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TITLE VII TODAY: THE SHIFT AWAY FROM EQUALITY

Title VII of the Civil Rights Act of 1964[1] was intended to act as an absolute barrier to all employment discrimination. The scope of Title VII encompasses both an employer's intentional acts of discrimination, and acts which are not intended to have a discriminatory effect, or disparate impact.[2] This non-intentional form of discrimination most often results from an employer's reliance on facially neutral employee selection procedures which tend to weigh heavier against a particular minority, such as intelligence testing and minimum education requirements.[3] The use of such apparently

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1. 42 U.S.C. § 2000 (1974).

2. Disparate impact is perhaps best understood as disproportionate effects unintentionally arising from conduct which appears neutral on its face. This concept should be distinguished from the concept of disparate treatment. The distinction turns on the fact that conduct giving rise to a disparate impact uniformly pertains to all members of a particular employment group. Disparate treatment, however, is conduct which pertains only to certain members of a particular employment group. A good example, which illustrates this distinction is where an employer gives an intelligence test to all employees and makes employment decisions based on the results of those tests. Assuming that white males scored higher than any other race-gender group, the employer's use of the test results would have a disparate impact upon women and minorities, even though the employer intended no such result. The employer would have engaged in disparate treatment if he had only administered the tests to women or minorities, not subjecting them to the favored assumptions apparently accorded to white males. Disparate treatment cases provide little difficulty for courts enforcing Title VII. The water gets very murky, however, as more and more disparate impact litigation confronts the federal judiciary. *See* Reiter, *Compensating for Race or National Origin in Employment Testing*, 8 LOY. U. CHI. L.J. 687, 688, n.5 (1977) [hereinafter Reiter].

3. While minimum education requirements and intelligence testing are frequently referred to as giving rise to the same type of disparate impact, intelligence testing has created far more problems for courts than minimum education standards. Generally, the Equal Employment Opportunity Commission (EEOC) has defined testing as "any paper and pencil or performance measure used as a basis for any employment decision, and all formal, scored, quantified or standardized techniques of assessing job suitability." M. MINER & J. MINER, EMPLOYEE SELECTION WITHIN THE LAW 28-30 (1979). One such standardized technique is the Wonderlic Personnel Test; a simple test consisting of a list of fifty questions which get increasingly more difficult as the test progresses. Wonderlic himself says that "the test does measure some very real and important human traits . . . [such as a person's] ability to (1) understand and think in terms of words, (2) understand and think in terms of numbers, (3) think in terms of symbols, and (4) think in terms of ideas." Reiter, *supra* note 2, at 699-700. From the comparative results of those taking the test, an employer is supposedly able to determine who is suitable for what job based on Wonderlic's estimates for minimum scores correlating to a given job function. *Id.*

The Wonderlic Test is perhaps the most widely used test of its kind. Of all employers in the United States who employ more than 1600 employees, over 53% of them rely on the Wonderlic Test. C. SULLIVAN, M. ZIMMER, R. RICHARDS, FEDERAL

neutral procedures has posed a significant problem for the courts in reconciling an employer's reliance on them with Title VII's stated purpose of eliminating all employment discrimination.

Initially, the United States Supreme Court was able to facilitate this reconciliation when it required employers to demonstrate that the use of such apparently neutral procedures was job related.[4] To

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STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §2.2 at 104, n.22 (1980) [hereinafter SULLIVAN]. Such widespread use of the test, however, has sparked controversy over its ultimate impact on minorities. Sullivan argues that a study of test results shows that there is a significant relationship between successful test scores and the level of education which the test taker has achieved. *Id.* at 104, n.23. The necessary implication of this demonstrated correlation between test performance and education is that it is not "very real human traits" which are being tested, rather it is simply the mental dexterity that naturally accompanies educational achievement.

An excellent example of how the Wonderlic Test discriminates against minorities is provided through a statistical breakdown of a substantial cross section of persons who have taken the test. Using Wonderlic's cut off score of 21 as indicating the level expected of a high school graduate, sole reliance on the test would exclude:

34.9% of all Caucasian applicants;
75.1% of all Black applicants;
67.4% of all Spanish Surnamed American applicants;
48.2% of all American Indian applicants;
43.7% of all Oriental applicants; and
54.4% of all other foreign native language applicants.

Reiter, *supra* note 2 at 702. Without demonstrating any justification, an employer relying on the Wonderlic Test would exclude 75.1% of all black applicants for jobs which they may, in fact, be quite capable of performing.

4. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). This landmark case stood for the proposition that if pre-employment tests or minimum education requirements bore no demonstrable relationship to satisfactory job performance and served to exclude minorities from employment, then such practices were illegal. The test of whether such job relatedness exists is: 1) is the practice necessary for the safe and efficient operation of the business; 2) is this business purpose sufficiently compelling to override any disparate impact; 3) does the challenged practice actually achieve the results which it is intended to facilitate; and 4) there must be no other acceptable alternative practices which would better accomplish the business purpose with a less substantial racial impact. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) (employment policy denying access to certain departments to minorities unless they transferred in at the lowest paying entry level position).

One reviewing court has said that the job relatedness doctrine essentially provides that employment standards must accurately predict or measure a prospective employee's ability to perform the specific job that he/she is applying for. In Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), the court assessed the use of minimum high school diploma requirements:

> Then, even assuming that non-high school graduates do not perform as well as high school graduates, the question should be whether non-high school graduates perform adequately. For only if the diplomaless individual is not adequate to a job may his exclusion from that job be deemed a business necessity . . . . We reject as unsupported by any evidence . . . the conclusion that a high school diploma increases tremendously the odds that a person could be trained to perform in one of the sensitive lines of progression. [This] conclusion was based on [the] assumption that the creation and validation of a test that more precisely screened applicants would be very expensive, and that, because of occasional nature of job vacancies, the simplicity of the high school requirement seems all the more justifiable. We believe, however, that, even if the creation and validation of screening tests are expensive, the expense is a burden

make such a demonstration, an employer had to undertake a statistical evaluation of the facially neutral selection procedures which allegedly had a disparate racial impact.[5] This evaluation had to demonstrate that minimum test scores, or minimum academic accomplishments accurately predicted, or measured an employee's ability to perform a specific job.[6] Unless the employer was able to make such a demonstration, the court was to conclude that the resultant discrimination outweighed any interest the employer had in maintaining the procedures.[7]

The last fifteen years have seen a significant shift in the lower federal courts away from traditional disparate impact analysis.[8] Cer-

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the employer must bear if it desires to use tests that operate discriminatorily. *Id.* at 1180-81. The court's position in *Watkins* fairly summarizes the traditional basis for the job relatedness doctrine. Requirements that have no apparent adverse impact on any particular minority may still be unlawful if they preclude minorities from service for any reason other than inability to perform.

5. Both *Griggs* and *Robinson* embodied guidelines which the EEOC promulgated for demonstrating job relatedness. Discrimination in these guidelines is defined as "the use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment." 29 C.F.R. § 1607.5 (B) (1986). The three separate categories are criterion related, content, and construct validity. The first category, criterion related validity, "should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance." *Id.* Content validity studies "should consist of data showing that the content of this selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated." *Id.* Finally, construct validity studies should "consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated." *Id. See* Reiter, *supra* note 2 at 695-99.

6. Reiter, *supra* note 2, at 695-99.

7. *Griggs*, 401 U.S. at 431. *See* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1371-72 (5th Cir. 1974) (employer failed to attempt a validation study for a high school diploma requirement).

8. This shift represents a willingness on the part of some federal courts to excuse employers from demonstrating job relatedness per the EEOC guidelines. *See* Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1972 (1986) (court excused city from validating minimum college credit requirements for police officers); Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984) (court excused nursing home from validating experience requirements for supervisory positions in the housekeeping departments); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981) (court excused auto shipper from validating requirements that all yard workers must have two years prior experience in driving heavy trucks); Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980) (court excused airline from validating its requirements pertaining to post-natal activities of female flight attendants); Boyd v. Ozark Airlines, Inc., 568 F.2d 50 (8th Cir. 1977) (court excused airline from validating a minimum height requirement for all flight attendants); Townsend v. Nassau County Medical Center, 558 F.2d 117 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (court excused county blood bank from validating minimum education requirements for all laboratory technicians); Hougson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom.*, Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975) (court excused bus company from validating maximum age requirements for all newly hired bus drivers); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (court excused airline from validating minimum education requirements for flight officers).

tain federal courts are now placing greater emphasis on the risk attendant to the performance of a particular job.[9] This alternate approach concentrates on the effect forced compliance with Title VII would have on the employer, rather than on the impact continued use of the particular selection procedure would have on minorities. This deviation from traditional disparate impact analysis compromises the original purpose for Title VII and threatens to drastically reduce its impact as a tool for eliminating discrimination.[10]

This comment will analyze the roots of Title VII and the foundations of traditional disparate impact analysis. It will then explore the basis for the shift away from the legislative intent of Title VII, and examine the misplaced rationale underlying this shift's development. Finally, this comment will look to the future of Title VII and propose solutions which accommodate the needs of the contemporary employer without laying waste to the initial critical goals of equal opportunity as provided for in Title VII.

I. Background of Title VII: Origins and Interpretations

Congress enacted the Civil Rights Act of 1964 in response to a groundswell of support for comprehensive civil rights legislation.[11] Pertaining to equal employment opportunity, Title VII was one of ten titles Congress integrated into the Act.[12] Title VII's purpose was to make unlawful any conduct which tended to deny minorities equal employment opportunity.[13] More specifically, Title VII was to guarantee minorities the opportunity to perform jobs previously reserved for whites.[14]

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9. *See* text *supra* note 8. In each of these cases, the courts concluded that the performance of those jobs bore such a substantial risk of harm to the public that the level of risk outweighed any potential for discrimination, and thus the job relatedness of any minimum requirements is presumed because they necessarily reduced the risk to the public.

10. Congress intended for Title VII to be the vanguard for eliminating employment discrimination in the United States. In the Act's preamble, Congress stated that " . . . the opportunity for employment without discrimination . . . is a right of all persons within the jurisdiction of the United States, and that it is the national policy to protect the right of the individual to be free from such discrimination." House Judiciary Comm., H. Rep. No. 914, 88th Cong., 1st Sess., *reprinted in* Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 2001, 2009 (1968) [hereinafter Legislative History].

11. During the early sessions of the 88th Congress, the House judiciary subcommittee held hearings on 172 different civil rights bills that had been proposed in that session. These bills came from members of both parties, and covered a wide spectrum of civil rights issues, such as equal employment, fair housing, voting rights, and antilynching legislation. Also in 1963, the president sent two messages to Congress recommending a national civil rights agenda. Legislative History, *supra* note 10 at 2016.

12. 42 U.S.C. § 2000 *et seq.*

13. *Id.*

14. *See* text *supra* note 10. *See also* Albermarle Paper Co. v. Moody, 422 U.S.

In addition to intentional acts of employment discrimination, Title VII prohibits the use of apparently neutral employment standards which unintentionally classify minorities such that they are denied equal employment opportunity.[15] The use of facially neutral, but effectively discriminatory standards has a disparate impact on minorities in that minority employees fail to satisfy the requirements more frequently than do their white co-workers.[16] As a result, they are relegated to lower level positions while their white co-workers are permitted to advance. The effect is the same as if the employer had intentionally discriminated against them.[17]

The most common example of this type of discrimination is where, because of cultural and economic inadequacies, blacks fail to achieve minimum intelligence test scores, or obtain a high school diploma.[18] Even though the employer requires these standards of all employees, the standards have a heavier impact against blacks than against whites.[19] To guarantee that blacks, or any other minority, would not be subjected to this subtle form of discrimination, Congress created the Equal Employment Opportunity Commission (EEOC).[20] It was the responsibility of the EEOC to regulate and enforce strict compliance with Title VII.[21] Pursuant to this charge, the EEOC issued guidelines regulating the use of such potentially discriminatory selection procedures as intelligence testing and mini-

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405 (1975) (employer strictly segregated production lines).

15. Another example of this type of classification is found in United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). Georgia Power, an electric utility, engaged in the practice of requiring all employees to pass a battery of intelligence and skill tests. The tests which Georgia Power used were known as the Bennett Mechanical Test, the PTI-Numerical Test, and the PTI-Verbal Test. *Id.* at 912, n. 5. The fact that these tests served to deny equal employment opportunity was manifested in Georgia Power's employment statistics. *Id.* Even though the tests were given to all employees, as of three years after testing began Georgia Power employed 7515 employees, of which only 7.2% or 543 were black. *Id.* at 910. Of those employees taking the test between 1967 and 1970: 1) 37.5% of all blacks failed the Bennett Mechanical Test while only 0.85% of the whites failed; 2) 43% of all blacks taking the PTI-Numerical Test failed while only 1.25% of all whites did likewise; and 3) 30% of all blacks, compared with 0.94% of all whites failed the PTI-Verbal Test. *Id.* at 912, n. 5.

16. Something as apparently neutral as a minimum education requirement can have a devastating impact on minorities where it is not a business necessity. For example, according to the 1960 census, the last census prior to enactment of the Civil Rights Act, 34% of all white males in North Carolina had graduated from high school while only 12% of all black males had done so. *Griggs*, 401 U.S. at 430, n. 6 (citing U.S. BUREAU OF THE CENSUS, Vol. 1, CHARACTERISTICS OF THE POPULATION, pt. 35, Table 47 (1960)). As for intelligence testing, the *Griggs* court noted that the EEOC had found in another case that 58% of all whites passed the tests as opposed to 6% of all blacks. *Griggs*, 401 U.S. at 430, n.6.

17. *See supra* note 2 and accompanying text.

18. *See supra* note 16 and accompanying text. *See also* Reiter, *supra* note 2, at 702.

19. Reiter, *supra* note 2, at 702.

20. 42 U.S.C. §2000e-4 (1974).

21. *Id.*

mum education requirements.[22] These guidelines outlined the procedures an employer would have to follow to demonstrate the job relatedness of such standards or procedures.[23]

The EEOC guidelines required an employer to demonstrate that minimum test scores, or academic accomplishments, accurately predicted or measured an employee's ability to perform a specific job.[24] To demonstrate this relationship, employers had to undertake extensive statistical studies to show that satisfactory job performance actually depended upon an employee's satisfaction of the minimum standards.[25] The EEOC guidelines substantially aided the courts in enforcing Title VII's stated purpose of eliminating all types of employment discrimination. Rather than undertake the EEOC's prescribed testing procedures, however, employers simply

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22. 29 C.F.R. §1607.1-14 (1986). These guidelines establish the ways in which an employer can validate its use of facially neutral employment standards, whether they are, in fact, predictive of competent job performance. "The basic purpose of validation is to determine what workers actually do, how they do it, why they do it. This information in turn is used to determine what skills, knowledge, and ability it takes to perform them." SULLIVAN, *supra* note 3, at 106.

23. 29 C.F.R. §1607.14(B)(1-5)(1986). These guidelines state that an employer must:

1 determine that it is technically feasible to make the required study in the employment context;
2 review job information to determine measures of work behaviors or performance that are relevant to the job to the extent that they represent critical or important job duties, work behaviors, or work outcomes as developed from the review of job information;
3 take particular care in making sure that the employee selection criteria actually used fairly represent the important or critical work behaviors or outcomes determined in b), above;
4 ensure that the sample subjects participating in the validation study fairly represent the mix of candidates normally available in the local applicant pool; and
5 show that the statistical relationship between the employment selection criteria and the validation test is such that there is a probability of no more than one in twenty that a showing of job relatedness occurred by chance, that showing consisting of proof that the selection criteria is critical to satisfactory performance of the job.

Id. See also SULLIVAN, *supra* note 3 at 106.

24. The most troubling aspect of testing and minimum academic requirements is that, without validation, these criteria will effectively block large segments of the population from jobs they otherwise would be capable of fulfilling. A high school diploma requirement, for example, may or may not have a direct bearing on an individual's ability to operate a forklift truck. Unless validated, however, such a requirement may unnecessarily discriminate against individuals who are perfectly competent to operate a forklift, albeit without a high school diploma. The EEOC guidelines " . . . undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability." United States v. Georgia Power Co., 474 F.2d 906, 913 (5th Cir. 1973).

25. To protect the use of tests not validated per the EEOC guidelines would be to "drastically undercut the overall legislative purpose of Title VII, which is to eliminate all unjustified impediments to the realization of full equal employment opportunity for Negroes." Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 321 (E.D. La. 1970).

did away with broad, generalized employment standards which had no apparent, specific relationship to satisfactory job performance.[26] This result did not mean that employers were forced to do away with all job classifications. It simply meant that Title VII would permit only bona fide job related selection procedures where the employer's reliance on such procedures had a disparate impact on minorities.[27]

The United States Supreme Court first defined job relatedness in the context of Title VII and the EEOC guidelines in the landmark case of *Griggs v. Duke Power Company*.[28] That case represented the exact situation Congress envisioned when it devised Title VII's approach to unintentional discrimination.[29] As a result, the *Griggs* opinion became the foundation of traditional disparate impact analysis.

At issue in *Griggs* was Duke Power's imposition of a requirement that all workers in its labor division must have a high school diploma before they could transfer to one of the other four operat-

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26. *Cf.* Gwartney, Asher, Haworth, Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME LAW. 633, 643-44 (1979) [hereinafter Gwartney] (generally criticizing this result on grounds that it hamstrings employers into a "warm body" approach to employment decisions).

27. During Title VII's journey through committee and floor debate, there was a good deal of discussion about whether Title VII would necessarily abolish any and all minimum job classifications. Senators Clark and Case, the bill's Senate floor managers, printed in the Congressional Record an interpretive memorandum on Title VII. This memorandum specifically stated that "there is no requirement in Title VII that employers abandon bona fide qualifications." LEGISLATIVE HISTORY, *supra* note 10, at 3040. Furthermore, in *Griggs*, the Supreme Court noted that "proponents of Title VII sought throughout the debate to assure critics that the Act would have no effect on job-related tests." *Griggs*, 401 U.S. at 434. Indeed, said the Court, "the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Id.*

28. 401 U.S. 424 (1971).

29. The complaint against Duke Power Co. alleged that it discriminated against blacks in its hiring at the Dan River Power Station. *Griggs*, 401 U.S. at 426. Specifically, Duke Power divided its Dan River workforce into five separate operating divisions or departments: 1) labor, 2) coal handling, 3) operations, 4) maintenance, and 5) laboratory and test. *Id.* at 427. Duke Power made it a practice of only hiring blacks to work in the labor division, and only hiring whites to work in the other divisions. *Id.* The highest wages paid in the labor division were less than the lowest wages paid in the other departments. *Id.*

In 1955, the power company changed its policies to require a high school diploma for entry into any department, except the labor department. *Id.* After enactment of the Civil Rights Act, however, Duke Power ceased its practice of limiting blacks exclusively to the labor department. *Id.* Instead, it imposed the diploma requirement as a prerequisite for transfer from labor to any other department. *Id.* What became dispositive for the Supreme Court was the fact that "white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' departments." *Id.* In reality, the diploma requirement had no bearing on an employee's ability to perform in the "operating" departments; a fact which Duke Power's own experience amply demonstrated. *Id.* at 431.

ing divisions.[30] While Duke Power retained this policy, it additionally, allowed those employees working in the labor division without a high school diploma the opportunity to pass a battery of intelligence and skill tests so as to be eligible for transfer.[31] An employee's satisfactory performance on these tests purportedly indicated an intelligence level commensurate with that of a high school graduate.[32] Even though these minimum standards appeared to be facially neutral, a combination of other factors rendered them extremely discriminatory against blacks.

Prior to 1965, Duke Power only hired black employees to work in its labor division.[33] The other four operating divisions employed only whites. After this practice became illegal in 1964 when Title VII was enacted, Duke Power abolished the isolation of blacks as a policy, but implemented, instead, its testing program and diploma requirement.[34] Duke Power argued that these new standards applied to everyone, and, therefore, were not discriminatory.[35] Facially, this allegation is true. The transfer conditions, however, only applied to the labor division.[36] Prior to 1965, blacks were the only people Duke Power had employed to work there. Thus, blacks were the only ones who had to satisfy the new standards.

The reality of this situation was that blacks would rarely satisfy these standards. The 1960 census indicates that only 12% of all black males in North Carolina had completed high school, as opposed to 34% of all white males.[37] Compounding this problem was the fact that only 6% of all blacks, as compared with 58% of all whites, who took the intelligence tests achieved a passing score.[38] Thus, although the employment standards applied to anyone working in the labor division, they weighed much heavier against black employees. Most blacks, therefore, would not be promoted or transferred.[39] The facially neutral employment standards thus had the

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30. *Griggs*, 401 U.S. at 427.
31. *Id.* at 427-28.
32. *Id.* at 428. The tests which Duke Power administered were the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test, neither of which were intended to predict satisfactory performance of any particular job function. *See supra* note 3 and accompanying text.
33. *Griggs*, 401 U.S. at 427.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Griggs*, 401 U.S. at 430 n.6 (citing U.S. BUREAU OF THE CENSUS, Vol. 1, CHARACTERISTICS OF THE POPULATION, pt. 35, Table 47 (1960)).
38. *Id.*
39. This merely stems from the fact that more than three times as many whites graduate from high school as do blacks, and that almost ten times as many whites pass the intelligence test as do blacks. The extremely disparate impact against blacks is quite apparent when one considers how many more whites will be transferred or promoted than blacks, even though the same standards allegedly judge both groups.

effect of denying blacks the opportunity that was available to their white colleagues.

The Court noted this disparity when it searched for a relationship between test scores and diplomas, and the abilities required for the satisfactory performance of jobs in the other operating divisions.[40] The total lack of any relationship became apparent when the Court discovered that white employees, lacking either a high school diploma or passing test scores, had been satisfactorily performing in the other operating divisions for several years.[41] The Court found no "manifest relationship" between Duke Power's minimum transfer standards and satisfactory job performance.[42] The *Griggs* court's analysis followed a three prong approach which implemented the EEOC guidelines.

The *Griggs* test[43] required a complainant to make a prima facie showing that an employer had hired or promoted employees according to criteria which result in a work force whose racial composition was inconsistent with the racial composition of the qualified, available applicant pool.[44] Once a prima facie case was established,[45] the

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Griggs, 401 U.S. at 430 n.6.

40. *Griggs*, 401 U.S. at 431.

41. *Id.* at 431-32.

42. *Id.*

43. The three prong test which the Supreme Court first enunciated in *Griggs* became the principle test for determining whether an employer's selection procedures complied with Title VII. *See* Bell, *Foreward: Equal Employment Law and the Continuing Need for Self Help*, 8 LOY. U. CHI. L. J. 681, 690-99 (1977); and Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 1-6 (1976).

44. The plaintiff's burden of proving a prima facie case of racial discrimination is that the employer's selection procedures result in employment decisions being made in a "significantly discriminatory pattern." Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). The plaintiff may establish this pattern in one of three ways. First, the plaintiff may show that one minority group is excluded at a rate significantly higher than the rate at which whites are excluded. Second, the plaintiff may show that the percentage of one minority group the employer is excluding is higher than the percentage of whites the employer is excluding. Finally, the plaintiff may show that the number of employees of one particular minority group present in the employer's workforce is substantially disproportionate to the number of persons of that racial background in the surrounding geographical area. Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1293-94 (8th Cir. 1975). *See* Brown, *Procedure In Employment Discrimination Cases Under Title VII of the Civil Rights Act of 1964*, 258 LITIGATION AND ADMINISTRATIVE PRACTICE SERIES 449, 462 (1984). For a very technical discussion of how statistics may be used to determine such racial discrimination, see SULLIVAN, *supra* note 3, at 69-90.

45. Job relatedness, or business necessity, was first characterized in *Griggs* as a burden which the employer has of "showing that any given requirement must have a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. Subsequent decisions have qualified this general statement of purpose holding that "application of the business necessity defense entails considerations which are a function of the job's demands." Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981). The *Chrisner* court further stated that:

[I]n order to justify the use of a means of selection shown to have a racially

burden then shifted to the employer to prove that employment standards causing such a disproportionate racial composition were, in fact, job related.[46]

The *Griggs* Court relied on the EEOC guidelines to determine that Duke Power had not demonstrated that its standards were job related.[47] Nowhere in the record had Duke Power shown the basis for its presumption that high school diplomas and intelligence test scores accurately predicted or measured the ability of black labor division employees to satisfactorily perform at jobs in the other operating divisions.[48] The Court held that there must be a statistically demonstrable relationship between standards and actual performance.[49]

Critics of the *Griggs* opinion contend that it goes beyond what Congress intended the courts to do in enforcing Title VII.[50] The basis for this criticism is that any job qualification could have a disparate racial impact, and that *Griggs* forces an employer to undertake expensive studies, thereby working a hardship on the employer.[51] If taken literally, this criticism leads to the conclusion that Title VII applies only where it is economically expedient for the employer to comply, or in those situations where economic factors are of no concern. Otherwise, economic considerations outweigh concerns over

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> disproportionate impact, [the employer must] demonstrate that the means are in fact substantially related to job performance . . . It may not, to state the matter another way, rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job.

Id. See also Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972) (challenge to the imposition of minimum height requirements, swimming aptitude, and test scores as pre-requisites for membership on a local police force on the basis that they discriminate against black and hispanic candidates).

46. Id.

47. *Griggs*, 401 U.S. at 432-33.

48. *Id.*

49. *Id.* at 433, n.9. *See supra* note 23 and accompanying text.

50. Gwartney, *supra* note 26, at 640-47. A major criticism of the *Griggs* standard is that it requires an employer to simply hire any warm body that walks through the door seeking employment. This criticism is presumably based on the belief that *Griggs* denies "the importance of qualitative degrees of competency." *Id.* at 641. In fact, the importance of the *Griggs* rationale lies in the inherent flexibility that it gives employers in establishing standard levels of competency for certain jobs that are fairly applied to all candidates as opposed to some *ad hoc* isolated decisions.

Validation procedures simply require an employer to insure that there is a fit between discriminatory procedures and job performance. If the employment criteria which has a disparate impact is closely related to job performance, then the burden of validating it should be minor relative to the importance of its imposition. If, however, the criteria is not so closely related, then the burden of validation will be very difficult, if not impossible, to achieve; the precise result which the Congress intended. Title VII and the *Griggs* standard absolutely "protect the employer's right to insist that any prospective applicant, black or white, must meet the applicable job qualifications." *Griggs*, 401 U.S. at 434.

51. Gwartney, *supra* note 26, at 641.

equal employment opportunity, and employers will bear no burden of demonstrating the job relatedness of their standards.[52] This argument overlooks the critical fact that Title VII is directed only towards discriminatory effects and impact. It pertains to the end result, equal opportunity, without any regard for the means to that end.[53]

Griggs gave employers the option of validating their employment standards per the EEOC guidelines, or rewriting standards that have a disparate racial impact so that all employees are affected equally.[54] Criticism of this standard is misguided because it ignores the clear legislative intent underlying Title VII, and more importantly, because it tolerates discrimination when the employer can show that the costs of complying with the EEOC guidelines is great.

II. Selective Application of Title VII: Analysis of the Shift Away From Equality.

Implicit in this criticism of *Griggs* is the notion that the individual employer's economic concerns are as important as the national policy of eliminating all employment discrimination.[55] This supposition purportedly justifies the shift away from traditional dis-

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52. The injection of economic considerations into disparate impact analysis throws open wide the door to exception and circumvention. Economic concerns must not permit courts to abrogate the right to equal employment. As such, Title VII states that equal employment opportunity is a right of every one within the United States. In the debate leading up to passage of the Civil Rights Act, Senator Case, speaking for the majority, said:

> It is up to us to prove that liberty is a great good. We shall surely never do it if it means liberty for the individual to indulge his appetites, to indulge a propensity for acquiring this world's goods, the liberty to grow fat, the liberty to acquire power for the sake of the gratification which the exercise of power gives the possessor, and liberty to exclude others from opportunities which he claims for himself.

LEGISLATIVE HISTORY, *supra* note 10, at 3133-34. Such a resounding statement of purpose demonstrates that the Congress never intended for economic considerations of the employer to have an effect on enforcement of Title VII.

53. *See* LEGISLATIVE HISTORY, *supra* note 10, at 2009. *See also Griggs*, 401 U.S. at 432.

54. *Griggs*, 401 U.S. at 432-33.

55. The notion that economic considerations must factor into any determination of disparate impact is the underlying rationale for a relaxed approach to the *Griggs* standard. This relaxation in enforcement implicitly signals employers that where cost considerations are substantial relative to the likelihood that employment selection criteria does bear some relationship, the employer will not be required to strictly validate the criteria per the EEOC guidelines. Lightfoot v. Board of Trustees of Prince Georges Community College, 457 F. Supp. 135, 143 (D. Md. 1978) (where a job clearly requires a high degree of skill and the economic risks are great, the employer bears a lighter burden to demonstrate job relatedness). *See also* Aguilera v. Cook County Police and Corrections Merit Board, 582 F. Supp. 1053 (N.D. Ill. 1984) (court cited to *Griggs*, but nonetheless held that a high school diploma requirement was valid as applied to police officers simply because of the characteristics presumed to be mandatory for satisfactory job performance).

parate impact analysis.[56] Without rejecting *Griggs*, the federal courts that have adopted this economic approach to Title VII have carved out an exception which threatens the job relatedness standard.[57] This exception takes the form of a risk spectrum, or sliding scale, where the court will presume the job relatedness of job standards where the risk to the public and employer is high, and the cost of demonstrating job relatedness excessive.[58]

In determining how to apply this standard, the court first assesses the public and economic risk attendant to the performance of a particular job.[59] In determining the risk factor, the court considers the dangers an unqualified employee may pose to the public at large, or the economic well being of the employer. As the level of this subjective notion of risk increases, the court lessens the burden on the employer to demonstrate the relationship between satisfactory job performance, and employment standards having a disparate impact.[60] Unlike traditional disparate impact analysis, this sliding scale

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56. *See* Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1973) where the court held that minimum education requirements for airline pilots were presumptively valid. The court's language has since become the basis for presuming validity of employment selection criteria in far less obvious situations.

57. The *Griggs* court wrote that an employer must meet the burden of showing "that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. Such language does not admit any exceptions, yet the *Aguilera* court relied on two other federal district court opinions to create such an exception. The court held that minimum education requirements did not have to be validated per the EEOC guidelines if they were being applied to candidates for positions on local police forces. United States v. City of Buffalo, 457 F. Supp 612 (W.D.N.Y.), *modified*, 633 F.2d 643 (2d Cir. 1978); League of the United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873 (S.D. Cal. 1976). The danger which these cases present is that it may become increasingly difficult to distinguish obvious cases of presumptive validity, as with airline pilots, from cases where the presumptive validity of employment selection criteria may not be so obvious. *See* Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984) (court held presumptively valid a nursing home's requirements that its housekeeping supervisors have certain minimum skills and experience because of the risk attendant to housekeeping). If the courts permit economic factors to affect their adjudication of disparate impact cases, then the job relatedness doctrine will become a shield for the employer's harmful employment practices rather than a shield for the employee against the headwinds of discrimination.

58. The *Spurlock* court established the rationale underlying the sliding scale when it held that:

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related.

Spurlock, 475 F.2d at 219.

59. *Id.*

60. *Id.*

analysis does not require an employer to statistically demonstrate such a relationship.[61] The presence of risk raises the presumption that minimum job standards necessarily make performance of the job safer, and thus, the employer need not undertake expensive validation studies.[62]

In the case of *Spurlock v. United Airlines, Inc.*,[63] for example, the United States Circuit Court of Appeals for the Tenth Circuit held that United Airlines did not have to statistically satisfy the job relatedness doctrine as enunciated in *Griggs*.[64] Instead, United only had to demonstrate the reasonableness of their employment standards.[65] At issue in *Spurlock* was United's minimum standards for flight officers. United required its flight officers to have logged 500 hours of flight time, be instrument rated, possess a commercial pilot's license, and have a college degree.[66] Spurlock, a black male, fell short of two of these minimum requirements, in that he had only logged 209 hours of flight time, and had attended college for only two years.[67] The court held that United did not have to demonstrate that its minimum requirements satisfied the EEOC guidelines for job relatedness even though they tended to exclude blacks from this position.[68] The job relatedness of these standards was so obvious to the court that it dispensed with a statistical demonstration.[69]

The *Spurlock* court erroneously cited existing EEOC guidelines as supporting its position that as the level of public and economic risk attendant to a particular job increases, the less the courts have

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61. *Walker*, 726 F.2d at 1558 (11th Cir. 1984) (the court said that an employer should be made to satisfy the heavy burden of *Griggs* only when the risk to the public is small and the skills required for satisfactory job performance are minimal).

62. Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom.*, 419 U.S. 1122 (1975) (court said that "it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than otherwise might occur," where the hiring policy was a policy of not hiring new bus drivers who are over forty years of age). The fact that the age of forty was merely an arbitrary limit and that company officials simply supposed that older drivers were a higher risk than younger drivers was of no consequence to the court. Unlike *Griggs*, the *Hodgson* court failed to find dispositive the fact that many drivers who were over the age of forty were performing quite satisfactorily.

63. 475 F.2d 216 (10th Cir. 1972).

64. 401 U.S. 424 (1971).

65. *Spurlock*, 475 F.2d at 219. "Reasonableness" in the *Spurlock* context consisted of minimum requirements for pilots of a college degree and a minimum of 500 logged hours of flight time. These requirements were never the subject of any validation studies, rather the court relied on the testimony of airline executives to establish job relatedness.

66. *Id.* at 218.

67. *Id.* at 217.

68. *Id.* at 219. The court stated the obvious when it held that "the public interest clearly lies in having the most highly qualified persons available to pilot airliners." *Id.*

69. *Id.* "The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job." *Id.*

to be concerned with the statistical significance of the relationship between standards and job performance.[70] The guidelines, however, did not support the court's proposition. Although the guidelines stated that as risk increases, the employer "bears a correspondingly lighter burden to show that his employment criteria are job related",[71] the guidelines did not dispense entirely with the requirement of a statistical validation. The *Spurlock* court went well beyond the limits of these guidelines when it excused United entirely from the requirements of *Griggs*. The statistical demonstration of job relatedness represents the fundamental protection for minorities against such subtle forms of discrimination as testing and diploma requirements.[72] The courts are establishing a dangerous deviation from the intent of Title VII when they replace the statistical certainty of the EEOC guidelines with subjective interpretation which the spectrum analysis requires.

The danger this deviation from traditional analysis poses to Title VII lies in the inadequacy of the *Spurlock* opinion to guide courts in less definite factual situations. *Spurlock* contains no definition of what public or economic risk the court contemplated as being sufficient to excuse an employer from the *Griggs* requirements.[73] Ab-

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70. *Id.*

71. 29 C.F.R. §1607.5(c)(1985). The logic implicit herein is not that validity studies can be dispensed with as the subject job classification becomes more sophisticated, but rather such studies may permit a greater consideration of subjective characteristics. It does not, however, mean that employers may hide behind sophisticated job descriptions as a shield against forced elimination of selection criteria which bears no substantial relationship to job performance.

72. Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980), *cert. denied*, 469 U.S. 1073 (1981) (court held a bank's practices violated Title VII, even though the bank made an elaborate attempt to validate its employment selection criteria). The importance of this statistical requirement is that any statistical modeling must be more than a simple, self-serving exercise. The statistical showing must be predictive based on hard, objective data rather than data massaged in such a way so as to achieve the desired results. The *Vuyanich* court stressed that it is statistical methodology which is critical rather than simple results. An "employer must carry a heavy burden of proof to show business necessity for the employment practice." *Id.* at 313.

73. The danger attendant to the sliding scale approach to disparate impact cases lies in the fact the courts have provided very little guidance on where the line between a lighter burden and a heavier burden should be drawn. One apparent distinction is made between blue collar and white collar jobs. One commentator has said that " . . . it is becoming increasingly clear that the very tight review of employment tests mandated by the Supreme Court in *Griggs v. Duke Power Co.* was intended more for blue collar positions than for those in the higher echelons of the work force." Bell, *Foreward: Equal Employment Law and the Continuing Need for Self-Help*, 8 LOY. U. CHI. L.J. 681, 682 (1977) [hereinafter Bell].

One explanation for such a distinction is that predictors for lower level jobs are far more objective in nature than those which are often relied upon for upper level or white collar jobs. Specifically:

> Case law fashioned to deal with the problems of providing equal employment opportunity for employees who work with their hands rather than with people, paper, or ideas cannot be applied without alteration or adjustment to employ-

sent, too, is any guidance as to the limits of applying the risk spectrum analysis. Expansion of the spectrum analysis to job classifications where the attendant risk to the public and employer is not as obvious as it was in *Spurlock* will systematically dismantle the enforcement of Title VII. The end result will be that *Griggs* will only apply to those jobs where minorities have never been discriminated against, such as porters, maids, and common laborers.[74]

The increased willingness of the federal courts to rely on *Spurlock* to justify upholding discriminatory selection procedures indicates not only a shift away from traditional disparate impact analysis, but also a shift away from the priorities of equal employment opportunity. This deviation from the clear purpose of Title VII creates a new standard for adjudicating disparate impact claims. That standard is that the courts are now more concerned about the impact of compliance with Title VII on employers, rather than what impact their failure to comply will have on minorities. As this erodes Title VII's applicability to all job classifications, promulgation of the *Spurlock* rationale can only lead to the total emasculation of disparate impact analysis and its guarantee of equal opportunity.[75]

The problem becomes more significant as the *Spurlock* rationale expands to encompass a greater variety of situations where employers are able to convince the court that their standards are safe-

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ment practices at the white collar and professional levels. The problems of selecting and evaluating workers whose success depend upon such intangibles as salesmanship or innovation necessarily are very different from the problems of selecting assembly line workers or craftsmen. They require different procedures and are deserving of a different standard of judicial evaluation.

Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional level*, 21 WM. & MARY L. REV. 45, 46 (1979) [hereinafter Waintroob].

The justification for this distinction, however, merely begs the question. The subtle differences between white collar and blue collar employees are equally deserving of fair treatment under Title VII. If anything, greater care should be given to guarantee that any subjectivity in employment decisions is strictly scrutinized otherwise employers will be able to do to white collar employees what they are prohibited from doing to blue collar employees. *See* Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir. 1977) (employer applied subjective criteria to sales positions in such a way that black males were effectively precluded from being hired).

74. *See supra* note 73 and accompanying text.

75. Perhaps the sliding scale approach to disparate impact analysis will continue to be promulgated simply because it enables the majority to pay lip service to the goals of equal employment opportunity, reacting to only the most blatant examples of discrimination, while protecting their highly valued interests:

[T]he limited strategy adopted by society for remedying employment discrimination may, in fact, prove of little value to minorities in other than those most blatant situations where the community conscience will not permit a particular form of racial exploitation to continue, at least not in its most unabashed form.

Bell, *supra* note 73, at 685. This observation amply demonstrates the danger underlying the distinction between white collar and blue collar jobs, which some courts read into Title VII.

guards to the public health and their own economic well being.[76] This expansion necessarily results in the courts applying the *Griggs* test less.[77] As the influence of *Griggs* diminishes, courts will increasingly apply it only where employers have imposed standards on jobs devoid of any substantial risk. The end result is that the courts will tolerate increasing discrimination in high risk jobs, while they enforce Title VII only at the lower end of the spectrum.[78] Minorities thus receive greater protection against discrimination in those jobs which, historically, they have never been discriminated in, and correspondingly less protection in those jobs Congress intended to make available to them through Title VII.[79]

Perhaps the most blatant example of how *Spurlock* systematically dismantles Title VII's protections for minorities is found in the case of *Townsend v. Nassau County Medical Center*.[80] Ms. Townsend, a black female, had worked as a "Senior Laboratory Technician" for over seven years at the defendant county's blood bank.[81] In

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76. The rationale seems to be that as an employee progresses up the job ladder, the risk attendant to that position necessarily increases and the courts permit increasing degrees of subjectivity to affect employment decisions. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (minimum test scores and diploma requirements for line workers subject to strict validation requirements); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981) (requirement that all yard personnel must have experience driving heavy trucks not subject to validation); Boyd v. Ozark Airlines, Inc., 568 F.2d 50 (8th Cir. 1977) (minimum height requirements for flight personnel not subject to validation); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (minimum test scores and diploma requirements for line workers subject to strict validation requirements); and Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (minimum education requirements for airline pilots not subject to validation).

77. Hunt & Pazuniak, *Special Problems in Litigating Upper Level Employment Discrimination Cases*, 4 DEL. J. CORP. L. 114, 131 (1978).

> [T]he courts have, as a general matter, ignored . . . the [EEOC guidelines], when called upon to evaluate subjective selection procedures. Instead, the courts usually pose two questions. First, they consider whether the criteria upon which candidates are evaluated bear a discernible relationship to the job under consideration. Second, the courts examine whether such criteria are evenly and equally applied to all candidates.

Id. These two questions stand in stark contrast to the admonition contained in *Griggs* that "what Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Griggs*, 401 U.S. at 436. Why this standard should apply with any less clarity to subjective criteria is not readily apparent.

78. *See supra* note 73 and accompanying text.

79. *See* LEGISLATIVE HISTORY, *supra* note 10, at 2009. Nowhere in any of the floor debates surrounding passage of Title VII is there the slightest evidence that Congress ever considered it to apply only at the blue collar level. The inherent subjectivity of the sliding scale analysis ignores this fact and prompts the courts to look at those same interests of the employer which are responsible for the disparate impact, as being critical in allowing the imposition of subjective criteria or qualifications. Because the courts accord these interests such importance, they become the justification for circumventing Title VII.

80. 558 F.2d 117 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

81. *Townsend*, 558 F.2d at 118.

July of 1967, the county upgraded its civil service structure and re-classified several job categories. Among those positions re-classified was that of senior laboratory technician.[82]

In response to an outside consultant's personnel study, the county upgraded Ms. Townsend's position to the grade of Medical Technologist I. Accompanying this re-classification was a significant adjustment in the minimum requirements for employment.[83] Previously, the county required a Senior Laboratory Technician to have a high school diploma, an approved two year training course in Medical Technology, and at least two years experience as a technician in a medical laboratory. A Medical Technologist would have to possess either a bachelor of science degree, or American Society of Clinical Pathologists' certification, and pass a competitive written examination.[84]

To give incumbent laboratory technicians, without degree or certification, the opportunity to retain their jobs, the county permitted them to take the written examination.[85] Although some employees did pass the examination, Ms. Townsend did not. As a result of Ms. Townsend's failure to pass the test, the county dismissed her.[86] The irony surrounding the county's dismissal of Ms. Townsend is that not only had she performed the job satisfactorily for over seven years, but she had also trained several of the employees who later became Medical Technologists.[87] To compound the indignity of the whole affair, the county subsequently reinstated Ms. Townsend because of a shortage of qualified candidates in the available applicant pool. Ms. Townsend was to perform the job of Medical Technologist,

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82. *Id.*

83. *Id.*

84. In developing the written examination requirements, the County failed to even consider the successful performance of persons not possessing the requisite attributes, but who had been doing the work which was to be assigned to the new "Medical Technologist." *Id.* at 118.

85. These incumbent employees were to be "grandfathered" for only one sitting of the examination. If they failed, they would not be permitted to re-take the exam until such time that they obtained the requisite qualifications. *Id.*

86. *Id.*

87. The court used this fact to justify its decision in such a way that its analysis would take the matter completely out of the realm of disparate impact analysis. The court said that a desire to redress the inequity could lead to bad law:

> The black community has already made tremendous strides in achieving academic degrees, and, happily, there appears to be continuing steady progress. In any event, should a college degree ever be interposed as a prerequisite simply as a pretext for disqualifying members of the black community, the courts will be alert to deal with violations of Title VII. But we cannot say that this is such a case.

Id. at 122. In other words, such a requirement will only be offensive where the employer intends the discriminatory result; otherwise, the courts will presume it valid despite overwhelming evidence that it is not manifestly related to job performance. Such an analysis is fitting of disparate treatment cases and has no place in an analysis of disparate impact. *See supra* note 2 and accompanying text.

her old position, but now at a reduced civil service grade with a correspondingly lower salary.[88]

Ms. Townsend challenged the new job requirements alleging that they had a disparate racial impact.[89] Her theory was similar to that which minorities have traditionally used to fight minimum education requirements.[90] Blacks graduate from college, or even high school, at such a substantially lower rate than do whites that education requirements impose an unreasonable burden on them.[91] Additionally, Ms. Townsend argued that her satisfactory job performance, both before and after re-classification, clearly indicates that no relationship existed between the college diploma or professional certification requirement and the performance of the duties assigned to a Medical Technologist.[92]

In reviewing the trial court's grant of relief to Ms. Townsend,[93] the circuit court held that *Griggs* would not apply to this situation because of the substantial public risk involved, although it never defined what that risk was.[94] The court said that the "relative function of the academic prerequisites to job relatedness varies inversely with the risk to the health and safety of the public who depend upon the technology."[95] In other words, where there is a great risk to the public health or safety, the court will presume the job relatedness of academic or other prerequisites, regardless of their discriminatory impact on minorities.[96]

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88. *Townsend*, 558 F.2d at 118.

89. *Id.*

90. The theory traditionally used is that blacks attain academic levels much lower than do whites. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1371 (5th Cir. 1974) (court found imposition of a high school diploma requirement resulted in unlawful discrimination against blacks). According to the *Johnson* court, only 39.9% of all blacks in the state of Texas possessed a high school education as opposed to 66.9% of all whites. *Id.*

91. Watkins v. Scott Paper Co., 530 F.2d 1159, 1160 (5th Cir. 1976). Educational requirements resulted in certain employees being barred from rising above their 'inferior, black jobs." *Id. Scott Paper Co.* followed a practice similar to that found in *Griggs*. The company excluded blacks from most main line production and maintenance positions. *Id.* at 1165. In 1963, they permitted blacks to transfer to positions outside their department provided they had a high school diploma. *Id.* This requirement had a devastating impact on black transfers. In 1972, a full 75% of the blacks who had been hired before the imposition of the diploma requirement in 1963, and who were still working, did not possess a high school diploma. *Id.* at 1165 n.7. These employees were thus locked into place regardless of any acquired skills which would enable them to successfully perform other jobs. *Id.* at 1166, n.7.

92. *Townsend*, 558 F.2d at 118.

93. The district court found that "Title VII mandates that an employer must recognize the *actual* demonstrated job skills of a minority employee whether those skills are acquired through practical experience or through formal training." *Id.* at 119 (emphasis in original).

94. *Id.* at 120. The court cited to the language of *Spurlock*, quoted *supra* note 58.

95. *Townsend*, 558 F.2d at 120.

96. *See supra* note 73 and accompanying text.

This argument represents a radical departure from the original logic of the *Griggs* test.[97] *Griggs* held that tests of standards should measure the "person for the job, not the person in the abstract."[98] The court's application of the spectrum analysis in *Townsend* completely ignores this proposition. The fact that Ms. Townsend satisfactorily performed her job prior to the re-classification was of no consequence to the court.[99] Instead, the court looked to the undefined notion of risk, and held that the college diploma requirement and passage of the written test were job related. Even though Ms. Townsend could perform the job, as her experience shows, she could not keep it because the court was willing to tolerate discrimination against her on the basis that, in the abstract, she posed an undefined threat to the public.[100]

The court used Ms. Townsend's failure of the written examination to justify the county's requirements. The court stated that her failure was proof of her inability to perform the duties of the job.[101] Implicit in this statement, however, is the assumption that the test is, in fact, an accurate predictor of the skills which the job requires, or of a person's ability to perform satisfactorily in the job.[102] When courts use the risk spectrum approach to make this type of assumption, it inescapably leads them into conflict with Title VII, and the clear legislative intent underlying its enactment.

If, in fact, tests like the one Nassau County used accurately predict job performance, then validation per the EEOC guidelines should pose little difficulty for the employer.[103] Even though there may be a discriminatory impact, the job relatedness of the test will

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97. *Griggs*, 401 U.S. at 424. The basic parameters of the *Griggs* test were that an employee must make out a prima facie case that an employer's imposition of certain selection criteria has a disparate impact on minorities. Once established, the burden then shifts to the employer to show that the selection criteria bears some manifest relationship to satisfactory job performance. Finally, the employee may still prevail if he/she can show that there exists a less discriminatory means of attaining the same result. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798-99 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

98. *Griggs*, 401 U.S. at 436.

99. *See Townsend*, 558 F.2d at 120.

100. *Id.* It must be noted, however, that the court never defined precisely what that threat was to the public.

101. *Townsend*, 558 F.2d at 121. Notwithstanding, of course, her long and successful tenure in the position prior to the re-classification.

102. *But see* United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). (individual scoring low on personnel test yet performing satisfactorily work demonstrates a "dubious" correlation between test scores and actual performance). "*Griggs* demands more substantial proof, most often positive empirical evidence, of the relationship between test scores and job performance." *Id.*

103. *Waintroob*, *supra* note 73 at 63. "In the white collar context, employers have had little difficulty in showing the validity of standardized skills tests. Indeed, . . . typing tests, when used to fill secretarial positions, are the classic examples of job related tests." *Id.*

comport with the traditional enforcement of Title VII.[104] The conflict arises, however, when the two approaches disagree over the importance of statistically demonstrated job relatedness. As seen in *Griggs*, job relatedness is only established when the employment tests or procedures are subjected to extensive study as stipulated in the EEOC guidelines.[105] Under *Townsend*, however, the courts presume job relatedness because of the putative risk an unqualified employee would pose to the public.[106]

The net result of this presumption, as seen in *Townsend*, is that the court permitted an employer to deny equal opportunity to a black female on account of a test that was never demonstrated to be job related, yet which had a definite impact against blacks. This situation is identical to the one presented in *Griggs* where the Supreme Court emphatically stated that such disparate impact was offensive to the national policy of enforcing equal employment opportunity through Title VII.[107] *Townsend* raises the question of whether Title VII has come full circle to the point where it will only protect minorities in jobs where the risk to the public is minimal. If this is true, then the courts adopting this approach will unwittingly restore the status quo of the pre-Title VII days and cloak it with the legitimacy of being in the public interest.[108]

As recently as November of 1985, the Circuit Court of Appeals for the Fifth Circuit adopted yet another variation of the original *Spurlock* spectrum analysis. In the case of *Davis v. City of Dallas*,[109] the Fifth Circuit dealt with the city of Dallas' minimum standards for new police officers. The city required that all new recruits have at least forty five hours of college credit. Two women, one black and one white, challenged the requirements on the theory that they tended to weigh heavier against blacks and women.[110] The court held that the city of Dallas was not required to meet the *Griggs* test because the risk attendant to the performance of a policeman's job was so substantial, and obvious, that the court could presume job relatedness under the *Spurlock* rationale.[111]

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104. *Robinson*, 444 F.2d at 791.
> The courts have recognized that respondents are sometimes justified in continuing an employment practice regardless of its differential racial impact . . . . The business necessity test has evolved as the appropriate reagent for detecting which employment practices are acceptable [per the EEOC guidelines] and which are invalid because based on factors that are the functional equivalent of race.

105. *Id.* *See supra* note 6 and accompanying text.
106. *See Townsend*, 558 F.2d at 120.
107. *Griggs*, 401 U.S. at 429-30.
108. *See supra* note 73 and accompanying text.
109. 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1972 (1986).
110. *Davis*, 777 F.2d at 206-07.
111. *Id.* at 216

Once again, this argument overlooks the principle underlying the enforcement of equal employment opportunity. It is not the person in the abstract that is important under Title VII, but protection of the individual applying for a specific job.[112] The city of Dallas reasoned that an educated police officer would pose a lesser risk to the public when confronted with dangerous, or delicate situations.[113] The presumption was that education imbued a certain dexterity that was required of a large, urban police force. While this may arguably be true, it completely eliminates anyone who may possess that dexterity without having gone to college. *Griggs* specifically forbade this type of justification for education requirements when it said that a person may accomplish the same results without the traditional badges of academia.[114] Employers must look to a person's innate ability to perform a specific job, rather than to the abstract qualities which education purportedly manifests.

Davis represents a bleak future for minorities attempting to secure equal employment opportunity through the traditional Title VII guarantees and protections. The courts' apparent willingness to turn its back on the promise that Congress made to the minority citizens of this county when it enacted Title VII is nothing less than appalling. To satisfy the demands of employers to make it easier to avoid judgments of racial discrimination, the courts have fashioned a standard which will tolerate discrimination so long as an employer can justify it with "proof" that the public, and itself, are somehow safer as a result. This standard thus renders Title VII impotent.

> Because of the extent to which the skills required of an officer were not definable with significant precision, the district court suggested that the degree of validation required of the City of Dallas to sustain the educational requirement for police officers was less than would be required to show job relatedness for other positions.

Id.

112. *Griggs*, 401 U.S. at 436.

113. *Davis*, 777 F.2d at 218 (citing League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873, 901 (C.D. Cal. 1976)).

> This court . . . is reluctant to accept the idea that education requirements must be empirically validated. To accept that concept would be to adopt the proposition that the empiricist's methods of arriving at truth are the only acceptable ones. It would involve the categorical rejection of reports of Presidential commissions on the basis that they were 'unscientific' . . . It is one thing to say that paper and pencil tests must be validated by prevailing concepts of educational measurement . . . it is quite another to say that common sense judgment and reasoning of expert observers cannot be considered as relevant to the assessment of the value of institutional education to the increasingly complicated tasks of the police officer in an urban environment.

Id.

114. *Griggs*, 401 U.S. at 433. "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees." *Id.*

III. Rediscovery: The Return of Total Equality.

To rededicate the nation, and the courts, to the goal of unqualified equal opportunity, the Congress must enact legislation requiring that no court may presume the job relatedness of discriminatory employment standards.[115] To satisfy the purpose of Title VII, employers must statistically validate the job relatedness of their employment standards regardless of the cost, inconvenience, or apparent lack of necessity.[116] The results of such legislation would be twofold. First, it would revive Title VII's implicit disincentives for employers to impose discriminatory testing and education requirements. Second, it would restore the *Griggs* standard as the seminal pronouncement on disparate impact analysis.[117]

The original policy considerations surrounding Congress' enactment of Title VII emphasized a belief in the inherent unreliability of testing procedures and minimum education requirements.[118] The *Griggs* opinion put these considerations into a clear and workable standard that made it very difficult for an employer to successfully impose discriminatory requirements.[119] Unless absolutely necessary, most employers simply opted out of any minimum requirements altogether. This is precisely what Title VII was supposed to do, break down barriers that "invidiously" act to deny minorities equal opportunity.[120]

Legislation restoring the requirement that employers statistically validate all discriminatory employment standards would restore those disincentives that existed under traditional disparate impact analysis. Such a requirement would eliminate the chance for employers to argue why they should not have to comply with the EEOC guidelines. Congress' preclusion of this opportunity for employers to plead leniency will result in employers imposing fewer minimum employment standards. Thus, the original effect of Title VII would be restored.

Attendant to this revival of disincentives for minimum standards will come a restoration of the *Griggs* standard for adjudicating disparate impact claims. This standard represents a clear and workable solution to the problem underlying the enactment of Title VII. Restoration of *Griggs* will insure that people like Ms. Townsend will

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115. Such legislation would codify the *Griggs* test to the exclusion of any other approach. *Griggs*, 401 U.S. 424.

116. *See* Watkins v. Scott Paper Co., 530 F.2d 1159, 1181 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

117. *See supra* note 4 and accompanying text.

118. *See* Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 320-21 (E.D. La. 1970).

119. *See* text *supra* note 4.

120. *Griggs*, 401 U.S. at 428.

not have to worry about losing their jobs because of some undefined and unsubstantiated consultant's opinion. As Title VII establishes the policy of equal employment opportunity, *Griggs* provides the framework for its enforcement. This framework will open up jobs at all levels of "risk" for minorities, not just jobs at the bottom of the ladder.[121]

IV. Conclusions

This comment has charted the development of a shift away from the initial goals and objectives underlying passage of Title VII of the Civil Rights Act of 1964. In the context of three critical cases, this comment has indicated the danger that this shift poses to members of all minority groups who seek employment at levels above that of the common laborer. The gradual erosion of the procedural safeguards which the Supreme Court established for the protection of minorities in the workplace represents a new emphasis on convenience and economy for the employer, rather than equality for minorities.

The safeguards which the *Griggs* opinion established, namely statistical validation of the job relatedness of employment standards which tended to weigh heavier against minorities,[122] left no option for employers to do anything but comply with Title VII. Blacks in North Carolina did not have to worry about only being able to work in a labor department because three times as many whites graduated high school than blacks. Likewise, employees at paper plants, power plants, and shipping depots, all could rest assured that employment decisions would only be based on a bona fide job related basis.

Because this rigid requirement purportedly imposed great hardship on employers, an alternative to the traditional disparate impact analysis under Title VII was established. This alternative came in the form of a spectrum. Employers found that courts were more willing to accept an argument that because certain jobs posed a significant risk to the public, the employer's minimum requirements must be necessary to avoid that risk. The courts merely agreed that the risk involved made the job relatedness obvious, and thus, employers could be spared the unpleasant process of validating their job requirements. In certain isolated instances, this rationale might have been legitimate. If only the courts had bothered to define what those instances might be.

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121. This is so because the *Griggs* analysis precludes any consideration of factors other than the job relatedness of the challenged procedures. *See* text accompanying note 97.

122. *See supra* notes 2 and 23 and accompanying text.

The failure to define the limits of this spectrum analysis, however, means that any job which poses a risk to the public or the employer can qualify for special treatment. So long as an employer is able to convince the court that dire consequences attends the preclusion of its employment standards, the courts are increasingly willing to excuse the employer from proving compliance with Title VII.

This exception has had the effect of swallowing up the rule. As the level of our technology increases, a substantially larger section of jobs will fit onto the "obvious" side of this risk spectrum. This in turn will mean that fewer jobs will qualify for the traditional approach. As the courts require fewer minimum standards to be scrutinized to the extent which Title VII anticipated, the chance for employers to use testing programs and diploma requirements as a form of subtle discrimination will markedly increase. Such a situation is diametric to the original purpose underlying Title VII.

The erosion of equal opportunity in this country can be reversed if Congress will enact legislation modifying Title VII. This modification must specifically require any employer, upon a prima facie showing of racial discrimination in employment standards, to statistically demonstrate that his minimum employment standards are, in fact, job related. Such legislation would eliminate the haphazard approach to the enforcement of Title VII which some courts now apparently prefer. These courts seemingly have forgotten that this country stands for equality. The Congress must restore the vision and the hope of millions which is embodied in Title VII. Equal opportunity is too important to be left to the whims of the employer and the court working in tandem.

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