positions and the court has structured the claims procedure so that two or more claimants have to share the pay allocable to a single position for which they establish their claim, the defendant is in virtually the same situation it is in under a lump sum procedure: unless all the claimants for a particular position are disqualified, the defendant does not reduce


111. Under those circumstances the defendant's liability could also exceed the amount it would have paid to the class had it not discriminated at all. If a position pays $20,000 per year, the defendant would have been able to avoid liability altogether by placing a class member in that position originally and paying her the $20,000. If defendant is found liable for discriminatory conduct in denying that position to a class member, and five class members can establish a claim to it during Stage II, the employer will end up paying $100,000 in salaries for a single position (in addition to the $20,000 already paid to the nonclass member actually promoted).
its monetary liability by attacking one of the claimants, but merely shifts money from one claimant to another. In such a case, the defendant may have little incentive to try to attack the claim of any single class member. Therefore, even if the court orders individual proceedings, in either lump sum or certain types of individualized recovery cases, the hearings may not occur if the defendant concludes that they will not reduce its liability.

One other important distinction between lump sum and individualized recovery cases should be noted: recovery in the lump sum case may be substantially smaller than in the individualized case. This is true even if the court does not adopt the Kyriazi procedure but instead orders the claimants to share positions on some pro rata basis (i.e., if the court limits defendant's liability to the actual vacancies that occurred during the relevant time period). In general, courts base lump sum calculations on some percentage of the total vacancies which could have been anticipated would go to the class members in the absence of discrimination.112 On the other hand, individualized proceedings usually allow class members to claim any position for which they might have been eligible; i.e., the number of positions which they can claim is not limited to a fixed percentage of the vacancies which occurred. As a result, class members may be able to claim every vacancy that arose during the relevant time period and was not actually filled by a class member.113 If enough class members are successful, the defendant's back pay liability will exceed that which he would have theoretically paid to the class as a whole had he not discriminated in the first place. In contrast, the lump sum procedures used in other cases usually assume that the class members would have only filled a percentage of available vacancies equal to the percentage of class members in the applicant pool—those procedures assume nonclass members would have filled at least some of the positions and exclude those positions from the back pay calculations.

112. See, e.g., Hameed v. International Ass'n of Iron Workers, 637 F.2d 506 (8th Cir. 1980), discussed supra in text accompanying notes 99-105.

113. Kraszewski v. State Farm Ins. Co., 41 Fair Empl. Prac. Cas. (BNA) 1088 (N.D. Cal. 1986), discusses this point explicitly. In Kraszewski, the defendant argued that its monetary liability should be capped by calculating the number of positions the class members would have filled if they had been hired in proportion to their labor force availability and then subtracting the number of class members actually hired. Id. at 1091. The court rejected this approach, which would have allowed the class members to claim 214 positions, for two reasons. First, it concluded that it might have found discrimination to have occurred even if the defendant had hired in proportion to the available labor pool. Id. Second, the court relied on the Supreme Court's rejection of a "bottom line" defense in Connecticut v. Teal, 457 U.S. 440 (1982), and ruled that each individual member of the class, and not the class as a whole, should have the right to a complete remedy. 41 Fair Empl. Prac. Cas. at 1091. The court granted each of the class members, who numbered more than 1000, "the opportunity to demonstrate that she was discriminated against with respect to any of the 1250 vacancies filled by men." Id. at 1092. See infra notes 167-78 and accompanying text.
C. The Proven Victims Approach

While the cases previously discussed suggest that individual hearings are necessary in order to identify the specific persons entitled to recover back pay, another category of cases dispenses with individual hearings altogether. In these cases, the courts have concluded that they have identified all of the victims of discrimination as a result of the proof during Stage I, and that further proceedings to establish their basic eligibility was unnecessary. The clearest group of such cases involves situations where persons doing similar work were paid at different rates. It is clear in those cases, without further proof, that every person occupying a particular position during a particular period of time was a victim of discrimination. In *Love v. Pullman Co.*, the court found that railroad “porters-in-charge,” all of whom were black, performed duties essentially similar to those performed by “conductors,” all of whom were white. The conductors were paid more than the porters-in-charge, despite the similarity of their duties. While the court developed an averaging formula to calculate each class member's back pay, and referred the proceeding to a special master to receive claim forms and perform the actual calculations, it assumed that every member of the class would be eligible for back pay. This conclusion was made even more explicit by the Tenth Circuit on appeal (after the decision in *Teamsters*), which stated that it was clear that each member of the class was adversely affected by the defendant's job classifications, and that “[e]ach member of the class was harmed.”

While the later proceedings consumed substantial additional time, those proceedings did not raise fundamental questions of qualification, but rather involved identification of the class members whose entitlement had already been established and mechanical computation of their recovery based on the length of their employment with the company.

Certain aspects of *Thompson v. Sawyer* are also similar in theory to *Love*. In *Thompson*, the D.C. Circuit affirmed the district court's conclusion that the U.S. Government Printing Office had illegally paid its women employees lower wages for doing work similar in content to that performed by men. The court concluded that this procedure violated the Equal Pay Act. The court also concluded that the disparity in wages

115. 569 F.2d at 1077.
116. The special master's final (and 16th) report notes that 1592 claims were filed and that even with the help of an expert and computer facilities, the special master devoted some 365 hours to the processing of the claims. *Love v. Pullman*, Sixteenth Report of Special Master (Dec. 8, 1978) (files of the author).
117. 678 F.2d 257 (D.C. Cir. 1982).
violated Title VII and provided back pay relief under that statute to those members of the Title VII class who had not opted in to the Equal Pay Act class. As to the latter category of plaintiffs, the court adopted a back pay procedure which simply required the defendant to pay each class member the difference between the wages actually paid her and those which she would have been paid had she been employed at the position reserved for male employees. The defendant was not allowed any opportunity to rebut class members’ claims to that entitlement. As in Love, the facts established in proving liability in Stage I also established which class members were entitled to monetary relief in Stage II.

The theoretical basis for this category of cases is discussed in Liberles v. Daniel. Unlike Love and Thompson, which involved disparate treatment (in those cases, the intentional assignment of minorities and women to lower-paying jobs which were virtually identical to higher-paying ones), Liberles was a disparate impact case. In Liberles, the court found that the Cook County Department of Public Aid had used invalid test and education requirements which prevented black employees working at one level from attaining higher status and salary, even though they were already performing virtually the same tasks as the more highly paid employees. The defendant claimed that Stewart v. General Motors Corp. required individualized remedies and that the defendant should have the right to demonstrate that individual members of the class were not qualified, independent of the unlawful test and education requirements, to perform the tasks involved in the higher status job. The court rejected this argument, for reasons worth quoting at length:

Although “[w]here possible, an individualized remedy should be utilized,” Stewart v. General Motors Corp., 542 F.2d 445, 452 . . . (7th Cir. 1976), cert. denied, 433 U.S. 919 . . . (1977), individualized remedies or even individual determinations within a class-wide remedy are not necessary here. The basis of the earlier liability ruling is that the plaintiffs were doing the same work as Caseworker I’s but were paid less money. The only requirements for promotion to Caseworker I are invalid. Thus, the only thing that prevented the plaintiffs from earning a higher salary was illegal conduct. Throughout their memoranda defendants insist on a right to prove non-entitlement on an individual basis, but they never point to any possible specific requirement or fact situation that would

118. As noted above, Title VII back pay relating to the denial of promotions, rather than to initial job assignments, was calculated using a lump sum procedure and pro rata distribution (the defendant having waived its right to challenge individual class members’ entitlement to their pro rata share). Supra note 107.


120. 26 Fair Empl. Prac. Cas. (BNA) 547 (N.D. Ill. 1981), aff’d in part. rev’d in part. 709 F.2d 1122 (7th Cir. 1983).

provide a defense to a back pay award to an individual plaintiff. There
simply are no remaining issues that could be resolved in individual
hearings.122

Love, Thompson and Liberles reach logically consistent results, even
though Love and Thompson were disparate treatment cases and Liberles
is a disparate impact case. All three are essentially “equal pay for equal
work” cases. In each case, the court had found every class member, by
virtue of the proof provided during the liability phase, to be a victim of
pay discrimination: each was paid less than the nonclass members who
were performing similar work, and there was no nondiscriminatory ex-
planation for the wage disparity. Thus, in these three cases, the question
of the actual availability of vacancies at the higher paying positions was
irrelevant. Plaintiffs did not have to claim that they were denied promo-
tion or transfer to or selection for another position; the discrimination
could have only occurred as a result of the employers’ decisions, based on
no factor other than race or sex, to pay the plaintiffs less than they were
paying other employees for doing the same work.

Love, Thompson and Liberles are also similar in that each involved
the denial of the benefits of a single, identifiable position to each class
member. As a result, each person’s damages were relatively easy to cal-
culate. It was also clear in each of those cases that discrimination, either
through a group of invalid tests and education requirements (Liberles) or
through an assignment policy based directly on sex or race (Thompson
and Love), was the only reason the class members were paid lower wages.
The defendant could not claim that the class member would not have
been paid more because of some other nondiscriminatory reason.

Love, Thompson and Liberles appear to be rarities. The factual situ-
ation in those three cases contrasts with those in other cases decided on
either disparate treatment or disparate impact theories. In disparate
treatment cases such as Carter and Kyriazi, the Stage I proof does not
identify one or more concrete discriminatory practices such as a directly
race- or sex-based assignment policy or an assignment policy based on an
invalid test which differentiates among employees by race or sex. Rather,
the proof establishes only that minorities or women have been dispropor-
tionately excluded from a position or series of positions, and that exclu-
sion can only be explained by the presence of discrimination. That proof
does not, however, establish which persons were excluded from those po-
sitions, the reasons specific individuals were excluded, or where they
would be absent discrimination. Identification of actual victims therefore
requires additional Stage II proceedings.

In disparate impact cases such as Hameed123 the discrimination re-

122. Liberles, 26 Fair Empl. Prac. Cas. at 550 (parallel citations omitted).
123. 637 F.2d 506 (8th Cir. 1980); see supra note 99-105 and accompanying text. The discrimi-
sults from a complex of unlawful practices, not all of which affected every class member. In addition, even if the disparate impact results from a single practice, the ultimate impact of that practice on any particular class member may not be at all clear. This could occur because the practice barred a person not only from one position but from an entire series of promotion or transfer opportunities. Under those circumstances, the court could not reconstruct from the facts established during Stage I exactly where each person would have ended up. Therefore, each class member's damages would not be calculable without further proceedings.

It may also be difficult to determine the effect of a particular practice in a disparate impact case if the defendant can argue that some class members were unaffected by the discriminatory practice because they would have been rejected for nondiscriminatory reasons. In *Dickerson v. United States Steel Corp.*, for example, it was clear that each class member who took and failed an apprentice test battery had been subjected to a discriminatory practice. Nevertheless, the defendant was permitted to show that any person who was the victim of that unlawful test battery should still be denied back pay because she lacked other qualifications, and would not have been selected for nondiscriminatory reasons.

These decisions demonstrate that the formulation of a case as one involving disparate impact or disparate treatment does not determine whether Stage II proceedings will be necessary. Absent convincing proof at the liability stage that the defendant had victimized each class member by a particular practice and that the defendant could not offer any non-

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125. Id. at 1089.
126. Id. at 1090. A second part of *Dickerson* dealt with promotions to first level management positions. Plaintiffs had proven during the liability stage that defendant had no selection criteria for these positions other than discriminatory ones and that the criteria resulted in a self-perpetuating elite. Id. at 1091. Defendant argued at the relief stage that there were other criteria that were in fact employed and that it should have an opportunity to show that some of the plaintiff class members would not have met them. The court denied defendant this opportunity, on the grounds that the other criteria were as subjective as those found to be discriminatory. "Because the total class recovery is essentially set, there is little reason to permit the company to offer its subjective criteria at trial to eliminate certain claimants, after the Court has already determined that those criteria were the root of the problem." Id. See *Officers for Justice v. Civil Serv. Comm.*., 473 F. Supp. 801 (N.D. Cal. 1979), aff'd, 688 F.2d 615 (1982), cert. denied, 459 U.S. 1217 (1983), in which the court approved a settlement agreement which provided for payments to each person who was required to take particular invalidated examinations or was precluded by discriminatory criteria from taking other examinations. The settlement reflects plaintiffs' argument that every class member was subjected to an unlawful discriminatory practice, and that those practices were the only reason those persons were not selected for promotion. It was therefore not necessary to establish individualized procedures to identify victims further. Cf. *Thoma's v. City of Evanston*, 610 F. Supp. 422 (N.D. Ill. 1985).
discriminatory explanation of why a particular person was not hired or promoted, courts have required some form of Stage II proceedings. While the courts may base those proceedings on lump sum calculations of injury to the entire class, and may rely on hypothetical comparative calculations of injury to class members, virtually all of the cases surveyed require some individual proceedings and give the defendant an opportunity to disqualify individual claimants (usually on the grounds that they would have been denied promotion or selection for nondiscriminatory reasons).

As explained in the introductory section of this Article, the reported cases rarely reveal the practical impact of the requirement of allowing the defendant to come forward and attempt to defeat every individual class member claimant. In some cases, the parties have found the first stages of the process so burdensome that they quickly reached a settlement. Correspondence from plaintiffs' counsel indicates that settlements were achieved after the directive to go through individual hearings in Stamps v. Detroit Edison Co.,127 Patterson v. American Tobacco Co.,128 and in several post-Teamsters cases.129 In Stamps, over 400 claim forms were received and the first hearing took five days. In the words of plaintiffs' counsel, "after 5 days on one claim the parties began negotiating in earnest." Had they not reached a settlement, the plaintiffs were prepared to use twenty law firms or individual attorneys to represent the claimants and at one point moved the district court for the appointment of ten more special masters.130 In other cases, the parties were willing to move ahead patiently and litigate the claims of many of the class members.131

Without additional facts about the final results of these cases, it is difficult to evaluate the practicability and fairness of the procedures cho-

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129. Settlements resulted in the post-Teamsters cases of Dickerson v. U.S. Steel, 439 F. Supp. 55 (E.D. Pa. 1980) (after five hearings of potential hundreds); Smith v. Union Oil, 18 Fair Empl. Prac. Cas. (BNA) 1183 (N.D. Cal. 1978) (after difficulty in locating 1224 potential claimants led to only 19 claims); White v. Carolina Paperboard, 564 F.2d 1073 (4th Cir. 1977) (prior to commencement of hearings); Chewning v. Schlesinger, 471 F. Supp. 767 (D.D.C. 1979) (settlement of more than 200 remaining claims after consideration of the first 11 back pay claims required one year to complete); and McKenzie v. Kennickell, 645 F. Supp. 427 (D.D.C. 1986). In McKenzie, in which the author was plaintiffs' counsel, plaintiffs recruited over 100 attorneys from 23 Washington, D.C. law firms to represent individual claimants in Teamsters hearings before a U.S. magistrate. By the time a settlement was reached, prior to the commencement of the first hearing, those attorneys and paralegals working with them had recorded 2782 hours of work in preparation, in addition to the work of class counsel. Information in files of author.
130. Correspondence of author with plaintiffs' counsel, September 12, 1984 (in author's files).
sen in any particular case or make confident generalizations about the "typical" case. In some cases the settlements or the series of individual hearings may well result in the award of relief to class members which is truly compensatory while being fair to the defendant. Experienced Title VII counsel may be able to structure Stage II proceedings which result in reasonably prompt distributions of back pay and a series of minitrials which are not particularly burdensome for plaintiffs, defendants or their counsel. On the other hand, the individualized procedures imposed by the courts may have induced settlements which involved very low awards to plaintiffs who are not able to wait out the completion of years of back pay hearings, or may have involved very large payments from defendants who concluded that the cost of minitrials (in terms of dollar expense and disruption) would be greater than the cost of an inflated lump sum payment. The fees paid to attorneys for handling the mini-trials may be disproportionate to the actual recovery of each class member. The actual judgments made about each claimant's case may be so speculative as to be no more than guesswork.

The resolution of these factual questions is beyond the scope of the present Article. Their resolution requires careful study of unreported materials (reports of special masters, pleadings, and orders in the late stages of litigation) and correspondence with the attorneys for the parties. One obvious conclusion is clear, however. Adherence to a reading of Teamsters which compels the use of individual hearings to establish each class member's entitlement to share in a back pay award, without consideration of the practical consequences of that decision, can lead to very complicated, time-consuming, and often highly hypothetical Stage II proceedings. The balance of this Article discusses recent cases which have specifically addressed these potential problems, and suggests certain factors which courts should consider in determining whether to require the parties to conduct Teamsters hearings.

IV
NEW JUDICIAL APPROACHES TO THE AWARD OF BACK PAY

Until recently, the only exceptions to the rule that the defendant must have an opportunity to disqualify each individual claimant were cases such as Love v. Pullman, Thompson v. Boyle, and Liberles v. Daniel, where the Stage I proof established that every class member was in fact a victim of discrimination. Some recent decisions, however, reach different results and suggest that courts may be beginning to recognize the burdens of requiring large numbers of class members to use individualized hearings to recover back pay.
The first and most important of these cases is Segar v. Smith, in which the D.C. Circuit addresses the central question of whether the defendant must be allowed to rebut individual, as opposed to class-wide, claims. In Segar, plaintiffs were a class of black Drug Enforcement Administration ("DEA") agents who alleged discrimination in salary, promotions, initial grade assignments, work assignments, supervisory evaluations, and imposition of discipline. After a trial described by the court of appeals as "in large measure a duel of experts armed with sophisticated statistical means of proof," the district court found that plaintiffs' multiple linear regression analyses showed that "salary differentials between white and black agents were a result of race discrimination, and that DEA had discriminated against black agents in grade-at-entry, work assignments, supervisory evaluations, and promotions." While the statistical evidence itself did not establish discrimination in promotions to higher level positions (GS 13-18), the district court nevertheless found such discrimination had occurred, basing its finding on inferences from the proven discrimination at the immediately preceding levels.

What is especially relevant about Segar, for the purposes of this Article, is the procedure chosen to calculate and distribute back pay. The procedure adopted by the district court was summarized by the court of appeals:

Class-wide Backpay. Rather than order individualized relief hearings, see Int'l Brhd of Teamsters v. United States, 431 U.S. 324, 361-362 (1977) [parallel cites omitted], the District Court ordered a class-wide award of backpay for members of the plaintiff class. For successive one-year periods beginning in July 1972, a class-wide backpay pool figure would be calculated. The calculations would derive from plaintiffs' first salary regression study (which measured disparities among all agents including those hired before 1972). For every year for which figures were available—1975 to 1979—the class-wide pool figure would be the race coefficient multiplied by the number of black special agents. For the years before 1975 and after 1979 the race coefficient would be derived by extrapolating backward and forward from the available figures, and this extrapolated coefficient would be multiplied by the number of black agents.

The annual backpay pool would be distributed evenly among eligible black agents. Only agents above the GS-9 level during the year in question were made eligible. The court excluded agents at GS-7 and GS-9 because most discrimination was found to occur at the higher levels of DEA. The court did, however, permit individual plaintiffs to come forward and seek backpay for discrimination suffered in initial grade assign-
ment (viz. assignment to GS-7 instead of GS-9). Any such individual awards would be subtracted from the class-wide pool in order to prevent double liability. Mem. Op. at 3, JA 116.136

The court of appeals approved this procedure.137 It agreed that the district court could properly order individual hearings at the lower levels (GS-7 and GS-9):

At these levels individualized hearings are appropriate because a small number of discernible decisions as to initial grade assignment and promotion will be in issue for each agent. These determinations are akin to those in Teamsters, where the required hearings were to involve a single determination as to whether individual plaintiffs had applied and were qualified for particular line driver positions in the trucking industry. 138

As to discrimination above the GS-11 level,139 the court of appeals approved a very different procedure, which does not appear to parallel the relief procedure ordered in the prior cases. As explained above, the procedure involves a lump sum calculation of back pay, followed by a pro rata distribution of the lump sum to class members. Significantly, the procedure does not contemplate any individualized analysis of the class members. While class members would presumably have to come forward to file some sort of claim form and establish that they were employed at DEA during the relevant time periods, the defendant would have no opportunity to disqualify them by showing that they would not have been promoted for some nondiscriminatory reason.

Judge Wright’s discussion of this procedure is illuminating. Perceiving no error in the district court’s finding that it would be impossible to reconstruct the employment history of the senior black DEA agents, Judge Wright noted the finding that discrimination had “impeded black agents at every turn,” and emphasized that the court had no way of knowing how any particular practice (discriminatory promotion criteria, discriminatory work assignments, discriminatory disciplinary actions) had affected any particular agent’s promotion opportunities. 140 The court of appeals concluded,

To require individualized proceedings in the circumstances would be to deny relief to the bulk of DEA’s black agents despite a finding of pervasive discrimination against them. In effect, DEA would have us preclude relief unless the remedial order is perfectly tailored to award relief

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136. *Id.* at 1264-65.
137. The court of appeals approved a procedure for calculation of the back pay pools using the same regression analyses used to establish liability. However, the court remanded the case to the district court with instructions to determine whether use of the regression analyses in this manner properly excluded the effects of pre-1972 discrimination from the calculations. *Id.* at 1291-93.
138. *Id.* at 1290.
139. Promotions from GS-9 to GS-11 were noncompetitive; thus, discrimination was alleged only as to promotions above the GS-11 level. *Id.* at 1260.
140. *Id.* at 1290.
only to those injured and only in the exact amount of their injury. Though Section 706(g) generally does not allow for backpay to those whom discrimination has not injured, this section should not be read as requiring effective denial of backpay to the large numbers of agents whom DEA's discrimination has injured in order to account for the risk that a small number of undeserving individuals might receive backpay.\textsuperscript{141}

Regarding the defendant's argument that \textit{Teamsters} requires individual hearings, the court of appeals stated,

Though \textit{Teamsters} certainly raises a presumption in favor of individualized hearings, the case should not be read as an unyielding limit on a court's equitable power to fashion effective relief for proven discrimination. . . . Later courts have often faced situations in which the \textit{Teamsters} hearing preference had to bend to accommodate Title VII's remedial purposes.\textsuperscript{142}

The court then cited \textit{Thompson} and \textit{Hameed}, and two leading pre-\textit{Teamsters} cases, \textit{Stewart}\textsuperscript{143} and \textit{Bowe}\textsuperscript{144}.

While the D.C. Circuit's interpretation of \textit{Teamsters} is correct, its reference to cases such as \textit{Thompson} and \textit{Hameed} is problematic. The court does not note that while those cases speak in terms of class-wide relief, and calculate lump sums in a manner similar to that approved by the district court in \textit{Segar}, those cases (together with \textit{Stewart} and \textit{Bowe}) assume some additional individual hearings would be required.\textsuperscript{145} That is, those cases recognize that the defendant should have some opportunity to come forward and show that a claimant would not have been promoted for some legitimate, nondiscriminatory reason. No such opportunity is provided in \textit{Segar}.

In essence, the practical result of \textit{Segar} is similar to that in cases such as \textit{Love}, \textit{Liberles} and the part of \textit{Thompson} relating to equal pay claims: the court assumes that each member of the class is entitled to back pay, and the defendant is given no opportunity for rebuttal. As explained above, \textit{Love} and similar cases reach the result they do because it is clear from the Stage I proof in those cases that every member of the class was in fact a victim. That is not, however, the explicit rationale of \textit{Segar}. In fact, the court recognizes the possibility that some agents were not victims; it concludes, however, that "[i]f effective relief for the victims of discrimination necessarily entails the risk that a few nonvictims

\textsuperscript{141} Id. at 1291.

\textsuperscript{142} Id. at 1289-90.

\textsuperscript{143} Stewart v. General Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976) ("Given a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages, we choose the latter.")\textsuperscript{144} cert. denied, 433 U.S. 919 (1977).

\textsuperscript{144} Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969).

\textsuperscript{145} The court of appeals in \textit{Thompson} implied that individual hearings with respect to promotion claims (rather than the equal pay claims) would have been necessary had the defendant not waived its right to require them. \textit{See supra} note 107.
might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk.” 4 The court therefore dispenses with individual hearings at the higher levels not because all of the upper level agents were victims, but rather because of the impossibility of reconstructing what effect an illegal practice would have had on a particular agent and the risk that the inability to establish how a particular practice affected a particular agent would deny relief altogether. 147

What principles emerge from Segar? First, Segar reinforces the presumption arising from Teamsters that individual hearings with detailed (if hypothetical) reconstruction of each individual’s job history are the preferred method of resolving back pay issues. It suggests, however, that such hearings can realistically be used only in factual situations similar to that in found Teamsters; i.e., where the hearings involve a “single determination” as to whether individual class members had applied and were qualified for particular (presumably single) positions. Only the GS-7 and GS-9 class members in Segar qualified under this standard.

Second, Segar suggests that individual hearings should not be used for any purpose, including the defendant’s rebuttal, where it simply would not be possible for the court to determine the impact of a particular discriminatory practice on a particular individual; where, as the court put it, “the court could have no way of knowing how much more favorable a particular agent’s evaluation would have been, or how a fair evaluation might have affected the agent’s chances for obtaining a particular promotion.” 148 It is this second aspect of Segar which departs from earlier case law. In the earlier cases, the courts faced with such a quagmire have required the parties to wade into it—they have still allowed the defendant to offer individualized rebuttals of each class member’s claim.

The question this analysis raises, therefore, is this: are the findings in Segar so different from those in other cases that they compel a decision to preclude the defendant from any opportunity to disqualify individual claimants? A review of the cases discussed above suggests that the factual findings in Segar are not significantly different from those in at least some of the earlier cases. For example, it is not clear that the reconstruction of an individual’s history in Segar would have been more speculative or hypothetical than that undertaken in Carter v. Shop Rite Foods.

146. Segar, 738 F.2d at 1291.
147. Segar does require individual hearings at the lower GS-7 and GS-9 levels, explaining that it will be possible to reconstruct the job histories of individuals at that level. See supra text accompanying note 138.
148. Segar, 738 F.2d at 1290-91. The court also stated that it had no way of determining the impact on particular agents of discrimination in work assignments or disciplinary actions. Id. at 1291.
It might also be suggested that the discrimination in *Segar* was more pervasive than that in other cases—the court did find that every selection criterion, at every level in question (supervisory evaluations, breadth of experience, disciplinary history), was "tainted with illegal discrimination." Such a finding might have led the court to conclude that, even though the defendant theoretically had a right to try to rebut plaintiffs’ claims, the DEA could not offer any nondiscriminatory reasons why a person was not promoted, and that an opportunity at "rebuttal" would be superfluous. Plaintiffs urged this theory in their pleadings, relying in part on *Dickerson v. U.S. Steel*, where the court concluded that the kind of evidence of qualifications the defendant could offer to try to defeat individual claims was unreliable. The court of appeals did not, however, explicitly adopt this rationale.

Rather, the only explicit rationale in *Segar* for dispensing with individual hearings is set forth in a footnote distinguishing the earlier D.C.
Circuit opinion in *McKenzie v. Sawyer*. In *McKenzie*, the court affirmed a district court decision to require individualized hearings, holding that "while [*Teamsters*] does not mandate individualized hearings in every case, [it] does require some demonstration that the individual class members receiving compensation were likely victims of illegal discrimination." 

The *McKenzie* court went on to recognize, although without citing cases such as *Love* or *Liberles*, that in some circumstances such hearings would not be required: "for example, if all white employees similarly situated to the plaintiffs automatically received a benefit denied to the plaintiffs." In the absence of such a finding, the court held that "further evidentiary proceedings are requisite," and upheld the district court's decision to require them.

*McKenzie* is therefore consistent with the earlier case law. *Segar* distinguishes *McKenzie* on the grounds that the panel in the earlier case "was not faced with a trial court's decision that individual hearings would effectively preclude relief for most members of the plaintiff class." After reviewing the district court's findings about the pervasiveness of the discrimination at DEA, the court concludes, "[t]o require individualized hearings in these circumstances would be to deny relief to the bulk of DEA's black agents despite a finding of pervasive discrimination against them." *Segar* appears to identify a new principle: if plaintiffs have shown that defendant's discrimination is pervasive and probably adversely affected most class members in one way or another,}

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156. 684 F.2d 62 (D.C. Cir. 1982), discussed in *Segar* at 738 F.2d at 1289 n.36.
157. 684 F.2d at 76 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977)).
158. *Id.* A footnote to this sentence states, "This determination [i.e., whether plaintiffs' proof at the liability stage is sufficient to establish victimization] can be waived, see *Thompson*, 678 F.2d at 286," 684 F.2d at 76 n.11. As explained above, *supra* note 98, it is not clear that this is what was waived in *Thompson*. Part of the proof in *Thompson* did in fact establish that all members of the class were victims because they had been denied equal pay; the defendant did not waive any right to challenge that finding, since it presumably had no right to do so. See *supra* text accompanying note 118. What defendant did waive in *Thompson* was its right to challenge the pro rata distribution of a lump sum among those class members who were denied promotions, but who were not all determined to be victims at the liability stage. See *supra* note 98. The practical effect of such a waiver, although probably unintended by the defendant appears to be an implicit recognition that all the class members were victims.
159. 684 F.2d at 76 (citing *Teamsters*, 431 U.S. at 368).
160. 738 F.2d at 1289 n.36. The unreported remedial order entered by the district court in *Segar* does not actually include specific findings about the potential difficulties of individual hearings or an explanation of why the court chose one procedure over another. Relief order. *Segar* v. Civiletti, 508 F. Supp. 690 (D.D.C.), *modified sub nom.* *Segar* v. Smith. 738 F.2d 1249 (D.C. Cir. 1984). cert. denied, 471 U.S. 1115. Plaintiffs' counsel did file an extensive memorandum arguing that reconstruction of hypothetical nondiscriminatory job histories would be impossible because of the pervasiveness of discrimination at all phases of DEA's selection procedure and explaining how individual hearings could delay relief for years. Plaintiffs' Memorandum on Relief Issues, *supra* note 154.
161. 738 F.2d at 1291.
and if the plaintiffs can show that the use of individual hearings will be so cumbersome, or require such speculation, that relief will be denied to some significant number of actual victims, the district court can dispense with individual hearings altogether.

In one respect, this conclusion in Segar says no more than the courts have said regularly since Pettway: each plaintiff should not have to prove exactly the extent to which he was injured; as the court noted, it would be impossible to reconstruct what would have happened to any particular individual in the absence of discrimination. To require each person to prove precisely how he was injured would in fact be impossible, and it would defeat the remedial goals of Title VII to require plaintiffs to do so. In recognizing this, Segar is consistent with prior case law, which has allowed plaintiffs to rely on generalized and to some extent hypothetically calculated claims of injury, and imposed most of the burden of defeating such claims on the defendant.162

Segar does break new ground, however, in considering not only the potential complications of plaintiffs' proof, but, albeit implicitly, the potential complications of defendant's proof. The Segar court appears to have concluded that even if the plaintiffs' phase of the Teamsters process is reduced to its most simple and generalized level, the second step in this particular case would be so speculative and time-consuming that it would deny relief altogether. This conclusion is based on practical considerations rather than theoretical ones; the court did not conclude that this case was like Love, Thompson, or Liberles where the Stage I proof rendered defendant's rebuttal in Stage II impossible.163 Rather, the court suggests that using generalized class-wide reconstruction of plaintiffs' claims may not help avoid the quagmire of hypothetical judgments if the defendant is then allowed to demand a separate hearing on each of those claims.

The decision to look at both steps of the Teamsters hearing process in practical terms and assess their possible impact on the parties is a new and promising approach to the individualized hearings issue. That approach is an intensely practical one that recognizes the problems that would result from insistence on a full-blown, two-step Teamsters hearing for each claimant in every case. Underlying Segar, of course, is a finding

162. That is, the courts have generally rejected the suggestion in Mitchell v. Mid-Continent Spring, 583 F.2d 275, 283 n.11 (6th Cir. 1978), cert. denied, 441 U.S. 992 (1979), and in the concurring opinion of Judge Bell in Pettway, see supra note 25, that if a plaintiff cannot show precisely how he or she was injured, no recovery is possible.

163. Given the complexity of the promotion system at DEA, it might have been difficult for the defendant to show, by "clear and convincing evidence," that a particular person would not have been promoted. The defendant's task would not, however, have been theoretically impossible. The defendant might have been able to show, for example, that a particular employee regularly declined the specific offer of promotions or that some nondiscriminatory information in his personnel records would have prevented any advancement.
that it is highly likely that most class members were "victims," in one way or another, of a discriminatory environment. While the court recognized that some people may have been unaffected, it suggests that they are few in number. Given that conclusion, Segar holds that, on the facts before it, it does not make sense to go through the burdensome and time-consuming process of individualized hearings to sort out a few nonvictims, when the effect of the hearings would primarily be to delay relief for the bulk of the class who were victims. The Segar court concludes that this flexible approach to relief is consistent with the purposes of Title VII and with the mandate of cases such as Albemarle Paper v. Moody and Franks v. Bowman Transportation Co. to make persons whole and eliminate the effects of racial discrimination.

In taking a flexible approach to the individualized hearings requirement of Teamsters, Segar departs from the procedure adopted in most of the earlier cases, but is justified in doing so. Teamsters does not compel a court to order a complex series of Stage II individual hearings in every Title VII back pay case regardless of the consequences, particularly where the plaintiffs themselves oppose the use of such hearings. Where a cycle of Teamsters hearings would simply delay relief and is not necessary to sort out any significant number of class members who were probably unaffected by discrimination, Segar suggests that a court can properly simplify or even eliminate Stage II.

Subsequent to Segar, a district court in the Northern District of California relied on the D.C. Circuit's opinion in recognizing that Teamsters does not compel individual hearings in every Phase II proceeding. In Kraszewski v. State Farm Insurance Co. the plaintiffs, rather than the defendants, argued that the court should use individual hearings instead of a class-wide lump sum approach in calculating back pay awards. The court cited Teamsters for the proposition that individualized hearings are the preferred method of determining damages in Title VII cases, but also acknowledged that some courts had held that a class-wide formula remedy may be appropriate under some circumstances.

The defendants in Kraszewski argued that individual hearings would "'entangle this Court . . . into the twenty-first century'" and, at a minimum, "'produce a process spanning 7000 consecutive days—more than nineteen years.'" The court disagreed:

On the basis of the record before the court, defendants' bogeyman of

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164. 422 U.S. 405 (1975).
166. 738 F.2d at 1291.
168. Id. at 1089.
169. Id.
170. Id. (quoting defendant's opposition to the plaintiffs' motion for a Stage II remedy).
nineteen years is not credible. Rather, plaintiffs' projection that the claims procedure would take only 2-3 years appears far more reasonable, both in light of the facts of this case and of this court's past experience with litigation of this nature. As plaintiffs point out, it is unrealistic to assume, as defendants did, that only one attorney would work on all anticipated one thousand claims. Moreover, plaintiffs reasonably assert that many of the claims would settle, obviating the need for a large number of individual hearings. Therefore, based on the reasonable projections of the plaintiffs, the court finds that an individual process in this case appears to be of manageable proportions, in keeping with the considerations expressed by those courts approving individualized hearings.\textsuperscript{171}

The Kraszewski court also found that the individual hearings would not be overly complicated, since the discrimination at issue only involved one entry-level position. The court noted that Segar itself had approved individual hearings for the claims relating to similar positions, and had only approved a class-wide approach for upper-level positions where the discrimination had been pervasive and it would have been too difficult to trace career paths.\textsuperscript{172}

Finally, "and perhaps most importantly,"\textsuperscript{173} the court emphasized that the class members were seeking very large back pay awards—the full amount of the claims could have been as large as $500 million for approximately 1000 class members.\textsuperscript{174} "Although both individual and formula relief may satisfy due process, where large sums of money are at stake, the presumption in favor of individualized hearings would appear to be critical."\textsuperscript{175} The court therefore was not persuaded that class-wide relief was appropriate, particularly in light of the plaintiffs' argument that "only approximately one thousand claims will be filed in this case."\textsuperscript{176} The court did indicate, however, that if it became obvious that many more than one thousand claims would be filed, it would be open to a motion from the defendants to reconsider on the basis that the individual hearings procedure would be unwieldy.\textsuperscript{177}

One of the most interesting elements of the Kraszewski opinion is the court's implicit conclusion that there is nothing extraordinary about a

\begin{footnotes}
\item[171.] Id. at 1089-90.
\item[172.] Id. at 1090. The court also concluded that the individual hearings would be simplified by the fact that plaintiffs had agreed to the use of stipulated average earnings. Id.
\item[173.] Id.
\item[174.] Id.
\item[175.] Id. It is not clear whether the court was more concerned about the rights of the individual class members to receive the largest award possible, or about the rights of the defendant to avoid paying such large awards. A footnote in the opinion suggests the court's concern was the former: "The court is also concerned that if class-wide relief resulted in an unduly harsh financial penalty for named plaintiffs, the class action mechanism would be eviscerated in an area where it has been invaluable in eliminating widespread discrimination." Id. at 1090 n.2.
\item[176.] Id. at 1091.
\item[177.] Id.
\end{footnotes}
procedure which would require the parties (and the court) to commit their resources to the processing of as many as one thousand claims over a two to three year period. The court's emphasis on the potential size of each class member's individual recovery suggests that it might have reached a different result, and that plaintiffs' counsel might have sought some other procedure, had the stakes for both parties not been so large.\textsuperscript{178}

While Segar and Kraszewski suggest that courts have substantial discretion under Teamsters in deciding how to structure back pay proceedings, exercise of that discretion may also be guided in the future by more recent Supreme Court pronouncements on the nature of remedies in employment discrimination cases. During the 1985 term, the Supreme Court decided Local 28, Sheet Metal Workers International Association v. EEOC,\textsuperscript{179} in which it approved the use of race-conscious affirmative action as a class-wide remedy. While the remedial scheme at issue in the Supreme Court involved the imposition of goals for minority membership in the defendant union, rather than monetary relief, the decision includes some language relevant to the award of back pay. Justice Brennan's opinion for the Court approved the use of affirmative action in the form of goals and timetables as a remedy for a Title VII violation, holding that such remedies may properly benefit persons who have not been shown to be actual victims of discrimination. The Court rejected the petitioners' position, which was based on dicta in Firefighters Local 1784 v. Stotts,\textsuperscript{180} that no relief was available unless the beneficiaries of that relief could show that they themselves were victims.\textsuperscript{181}

\textsuperscript{178} Two other post-Segar cases, both arising in the Northern District of Illinois, dispensed with individual hearings and appear to have awarded back pay on a lump sum pro rata distribution basis. Thomas v. City of Evanston, 610 F. Supp. 422 (N.D. Ill. 1985); EEOC v. Chicago Miniature Lamp Works, 640 F. Supp. 1291 (N.D. Ill. 1986). Both cases rely on Stewart v. General Motors and Hameed v. International Association of Bridge Workers, but do not acknowledge that those cases both required some additional proceedings at which the defendant was allowed to come forward to attempt to disqualify those claimants who were not actually "victims." Thomas appears to turn on the court's view that all of the class members were equally affected by the employer's discriminatory practices and that each was therefore a "victim." Thomas at 435. In contrast, Chicago Miniature Lamp emphasizes the unpredictability and speculation inherent in individualized proceedings, in which the court would have had to determine which of the claimants would have actually been hired in the absence of discrimination. 640 F. Supp. at 1298-99. Like the court in Segar (which it does not cite), the Chicago Miniature Lamp court recognizes that the class-wide approach may result in an award for some persons who would not have been hired even in the absence of discrimination, but concludes that the defendant should not be allowed to take advantage of an uncertainty caused by its own wrongdoing. Id. at 1300.

\textsuperscript{179} 106 S. Ct. 3019 (1986).

\textsuperscript{180} 467 U.S. 561 (1984).

\textsuperscript{181} 106 S. Ct. at 3049. Petitioners based their position, supported by the Solicitor General, on their reading of the last sentence of § 706(g) of Title VII, which provides:

No order of the court shall require the admission or reinstatement or an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission,
The petitioners' position, had the Court accepted it, would have presumably required each class member to go through a Teamsters hearing to benefit from a goals and timetables procedure. Justice Brennan's decision rejected this argument, holding that reading section 706(g) and Stotts "to prohibit a court from ordering any kind of race-conscious relief that benefits non-victims . . . would deprive the courts of an important means of enforcing Title VII's guarantee of equal employment opportunity."

Significantly for the purposes of this Article, however, Justice Brennan pointedly contrasted the affirmative class-wide relief at issue on appeal in Sheet Metal Workers with "make-whole" relief, such as competitive seniority, promotion, or back pay. Emphasizing that the district court's orders did not require the defendant union to indenture or train particular individuals, or to admit to membership any person who had been refused admission for reasons unrelated to discrimination, the Court stated in a footnote: "We note that, consistent with Stotts, the District Court in this case properly limited make-whole relief to the actual victims of discrimination. The Court awarded back pay, for example, only to those class members who could establish they were discriminated against." 183

This dicta in Sheet Metal Workers is significant, since it suggests that Title VII prohibits the award of back pay to any class member who has not come forward (presumably in a Teamsters hearing) to prove she was an "actual victim." Applied literally, such a reading of Title VII might prohibit the type of class-wide relief ordered in Segar. However, the Court did not address the issue directly. The Court did not have before it a situation like the one in Segar where the trial court had found individual hearings to be impractical and likely to result in a total denial of relief. In Sheet Metal Workers, the district court had found that the number of potential claimants was "undoubtedly small," primarily because the defendant had no records of who had applied for admission. 184 There is no indication the district court ever considered the prospect of a class-wide monetary award, probably because it was not clear who the

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182. 106 S. Ct. at 3049-50 (footnotes omitted).
183. Id. at 3049 n.44.

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suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin in violation of . . . this title.

42 U.S.C. § 2000e-5(g) (1982). In Stotts, the Court had stated (in language later described by Justice Brennan in Sheet Metal Workers as "not strictly necessary to the result." 106 S. Ct. at 3049) "[o]ur ruling in Teamsters that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g)" which, the Court noted, "is to provide 'make-whole' relief only to those who have been actual victims of discrimination." Stotts, 467 U.S. at 579-80.
class of claimants would be.\textsuperscript{185}

In light of the small number of potential claimants, and the fact that the case involved denials of entry level positions and probably would not have required extensive reconstruction of job histories, the district court's 1975 decision in \textit{Sheet Metal Workers} is consistent with \textit{Teamsters} and also with \textit{Segar}, which recognize that the usual practice in awarding back pay has been to require individual proceedings. \textit{Sheet Metal Workers}, therefore, does not hold that a district court can never bypass the individual hearings procedure and award monetary relief to persons who might be "nonvictims." While the Supreme Court would surely examine closely a case involving class-wide awards of retroactive seniority, it seems less likely that it would second-guess a district court's decision where the relief involves back pay awards, which have no impact on innocent parties.\textsuperscript{186}

\textsuperscript{185} The district court had also refused to permit claims by persons who would have applied for admission had the union's reputation for discrimination been less pervasive, stating that any damages based on such claims were "unascertainable." \textit{Id.} As noted above, \textit{supra} note 58, the later decision in \textit{Teamsters} would appear to allow such claims, even though they involve a difficult burden of proof for each claimant.

\textsuperscript{186} A literal reading of \textit{Sheet Metal Workers} could have an enormous impact on the size of defendants' back pay liability. If the case is read to require individual hearings in every case, on the grounds that no individual can receive "make-whole" relief without showing that she was a victim of discrimination, then each class member required to go through an individual hearing should be able to insist that she in fact be "made whole." In other words, an individual seeking to be made whole should not have to share with anyone else an award of back pay for denial of promotion to a particular position—if ten class members claim they should have received a particular promotion, and the defendant cannot defeat the claim of any of the ten, the defendant should be required to make each person "whole" and pay a full award to each of the ten. To say, to the contrary, that each person should only receive a tenth is to recognize that none of the ten is to be made whole. Such a result is, however, inconsistent with the rationale of \textit{Sheet Metal Workers}, and also with \textit{Connecticut v. Teal}, 457 U.S. 440 (1982), which held that Title VII focuses on whether individuals have suffered discrimination rather than on the status of the protected group as a whole. See \textit{Kraszewski v. State Farm Ins. Co.}, 41 Fair Empl. Prac. Cas. (BNA) 1088 (N.D. Cal. 1986), discussed \textit{supra} in text accompanying note 113.

The only rationale for a result that requires class members to share their recovery is a theory that the defendant's discrimination is against the class at large, and that the entire class is the "victim." Under that theory, the defendant discharges its monetary obligations to the class when it pays the full amount (to one person or to a group of persons) that it would have paid a class member had he not been unlawfully excluded; i.e., the defendant only pays one salary for each position from which plaintiffs were excluded. That result appears to be based on some unstated theory of the Title VII remedy as restitution (which looks at the impact on the wrong-doer) rather than on a theory of rightful place (which looks at the impact on the victim and seeks to make that victim whole). Abandoning the rightful place theory seems incorrect, however, in light of the remedial purposes of Title VII. In the future, therefore, if defendants take the position that each class member must go through a \textit{Teamsters} hearing in order to receive "make-whole" relief, those defendants should be prepared for the consequences of that position: they will not be able to force class members to share the back pay for positions denied them, and they may end up paying out far more in back pay than they would have paid had they not illegally discriminated in the first place. Plaintiffs' counsel may, of course, seek precisely that result on behalf of their clients.
V
FACTORS TO BE CONSIDERED IN STRUCTURING MONETARY RELIEF

A. The Factors

While both Teamsters and Segar recognize that a court must exercise its discretion in structuring relief which meets the goals of Title VII, neither case provides a definitive answer as to what factors a court should consider in exercising its discretion. The balance of this Article identifies some of the factors which a court and the parties might consider in structuring future back pay proceedings. The Article concludes by suggesting that the weight a court gives to particular factors may depend on the individual court's policy judgments about the importance and goals of federal employment discrimination law and the proper use of judicial resources.

Reading Teamsters and Segar, and considering some of the experiences already reported by counsel who actually handled other cases, one can conclude that a court should consider the following in deciding on a framework for providing monetary relief:

1. Was evidence presented in the Stage I liability proceedings which suggests that there may be a substantial number of class members who were unaffected by any discriminatory practices? In Teamsters, the defendants argued that the Stage I proof already showed that some class members were not victims. In contrast, in Love and similar cases, the Stage I proof...
showed that all class members were in fact victims and that the defendant could not claim any of the plaintiffs had escaped the effects of discrimination. The facts in Segar fall in between Teamsters and Love. In Segar the court assumed that the class might include some people who were denied promotions for legitimate nondiscriminatory reasons, but apparently concluded that the number of such persons was small. Where the court can be convinced that there may be more than a minimal number of nonvictims, the court may wish to undertake additional individualized proceedings to sort out those who have no legitimate claims.

2. Is there reason to believe that a significant number of class members did not actually seek the benefit they were allegedly denied? This inquiry is related to the preceding one: Teamsters holds that a person who did not seek a promotion is not a victim unless she can show that she was deterred by the prospect of discrimination. If the court cannot assume that almost every class member would have sought promotion or hiring in the absence of discrimination, it may legitimately hesitate to award back pay to every class member. The court in Teamsters relied on this factor explicitly in deciding to order individual proceedings. In Segar, the court appears to have assumed that each agent would have sought a promotion, since there was no evidence that the promotions involved any disadvantages of the type associated with the transfer from city driver to line driver in Teamsters.

3. How pervasive was the discrimination proven in Stage I? In Segar, the D.C. Circuit identified a broad range of practices which “impeded black agents at every turn.” While the court acknowledged the possibility that some agents were not victims of particular illegal acts or practices, the opinion implies that the panel agreed with plaintiffs’ argument that it was unlikely that anyone could have escaped the effects of the pervasive discrimination. In such a case, a court may not feel compelled to try to separate out victims of particular practices from victims of the overall discriminatory milieu.

4. How difficult would the reconstruction of job histories and qualifications be? This is the principal factor alluded to in Segar and the one which may be central to most courts’ assessments of how to proceed. The difficulty of reconstruction will depend on several factors, which are often overlapping and interrelated:

   (a) The clarity and objectivity of the standards used to determine em-

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189. A related question involves the length of the period during which discrimination occurred. If discrimination continued over a long period of time, the pervasiveness of its effects may increase. The court may be convinced that the longer an employer allows discrimination to continue, even if in only one practice, the greater the likelihood that the discrimination will infect other practices as well as the overall atmosphere at the employer’s facility.
ployees' qualifications. If the qualifications for the promotions or hires were few, it may be relatively easy to determine whether or not a particular employee or prospective employee met them. In that situation, the employer's potential for rebuttal may be very limited, and each hearing would be fairly simple. On the other hand, the courts have allowed defendants to defeat claims by showing that even though a claimant was qualified, the nonminority person selected for the position was better qualified. Where jobs involve a range of skills and experience, and where the criteria for selection are numerous or highly subjective, the hearing process can become extremely complicated and time-consuming. This prospect may lead a court to explore other options for distributing monetary relief, especially where there is a large class of potential claimants and a large number of vacancies, or both.

(b) The length of the period when discrimination occurred. The complexity of examining job decisions and employee qualifications over a ten year period is obviously greater than it would be for a one year period.

(c) The number of positions at issue and their interrelationship to each other. While deciding whether a person would have obtained one promotion may not be too difficult in a particular case, deciding where that person's career would have gone had she actually received such a promotion can be extraordinarily difficult. At that point, the judgments do become almost entirely hypothetical, and a court may therefore reasonably decide to seek refuge in a more general class-wide procedure.

5. What sort of evidence might the defendant introduce to attempt to show that any particular class member was not actually a victim of discrimination? If a court can conclude that the defendant could not actually introduce any reliable evidence to defeat claimants, even if it theoretically should be permitted to do so, the court may eliminate the defendant's rebuttal opportunity altogether. This suggests that the court should require the defendant to identify in advance the type of evidence which it believes may be available to it. If that evidence is highly speculative in nature, or if it would be tainted by the same discriminatory factors that the court has already condemned, there would seem to be little reason to allow the defendant to present it.

6. How long will it take to resolve all the claims? Inquiries with plaintiffs' counsel indicate that an individual hearing may take two hours or


192. See supra notes 153-54 and accompanying text.
five days. The Kraszewski court granted plaintiffs' request and ordered individual hearings that could take two to three years to complete. One can assume, of course, that the hearings in a particular case would become more streamlined as they proceed. Questions relating to the relevance and weight of certain common evidence would be resolved, the value of certain defenses would be established, and certain presumptions would emerge to be reapplied in later cases. Nevertheless, a court should probably attempt to assess at the outset, before deciding on a particular approach, how long it would take to complete the hearings process and how long it would be before the plaintiffs actually receive some monetary relief. The court may well conclude that the procedure would take so long that it effectively denies relief altogether, and may determine that a less refined procedure is the only effective remedy.

7. **What do the parties want, and why?** As a general matter, a court would probably accede to an individualized claims procedure if the parties agree that is how they wish to proceed. If either side proposes an individualized procedure to which the other side objects, the court may wish to examine the proponent's motivation before deciding whether to order Teamsters hearings. Requests for such a procedure are presumably legitimate if the plaintiffs feel it will maximize their recovery, or if defendants feel it will minimize their monetary liability. On the other hand, insistence on individualized proceedings may not be legitimate if it is motivated by an interest in causing delay in plaintiffs' relief or disruption of the defendant's operations, or if one party or the other believes it can take advantage of a disparity in resources to wear down the other party and elicit a favorable settlement offer.

8. **What are the risks of some injustice if class-wide relief is used?** In Teamsters (and in Wygant and the other affirmative action cases decided in the 1985-86 term), the Court was concerned about the potential impact on innocent white employees of awards of retroactive seniority to class members. The Court was willing to modify the rights of white employees only in order to make whole proven victims of discrimination. The Court was also concerned, although apparently to a lesser degree,
about the windfall effect; i.e., the potential that class-wide relief without an individual disqualification procedure would provide a benefit to a person who was not actually a victim of discrimination.

Similar concerns exist, albeit in a different form, where back pay rather than seniority is at issue. Unlike a grant of retroactive seniority, the award of back pay does not affect innocent non-class-member employees; the money comes out of the employer's pocket, not the pockets of non-class-member employees. A lump sum award may, however, create the possibility of a windfall to nonvictims. Segar considered this issue, but concluded that nonvictims were probably few in number and found the risk of some windfalls outweighed by the risk of nonrecovery for the far larger number of actual victims. What Segar does not mention is that where the amount of money to be recovered is finite, a windfall to one nonvictim may reduce the awards of other class members who actually are victims. In Segar, the court may have believed that all the class members were more or less similarly situated, and that no one person could actually claim to be significantly more injured than another. In other cases, the situations of various class members may vary substantially in terms of length of service, actual qualifications, and their own perceptions of their abilities vis-a-vis other class members. In deciding whether to require individual hearings, or in determining how to divide up a lump sum, a court should consider whether a procedure which treats all class members similarly is fair and reasonably accurate.198

9. How large are the potential individual back pay awards? In a class like Kraszewski, where the stakes for both claimants and the defendant are very substantial (potential distribution of $500 million among 1000 claimants), a court may properly be reluctant to order class-wide relief. In that situation, the impact of an error may be so great that due process requires the most exacting procedure, even if it results in extensive further litigation or significant delay in obtaining relief.

B. Balancing Issues

Application of these factors will require a court and litigants to make complex judgments about how to structure back pay proceedings.

198. Of course, if the lump sum award is large enough, a windfall to a "nonvictim" will have no effect on the awards to "actual victims." If the latter are already made whole by their share of the lump sum, elimination of windfalls will not increase the actual victim's share.

199. A lump sum procedure could lead to complicated further proceedings even if the court does not give the defendant the opportunity to disqualify particular individuals. At a minimum, the parties would probably have to consider designing a pro rata distribution procedure which takes into account the length of time each person was exposed to potentially discriminatory practices. If the class members themselves cannot agree on a distribution procedure, the court may have to design some system of sorting out the claims of competing class members and for insulating class counsel from potentially complicated conflict of interest problems. For a discussion of such problems in the context of a settlement, see Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983).
Nevertheless, the courts and the parties should make those judgments, and should not assume that Teamsters, or the later affirmative action cases, require any particular type of proceeding. The Court’s discussion of the limitations on “make-whole” relief in Sheet Metal Workers suggests that the court must weigh the factors carefully.200 Some of the factors should probably weigh very strongly. For example, if a court believes that a large number of class members probably were not victims at all, or that many class members did not suffer financially despite the discrimination against them, that court may hesitate to foreclose the defendant’s opportunity to defeat individual claims. On the other hand, if the court concludes that the defendant’s practices were especially egregious and that an atmosphere of illegal discrimination pervaded the workplace, it may be unwilling to allow the defendant to delay relief by requiring each employee to go through a separate hearing.

The weight accorded all of these factors may also depend on a court’s judgments about the purposes of the remedial provisions of Title VII. One view of those purposes may be affected by the traditional linkage between rights and remedies. If a court believes that its responsibility is to ensure that each person’s remedy is completely congruent with that person’s right, and if it believes that the rights and the remedy should be established using traditional procedures of proof, that court may tend to weigh the factors to favor highly individualized hearings.201

A court’s approach to these factors may also depend on its view of the nature of racial discrimination. If a particular judge believes that racial discrimination is by nature an individual phenomenon, she may hesitate to award back pay to anyone who is not proven to be an “actual” victim. Alternatively, if the judge agrees with the view that racial discrimination is essentially a group phenomenon, she may be less hesitant to calculate back pay on a class- or group-wide basis and to assume that no class members could have escaped being a victim.202

**CONCLUSION**

This Article suggests that in certain circumstances the courts can move away from the traditional individualized right/remedy model in

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200. See supra notes 181-85 and accompanying text.

201. This view may be reflected in Judge Bell’s comment in Pettway that “damage awards must be individualized to avoid constitutional problems which would arise in taking the property of one for another without a showing of loss to the particular recipient.” Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 267 (5th Cir. 1974), discussed supra at note 25; cf. EEOC v. Korn Indus., 662 F.2d 256, 262-64 (4th Cir. 1981), discussed supra at note 70; Mitchell v. Mid-Continent Spring Co., 583 F.2d 275, 281-84, modified, 587 F.2d 841 (6th Cir. 1978), cert. denied, 441 U.S. 922 (1979), discussed supra at note 70.

designing monetary remedies in Title VII cases and adopt a more flexible approach. Segar v. Smith recognizes the flexibility authorized by Teamsters, and acknowledges the admonition in Albemarle Paper Co. v. Moody that back pay should not be denied if doing so would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 203 In deciding how to structure monetary relief, it is important to note that Albemarle emphasizes two interrelated statutory purposes: the need to make persons whole, and the need to eradicate discrimination.

If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 204

Courts therefore must consider carefully whether the procedures urged on them by the parties will provide an effective remedy for plaintiffs and an effective deterrent for defendants, or whether the length and complexity of those procedures could result in a de facto denial of the back pay remedy.

Since Albemarle, the courts have commonly decided to award back pay in some form to prevailing plaintiffs. While more systematic research into the final disposition of these cases is necessary to expand and refine our understanding of the consequences of the choices made in structuring back pay proceedings, the courts in the meantime can and should exercise the discretion and flexibility granted to them by Title VII in deciding on remedial structures. The analysis and the factors identified in this Article should aid courts in the effort to determine which procedure best meets the remedial goals of Title VII.

203. 422 U.S. 405, 421 (1975).
204. Id. at 417-18 (quoting United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973)).