The Legacy of Griggs: Social Progress and Subjective Judgments
- The Kenneth M. Piper Lecture

Alfred W. Blumrosen

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THE LEGACY OF GRIGGS: SOCIAL PROGRESS AND SUBJECTIVE JUDGMENTS

ALFRED W. BLUMROSEN*

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 has emerged as a major instrument of social progress because of the Supreme Court decision in Griggs v. Duke Power.1 Few decisions in our time—perhaps only Brown

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1. 401 U.S. 424 (1971). Without Griggs, the statute might have warranted little more than a
v. Board of Education—have had such momentous social consequences. Between 1965 and 1983, nearly a million complaints of race, sex, national origin and religious discrimination in employment were filed with the EEOC, and more than 175,000 settlements favorable to complainants were reached in the administrative process. Nearly 60,000 lawsuits were filed. These figures—which show more of the iceberg than usual—only begin to suggest the social effects generated by Title VII.

For example, in the year 1980, 2.3 million minority workers—one quarter of the minority labor force—held better jobs than they would have held if minorities were distributed among occupations as they had been in 1965. The wage income going to minority workers in 1980 was nearly 9 billion dollars more than would have been the case under the occupational distribution of 1965. For women, the corresponding figures for 1980 are 4 million in higher job categories and an increase in wage income of 22 billion dollars as compared to the occupational distribution of 1965. The proportion of minorities and women in each major job category in 1980 was closer to that of white males than in 1965. As a result, the relative income of employed minorities and women is closer to that of white males than it was in 1965. This article will first examine the role of law in producing this transformation of the American work force and then examine the application of Griggs to employment decisions based on the subjective judgment of the employer—an issue which has become central to equal employment law.

The issue of intentional discrimination alone is scarcely worth a law school course. One test of this thesis can be found in examining how labor law case books circa 1965 treated the state fair employment laws, and the then new federal statute. See, e.g., R. Smith, L. Merrifield & T. St. Antoine, Labor Relations Law, Cases and Materials 951, 980, 1013 (4th ed. 1968); Labor Relations and the Law 281, 1004-16 (J. Williams 3d ed. 1965).


4. See infra Appendix I.

5. Id.


7. Law Transmission System, supra note 6, at 313, 338 n.67.

8. Id. at 337 n.66, 339 n.69.

9. See Closing the Gap, supra note 6, at 70. See also Economic Progress, supra note 3.
II. SOCIAL PROGRESS AND THE LAW

A. The Role of the Disparate Impact Principle

The "disparate impact" concept adopted in *Griggs* paved the way for the massive improvement in the occupational position of minorities and women described above. The Supreme Court held that educational requirements and testing practices which screened out a higher proportion of minorities than whites, and were not necessary for job performance, violated Title VII regardless of the employer's intent. If Title VII had been construed to prohibit only "intentional discrimination," limited education could be converted into a denial of employment, because an employer could establish educational or testing requirements without any intent to discriminate. The point embedded in Chief Justice Burger's description of the unnecessary educational qualifications as "built in headwinds for minority groups" was driven home by Justice Powell in *McDonnell Douglas v. Green*, where he explained:

*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *Griggs* has infused Title VII with extraordinary influence. It caused


11. *CLOSING THE GAP*, supra note 6, describes the racial impact of a high school diploma requirement in 1960. "It is easy to forget how little schooling the average black male worker had, even as late as 1960, and how large the black-white education differences were. ... Fully 80% of the 1960 black male work force had not finished high school, and less than three percent had college degrees. ... In contrast, the majority of white workers in 1960 ... had completed high school and one in ten were college graduates." *CLOSING THE GAP*, supra note 6, at 28-29.

There appeared little economic incentive at that time for blacks to continue their education. "In 1940, attending school for another year raised black male wages by less than 4 percent—half the amount for whites. Matters had improved little by 1950." *CLOSING THE GAP*, supra note 6, at 33.


*Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977), crystallized the distinction between "disparate impact" and "disparate treatment." The Supreme Court has never refined the concept of "disparate impact" and "disparate treatment." The Supreme Court has never refined the concept of "disparate impact" with the "two to three standard deviation" analysis. This is an error because the "standard deviation" analysis is intended to identify intentional discrimination, not whether the practice had disparate impact. Statistical significance is relevant to the issue of intentional discrimination because it negates the possibility that the result being measured occurred by chance. *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). This leaves open the likelihood that the result was intended; which may ripen into a conclusion if the defendant fails to adduce evidence to the contrary. Other courts have
employers to revise many of their practices so as to include minorities and women and laid the foundation for affirmative action programs.14

The improved minority and female opportunities described above have significantly influenced some of the measures of group inequality which have been used for forty years. These measures are relative occupational distribution, relative wages and relative unemployment rate as compared to whites or males.15 Partly as a result of the improved occupational position described above, relative black-white male wages have improved from 42% in 1965 to 69% in 1985. Those improvements contrast with the continuing high minority unemployment rate.16

In the early 1980's, the Reagan Administration claimed that most of the improvement in job opportunities took place before the age of affirmative action.17 We have not heard much of that claim lately, thanks to

relied on the "80% rule" of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1986), to identify disparate impact, but "the great majority . . . simply made a judgment as to whether the difference was 'substantial' or 'significant' in a given case." B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 98-99 (2d ed. 1983) [hereinafter EMPLOYMENT DISCRIMINATION LAW].

It has been suggested that a test of "statistical significance" should be used to define "disparate impact," because the existing standards are either too vague or yield incorrect results. EMPLOYMENT DISCRIMINATION LAW, supra, at 11, 12.

However, for the purposes of the disparate impact test, it does not matter if the result was unintended. See infra note 102 and accompanying text. The fact that the restriction or exclusion of minorities or women occurred by the chance workings of the industrial relations system does not lessen the "built in headwinds" of that system. Therefore, the courts have properly rejected efforts to limit the concept of disparate impact by reference to statistical significance.

17. See Special Analysis, J.P. J-15, Budget For Fiscal Year 1986 (citing Smith & Welch, Affirmative Action and Labor Markets, 2 J. Lab. Econ. 269 (1984)). Smith and Welch contend that the proportion of minorities and women as officials and managers increased more rapidly between 1967 and 1974, leveled off in 1974, and did not increase thereafter, despite the increase in enforcement programs after 1974. However, the Goals and Timetable Program was in place in 1971. Furthermore, Leonard, The Impact of Affirmative Action in Employment, 2 J. Lab. Econ. 439 (1984) describes in detail the relative gains of minorities and women after 1974. His research suggests that the greater gains were made in employment with governmental contractors covered by E.O. 11246. CLOSING THE GAP, supra note 6, at 85-100, confirms this conclusion.

T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 133, 134 (1984), argues that "the economic rise of minorities precede passage of the Civil Rights Act by many years." This is incorrect with respect to employment as shown by the evidence of improvement after the 1960's cited infra note 18. He also argues that "the disadvantaged . . . are precisely the people who have fallen further behind under Affirmative Action auspices." This point confuses Equal Employment Opportunity programs with poverty programs. The thrust of Title VII is to protect all members of protected groups against subordination based on group membership, not only the poor. Title VII never sought to aid the "unqualified." Many members of protected groups have accomplished much in the face of discriminatory conditions. They might have accomplished much more if they had been free to function in a non-discriminatory setting. Their success, however, does not mean that discrimination was

the works of Hammerman, Leonard and Jones. This body of work establishes that much of the improvement in minority and female opportunities took place throughout the entire period of the seventies, during the time when affirmative action was institutionalized under Title VII and Executive Order 11246.

Employers with 15 or more employees are covered by Title VII which is enforceable by private or government suit in federal court. Under Title VII, courts may require affirmative action in some circumstances, and it is permitted in additional circumstances. In addition, government contractors are required by Executive Order 11246 to take affirmative action in some circumstances. Recent studies suggest that, since 1970, government contractors with affirmative action programs under Executive Order 11246 have done “better” in providing Equal Employment opportunity than non-contractors. This is a welcome change from the 1960's, when large government contractors hired fewer minority white collar employees than their non-contractor counterparts. This improvement by government contractors resulted from regulations issued by the Labor Department under Executive Order 11246. These regulations required a contractor who has “underutilized” minorities and women to take affirmative action, including specific goals and timetables, to increase participation of those groups. This approach

absent. Their further advance does benefit themselves, the group and the society at large which thereby draw nearer to when it will be unnecessary to provide legal protection to the group. See Blumrosen, Some Thoughts on Affirmative Action Here and In India: Galanter's Competing Equalities, A. B. FOUND. RES. J. 653, 660-61 (1985).

A preliminary draft of the U.S. Civil Rights Commission Report, ECONOMIC PROGRESS, supra note 3, included the claim that more progress was made before 1960 than after but this claim was omitted from the final version.


21. See Leonard, supra note 17; CLOSING THE GAP, supra note 6, at 85-100; ECONOMIC PROGRESS, supra note 3, at 230-35.

22. In the 1960's, many large contractors joined “Plans for Progress,” an association devoted to increasing minority employment. An EEOC study of white collar employment in the New York headquarters of these companies established that they had fewer minorities than the headquarters offices of non-PFP organizations. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HEARINGS ON DISCRIMINATION IN WHITE COLLAR EMPLOYMENT 614-16 (1968).

produced the "turnaround" of government contractors.24

In light of the government's hesitancy to enforce the Executive Order by debarring a contractor from doing business with it,25 I believe that contractors have responded positively to these regulations in part because of the influence of the Griggs principle. The Executive Order was not seriously enforced before Title VII was enacted and interpreted, even though similar orders had existed since 1941.26 Neither the prohibitions on employment discrimination in state laws since 1945 or the Supreme Court proscription of discrimination in collective bargaining in 1944 produced significant results.27 Congress and the Griggs decision provided legitimacy and acceptability for the equal employment opportunity program.28 The Labor Department usually went "to the mat" only with a contractor whose practices violated both the Executive Order and Title VII.29 An employer who challenged the applicability of the Executive Order would still face liability under the Griggs principle. Under these circumstances, opposing the Order was scarcely worth the effort. In this way, the Griggs principle supported the Executive Order Program.

Finally, Griggs provides the underlying justification for race conscious affirmative action programs under Title VII. Identification of "disparate impact" requires that employers be race conscious. Once disparate impact is identified, voluntary action to ameliorate it is necessary to avoid liability in the absence of business necessity. Affirmative personnel actions taken to comply with Griggs could not be held to violate the statutory restrictions on preferential treatment in Title VII.30 These af-

25. For an illustration of this hesitancy, see Chrapliwy v. Uniroyal, Inc. 670 F.2d 760 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983).
26. See M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT ch. 5 (1966) [hereinafter LEGAL RESTRAINTS].
27. Id. at ch. 3 (State Laws) and ch. 6 (Duty of Fair Representation).
28. See Hyde, The Concept of Legitimation in the Sociology of Law, 1983 Wis. L. REV. 379 for a discussion of the pitfalls in the use of the concept of legitimacy. The empirical evidence of the change of national behavior after the passage of the Civil Rights Act stands in such sharp contrast to the minute movements in the pre-1964 period as to warrant the conclusion in the text. P. BURSTEIN, DISCRIMINATION, JOBS AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL (1985) [hereinafter POLITICS]. In chapter 3, the author concludes that Congress acted in 1964 when public opinion was at its height in support of civil rights. Id. at 67.
29. There is a close relationship between "underutilization" as used in the regulations under E.O. 11246 and "disparate impact" as used in Title VII. When the government did seek to enforce the Executive Order in circumstances where Congress specified that there was no violation of Title VII, it lost. See United States v. East Tex. Motor Freight Sys., Inc., 564 F.2d 179 (1977).
firmative actions generated by Griggs account for much of the improvement in minority and female opportunity described above.

B. Economic Forces or the Force of Law

The argument that forces other than the law are responsible for the changes which have taken place in the composition of the workforce is frequently made by those who disapprove of government intervention in the economic system. Some economists insist that economic forces explain the improved position of minorities and women in employment, and that the law is either of marginal influence, or is positively harmful. Smith and Welch conclude that Title VII, E.O. 11246 and affirmative action did have a positive influence on black employment and wages. However, they state that this effect had "marginally altered black male wage gains." They base this conclusion on a detailed study of black male employment patterns from 1940-1980. In that period, they conclude, the "long range historical forces . . .—education and migration—were the primary determination of long term black economic improvement."

However, their analysis does not acknowledge that the increase in labor demand and decrease in supply along with wage controls of World War II accounted for much of the improvement in black male wages from 1940 to 1950. Wage controls decreased the black/white male wage differential in three ways: (1) increases were in cents per hour rather than percentages which reduced the percentage differential; (2) it was easier to raise low or substandard wages; and (3) there was an anti-discrimination component of the wage control program as well as an Executive Order prohibiting discrimination in defense employment. In effect, wage controls restricted white male wages more rigorously than minority or female wages. If the 1940-50 period is omitted from the Smith and Welch analysis, their own calculations make the accomplishments of the affirmative action era appear most impressive. Eighty-five percent of the improvement in black/white male wage ratio between

31. See sources cited supra note 17.
33. CLOSING THE GAP, supra note 6, at 85-100.
34. Id. at 99.
35. Id.
1950 and 1980 which they report occurred after 1960. Smith and Welch conclude that the historical black-white wage gap in the South was prominent until 1970, and then it narrowed "very sharply" between 1970 and 1980. They attribute this change to the probability that "racial discrimination is waning in the South." This "waning of racial discrimination" was certainly related to the Civil Rights Laws.

Further, they note that the wage disparities between comparably educated blacks and whites tended to be life-long. The opening of better paying "white jobs" to blacks was a crucial enforcement strategy and a central concern of Executive Orders and Title VII from 1965 to the present. To the extent this strategy has worked, the Smith and Welch study suggests it had long term advantageous consequences.

Finally, Smith and Welch emphasize that one long term force at work in reducing the black-white male wage gap was improved schooling for blacks. This factor in their view largely explains the decline in black-white wage differences, including those of the 1970's, when for the first time, wage benefits from additional schooling were greater for blacks than whites. They do not attribute this development to the law because "more than half the narrowing of the gap in income benefits from additional schooling took place before 1960." However, as previously noted, when the factors which account for the 1940-1960 gain are examined, they turn out to include World War II wage controls. Furthermore the improved schooling in the South may well have been influenced by the line of Supreme Court opinions which culminated in Brown v. Board of Education. Thus, the lynchpin of their argument that "education" and not "Civil Rights" was the primary social cause of improved black-white male wage differentials disintegrates.

The United States Civil Rights Commission issued a report in 1986 which confirms that affirmative action programs are essential to the con-
tinued narrowing of the black-white male wage gap. The Report notes that this gap narrowed in three of the four decades between 1940 and 1980. Only during the 1950's did the gap remain stagnant. The fifties was the only decade without meaningful federal equal employment opportunity programs. In the three decades with such programs, the black-white wage gap narrowed. This suggests that the federal programs were a necessary element in the improvement of relative black-white wages. The Commission concluded that research methodology was not able to establish the effect of civil rights programs on employment. Therefore, this research methodology cannot rebut the inference that government programs are essential to continued progress in minority and female employment.

C. The Law Transmission System

To understand the impact of the law, it is helpful to conceive the process by which a legal norm is transmuted into conforming behavior as a "law transmission system." The "law transmission system" is "that set of legislative, administrative and judicial actions which interact with regulated institutions, beneficiary organizations and individuals to achieve a real world response to a legislative standard." Viewing the law in this way requires consideration of both objective statistics of legal activity and a wide range of low visibility activity which cannot be quantified. We can identify complaint processing activity of agencies, agency budgets, and number of lawsuits. The volume of reported federal court

44. ECONOMIC PROGRESS, supra note 3.
45. Id. at 16-18.
46. Id. at 238-41. The Commission report purports to explain a significant part of the continuing wage gap as based on the greater involvement with crime among younger black males, and a greater propensity to rely on disability and retirement benefits among older black males. The greater propensity to invoke disability benefits among older blacks may be directly tied to discrimination which steered them into blue collar jobs with higher risks of physical injury. See NATIONAL CENTER FOR HEALTH STATISTICS, PUBLIC HEALTH SERVICE, SELECTED HEALTH CHARACTERISTICS BY OCCUPATION 34 (1980). Since many of these jobs were lower paying jobs, the prospect of disability insurance benefits may have been more inviting than would otherwise have been the case. The Commission report recognizes this possibility, yet explains the "wage gap" in part by reference to the use of disability benefits without noting the relationship of disability to discrimination. See ECONOMIC PROGRESS, supra note 3, at 56-70. Whether the explanation of criminal behavior accounting for lower labor market participation of younger blacks is valid lies beyond the scope of this paper.

The Commission fails to note that the G.I. Bill for returning World War II Veterans probably exacerbated educational differences between blacks and whites, because the proportion of blacks eligible for college benefits was necessarily much smaller than the proportion of whites. See CLOSING THE GAP, supra note 6.
47. See Law Transmission System, supra note 6.
48. Id. at 314. From a sociological perspective, the law transmission system is a process for mobilization. See Mobilization, supra note 3.
49. See infra Appendix I; Smith & Welch, supra note 17; Mobilization, supra note 3.
decisions under Title VII is substantial. \(^5\)

But the law influenced employment decisions in more subtle and less easily measured ways. The emergence of EEO specialists in larger corporations, encouraged and required by regulations under E.O. 11246, \(^5\) has meant that in many situations, EEO policies have been implemented without direct government intervention. The expansion of law school courses, seminars and conferences on EEO matters attest to the degree that EEO policies have become imbedded in employers' industrial relations policies. The outpouring of law review articles and the publication of a most useful case-text book by Schlei & Grossman titled EMPLOYMENT DISCRIMINATION LAW \(^5\) brought developments home to the legal community, as did the emergence of specialized case reporting services. \(^5\)

Once the Civil Rights Act was in place, most personnel decisions involving minorities and women were affected by its presence. By the

\(^5\) See Culp, A New Employment Policy for the 1980s: Learning From the Victories and Defeats of Twenty Years of Title VII, 37 Rutgers L. Rev./Civ. RTS. Dev. 895, 899 (1985); Mobilization, supra note 3, at 361. A study of how the industrial relations process responded to the substance of these decisions is found in Law Transmission System, supra note 6.

\(^5\) See 41 C.F.R. § 60-2.22 (1986).

\(^5\) Supra note 13.

\(^5\) Bureau of National Affairs Fair Employment Practice cases introduced in 1969 is now up to volume 40. Three volumes of nearly 2000 pages are published every year.

One barometer of the concern for EEO matters in the industrial relations community is the extent of references to these matters in the Labor Relations Yearbook, published annually since 1965 by the Bureau of National Affairs. The Yearbook summarizes conferences, speeches and government developments in labor relations generally. An analysis of these annual volumes shows an increasing emphasis on EEO matters from 1965 to 1984.

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early 1970's it was difficult for any of the participants in a personnel decision involving a female or minority to be oblivious of the candidate's race or sex. Advice from corporate counsel, personnel and EEO officers of corporations, and outside attorneys influenced decisions which were never subjected to formal proceedings. Thus the existence of the law—as interpreted in *Griggs*—exerted a major influence on personnel decisions. When one understands how the legal system has interacted with the industrial relations system, the assumptions that the role of law can be isolated from other "economic" or "social factors" become untenable. It is virtually impossible to isolate particular components or programs, because their pressures are interdependent and their influence is cumulative.

Assessment of the influence of the law is further complicated by the political reality that the statute could not have been adopted in the first

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It is difficult to assess the significance of this pattern of citations because there are few analyses of the "quantitative" importance of court decisions. Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 Emory L. J. 195, 213 (1980), suggest that the "half life" of a reported court of appeals opinion is seven years. Shuchman and Gelfand's statistics were based on citations to opinions published only if at least one member of the three judge panel believed that it would have precedential value. The mean number of citations to each such opinion within four years after publication was 5.2. *Id.* at 217. If this analysis is applicable to the Supreme Court opinions, then *Griggs* is still leading a healthy existence.


55. Chopper, *supra* note 3; *ECONOMIC PROGRESS, supra* note 3.
instance, unless a significant part of the society was "ready" to comply with equal opportunity standards.\(^5\) This social readiness to accept a new behavioral norm arose from a melange of moral, emotional, political and economic judgments. Its existence does not detract from the significance of the statute in influencing subsequent behavior. Rather, it may help explain the extent of compliance with the norm once it has been "established" as national policy.\(^6\)

This description of the process by which the principles of the law were incorporated into industrial relations systems makes it impossible to isolate the law from other factors involved in personnel decisionmaking.\(^7\) It suggests that the law did have a major impact on the pattern of personnel decisions of significant employers, and properly places the burden of persuasion to the contrary on those who would dispute the point.

### D. A Judgment of Effectiveness

Assessing the effect of the law requires a standard against which to measure its accomplishments. This is difficult to develop.\(^8\) There probably was no detailed consensus in 1964 as to exactly what the law should accomplish. Two of the three social indicators of discrimination—occupational distribution and wage disparities—have improved since 1965, while the third indicator—the unemployment rate—has not.\(^9\) The high minority birth rate in the 1950's and 1960's provides a partial explanation for the continued high relative unemployment rate, along with inferior educational preparation.\(^10\) The shift of jobs from the city to the

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56. POLITICS, supra note 28.
57. A widely circulated booklet describing developments in EEO law and policy published by the Conference Board was R. Schaeffer, NON DISCRIMINATION IN EMPLOYMENT: CHANGING PERSPECTIVES, 1963-1972 (1973). In the Introduction, Alexander B. Trowbridge, President of the Conference Board, stated at 111:

> Business organizations found that, as a matter of law (Title VII) they were required not to discriminate because of race, color, religion, sex, national origin, or age in any aspect of the employment relationship. But the nature of that obligation was by no means obvious.

> It is only during the past year that leading companies have reported that the central thrust of the court decisions dealing with nondiscrimination has become sufficiently clear to serve them as a reliable guide to action. Once again, it was a Supreme Court decision, in Griggs v. Duke Power Co., that set the basic course. Id. at 111.

58. The optimum method of achieving compliance with a regulatory standard is for the regulated community to absorb the standard as part of its regular process. See Blumrosen, Six Conditions for Meaningful Self Regulation, 69 A.B.A. J. 1264 (1983).
60. The "improvement" in occupational distribution is significant when measured against either past performance, or a realistic estimate of the possible. POLITICS, supra note 28, ch. 7. The improvement in wage disparities is not as visible because of the increasing minority unemployment rate.
61. See CLOSING THE GAP, supra note 6; ECONOMIC PROGRESS, supra note 3.
suburbs which are still largely white has contributed to the problem. Finally, the EEO laws have probably had less impact on smaller employers who provide many entry level jobs. Nevertheless, overall minority employment had increased about a million beyond that which it would have been under 1965 distribution.

The remaining wage differential between both minorities and women and white males may still be influenced by Title VII. Women and minorities have only recently entered the higher paying job classifications. Within these classifications, time brings increased rewards. Thus, the wage gap will begin to narrow as time passes. In addition, the law of wage discrimination lags behind other aspects of Title VII law. This is due largely to the slow start that the EEOC made in recognizing sex discrimination as a major element in Title VII. As a consequence, the law of wage discrimination is about five years behind where it would have been if the EEOC had been vigilant concerning sex discrimination matters in the sixties. When the law of wage discrimination matures, it will help to address the minority/female wage differential as compared to white males.

The progress in connection with occupational distribution and relative wages has been substantial. However, minorities and women are far from equal to white males in occupational distribution and relative earnings. But the framers of the Civil Rights Act, while they did expect that there would be substantive, not merely procedural, improvement in the relative position of minorities and women, did not adopt group equality as its objective, nor did they set a timetable for the substantive achievement they expected. Improvement has come far more rapidly under the Act than before it, and the remaining disparities do not seem insurmountable. My view is that heretofore respectable progress should continue until the remaining group disparities are no longer fairly attributable to discrimination. This point is not easy to identify, but we might

62. See Leonard, supra note 17, who concludes that employers who are not government contractors have not done as well as government contractors in hiring minorities. This group would include many "small" employers. CLOSING THE GAP, supra note 6, at 85-100. It has been estimated that more than half the job growth in 1986 will be with employers of fewer than 100 employees. Daily Labor Report, Mar. 26, 1986, at A.4.

63. CLOSING THE GAP, supra note 6, at 18-20, notes that a significant proportion of black males have "made it" into the middle class. POLITICS, supra note 28, at ch. 7, discusses the effect of passage of time.


65. On measuring "substantiality" see Blumrosen, Quotas Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675 (1974); POLITICS, supra note 28, at ch. 7.

66. See infra notes 78-80 and accompanying text.
take the "rule of thumb" of the UGESP of an 80% ratio as a general guide. This suggests that current EEO strategies, including affirmative action, should continue. The existing disparities do not justify abolition of the programs.

The EEO strategy followed since 1965 is not likely to provide enough jobs to meet the needs of a rapidly increasing, young and poorly educated minority labor force. The increased unemployment rate of minorities attests to this point. Job creation should be explored in conjunction with the EEO enforcement program. A relatively simple method of creating some 5 million jobs, many of them part-time, would be to reduce "normal" work weeks under the Fair Labor Standards Act to 32 hours. This approach would be effective in enhancing minority and female opportunities if coupled with continued enforcement of EEO law.

E. The Legitimacy of Griggs

Was the "disparate impact" concept properly read into Title VII? The statute can be read either as requiring "intent" or as prohibiting practices with "adverse effect." The standard definition of discrimination in the legislative debate, a "distinction in treatment given to different individuals because of their different race" did not address the question of whether the difference had to be intended. The "impact" concept was consistent with the Congressional purpose to "lift the Negro from the status of inequality to one of equality of treatment."

While Congress was not specifically aware of the disparate impact principle in 1964, it did intend to eradicate "all forms of discrimina-

67. The Uniform Guidelines on Employee Selection Procedures—1978, 29 C.F.R. § 1607.18 (1986) establish Federal standards to implement the Griggs principle. 29 C.F.R. § 1607.4(D) (1986) provides that a selection rate of minorities or women which is less than 80% of the selection rate for white males will be assumed to have disparate impact.


70. 110 CONG. REC. 5423 (1964) (statement of Sen. Humphrey).

tion" and it rejected efforts to narrow the definition of discrimination. To implement the Act, it created an agency which had to interpret the statute in order to engage in investigation and conciliation. It is conventional law that the interpretations of the agency are to be given deference by the courts if they are "permissible," or "reasonable" interpretations of the statute. In Griggs, the government argued for a "disparate impact" interpretation, and for a "job relatedness" requirement with respect to testing. The Court accepted the government's argument, fully aware that the agencies had consciously adopted a "broad" interpretation of the statute. Thus, it appears that Griggs was correctly decided under the 1964 Act.

In any event, the concept was understood by the time of the 1972 amendments, as committee reports in both houses demonstrate. The

73. Both Houses rejected efforts to limit Title VII to acts which were based "solely" on race, etc. See A. Blumrosen, Black Employment and the Law 172-76 (1971). See also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 286-87 (opinion of Powell, J.), and 337-40 (opinion of Brennan, J.) (1978).
75. See Strangers in Paradise, supra note 10, at 110. This same analysis was applied to the government's interpretation of religious discrimination in Trans World Airlines v. Hardison, 432 U.S. 63 n.11 (1977).
76. See Thomson, supra note 69.
During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. ... Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in Griggs v. Duke Power Co. ... where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.
In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. ... Experience has shown this view to be false. Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

See, e.g., Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 Rutgers
extension of *Griggs* to sex discrimination in 1977 was consistent with the Court's view of the original Act, and with the 1972 legislative history.

The legislative history of Title VII is murky on many questions. The legislators who were addressing the general social problems of discrimination did not have before them the specific issues which were identified only when the statute was applied to actual cases. Nonetheless, two points emerge clearly from the debates.

First, Congress was intent on securing *visible and measurable* improvement in employment of minorities and women. Both the 1964 and 1972 Committee Reports describe their inferior position in the employment system and state that progress had been "too slow." These statements make clear that the legislators were concerned with substantive improvement, as well as with procedural fairness. Those comments provide support for the "consequences" concept of *Griggs*.

Secondly, Congress did not want jobs to be allocated mechanically to members of various groups by reference to population or labor force. The debates about "quotas" as well as the language of the "no preferential treatment" provision and the references in the debate to the desirability of "color blind" personnel decisions establish this point.

These two principles press in different directions with respect to the definition of illegal activity and the scope of affirmative action. The interplay between these principles was left to the agencies and the courts. By 1972, the courts had developed the disparate impact principle and the agencies had developed "good faith efforts to meet goals and timetables" to address these points. Congress, in 1972, confirmed the *Griggs* deci-

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78. One primary reason for the inconclusive quality of the legislative deliberations was the lack of legal terminology to discuss group interests. See *Group Interest*, supra note 71. On the difficulty of articulating group concerns in an individualistic society, see R. BELLAH, R. MAIDEN, W.M. SULLIVAN, A. SWINDLER & S.M. TOPTON, HABITS OF THE HEART, INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE 206 (1986); UNGER, KNOWLEDGE AND POLITICS 81-82 (1976).

79. See H.R. REP. No. 238, supra note 76, at 4-5; S. REP. NO. 415, supra note 76, at 415-16 for discussion prior to the adoption of the 1972 Act. See also H.R. REP. NO. 914, 89th Cong., 1st Sess., at 18 (1963). This was the only committee report on the 1964 Act.


sion and refused to overturn the goals and timetables approach which had been adopted by the Labor Department. These actions strongly suggest that both the broad definition of discrimination and the liberal scope for affirmative action are mandated by the Act, or are at least clearly "permissible." Nevertheless, the principle has been challenged in recent years with respect to its application to the single most critical aspect of employment decisionmaking—the employer’s subjective judgment. The remainder of this article will explore that issue.

III. SUBJECTIVE JUDGMENTS AND GRIGGS

During the industrial upheaval of the last ten years, the Griggs principle has increasingly been brought to bear on employment decisions based on "subjective judgment," rather than on objective criteria, such as scored tests, diploma requirements, and objective physical requirements. Personnel actions based on "subjective judgments" such as those involving "aggressiveness," "leadership ability," "capacity for handling unforeseen situations," and "ability to handle interpersonal relationships" have become increasingly important in the last decade. Employment discrimination law will be more heavily involved in these matters in the next decade. Several factors contribute to this development.

(1) Griggs may have contributed to the increasing use of subjective judgments in personnel decisions. In order to avoid "disparate impact," some employers may have abandoned the use of scored tests and moved to a subjective selection process. Others may have combined the results of "objective" criteria with "subjective" judgments in order to avoid adverse impact by including minorities and women in jobs from which they would otherwise have been excluded. This approach is recognized as an alternative to validation in the Uniform Guidelines on Employee Selection Procedures and protected under the Affirmative Action Guidelines.86

(2) The older theory of "scientific management" that jobs should be narrowly defined to encourage repetitive performance of limited func-

82. See supra note 76.
83. See Helfand & Pemberton, supra note 69; Group Interests, supra note 71.
84. Helfand & Pemberton, supra note 69.
tions, is giving way. Management now seeks flexibility in task assignment, which requires a broader definition of the totality of the "job." The broader the job description, the more likely it will encompass matters for which subjective judgments are brought to bear in selection.

(3) The shift from smoke stack to service industries and from blue collar to white collar work expands the proportion of jobs for which interpersonal skills and intangible abilities are critical. Selection for jobs which are believed to require these skills and abilities is commonly based on a "subjective judgment" of the likelihood that the candidate will have these capabilities. This process does not only apply to "high level" jobs. The fast food store manager may make less than a steelworker, but the job may require a wider range of interpersonal and managerial skills.

(4) Almost all of the jobs in the upper tier of job categories require the incumbent to engage in decisionmaking under conditions of uncertainty. The selection of persons with this ability involves an estimate of likely performance under unknown conditions. These estimates are usually "subjective," reflecting the best guess of the decisionmaker. This is true of officials, managers, professional and technical positions—most of the "better jobs" in terms of money and status.

(5) The wave of reorganizations, mergers and acquisitions, coupled with the enhanced quest for short term results has placed increased pressures on managers at all levels. These managers in turn are likely to pay closer attention to the quality of performance of persons they select. In situations where there are no "objective" criteria by which success can be predicted, and the pressures to produce are strong, managers are likely to fall back on a deep-rooted assumption that those whose backgrounds are similar to their own or familiar to them are likely to do a better job than those whose background and experience are different.

87. Discretionary Decisionmaking, supra note 13, concludes that this characteristic of the job is so crucial as to warrant judicial deference to the employers' "subjective decision" when the job actually requires discretion and the employer actually exercised it. Burstein and Monaghan note that 45% of Title VII cases with reported opinions involved upper level or supervisory jobs. Mobilization, supra note 3, at 369.

88. The fact that this is irrational is beside the point. The law school that I attended 35 years ago bears little resemblance to the law school of today; most of my professors are long dead or retired. Nevertheless, when I meet a recent Michigan Law School graduate, I assume initially that the legal education he or she received must have been similar to mine. It is difficult to shake free of this initial perception.

The underlying error, of course, is to assume that the "legal education" which I received was "the same" as that which any one else obtained then or at any time. Education involves an individualized interaction between student and environment and is unique to each person. Overgeneralization about its effects can be disastrous. See R. Lindsey, The Falcon and the Snowman (1979) for an illustration of a major security leak resulting from assumptions based on knowledge of an individual's family background.
This tendency to identify with persons "like ourselves" and to project upon them characteristics and attributes which we believe we have, is an important element in the necessarily subjective judgments which predict future performance. The higher the job level, the more visible will be the performance of the person selected, and the greater the pressures on the selecting personnel will be to demonstrate their acumen. This pressure increases the likelihood that a "bias toward the familiar" will occur in the selection process. 89

Subjective judgments are most common in the promotion and discharge situation because there is more data on which they can be based. The employee already has a "track record," with supervisors and co-workers, and has been observed in a myriad of work related situations. 90 A "net judgment" on probable future performance which is sensitively rooted in past experience may be the preferred form of decisionmaking, as long as it does not incorporate discriminatory factors. In contrast, the hiring of a new employee is likely to be based on more formal "objective" background requirements, and a brief encounter with supervisory personnel. These requirements can, with relative ease, be subjected to disparate impact analysis. 91

The courts have long recognized that the use of subjective judgments in personnel decisions provides a ready occasion for the application of discriminatory perceptions—stereotypical ideas such as, for example, that women are not tough enough or aggressive enough for some kinds of work. 92 The leading case is Rowe v. General Motors, 93 decided in 1972, which addressed the probabilities that white supervisors making subjective judgments would fairly consider blacks for supervisory positions in Georgia. The court said, "We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." 94


90. The situation is similar to that which Horace Greeley perceived when he was threatened by a libel action by James Fennimore Cooper. "He will not bring it in New York, for we are known here, nor in Ostego, for he is known there." N.Y. Tribune, Nov. 29, 1841, at 2, col.1.

91. See, e.g., the analysis of a prior experience requirement in Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984).

92. In EEOC v. Sears, Roebuck, Inc., 628 F. Supp. 1264 (N.D. Ill. 1986), the employer introduced expert testimony that stereotypes of women's interests were "true" in an effort to explain a smaller applicant pool of women for sales jobs. See Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C.L. REV. 345 (1980).

93. 457 F.2d 348 (5th Cir. 1972).

94. Id. at 359.
markable improvement in promotional opportunities for minorities and women since 1965 makes it impossible to draw the categorical conclusion which was suggested in Rowe. White male managers have promoted many minorities and women.95

In Rowe, white foremen had not recommended black workers for "white jobs" and, in the court's view, were unlikely to do so.96 Therefore, the use of subjective judgments constituted a "built in headwind" under the Griggs test.97 Is there still a sufficient "tilt" against promotion of minorities and women some fourteen years after Rowe, to require an interpretation of the statute to counterbalance it? Many employers have adopted personnel practices which no longer restrict minority/female opportunities, but many have not. How should the law deal with this more complex situation? A simple answer to this question is no longer possible.98

A. Division Among the Circuits

The courts of appeal are divided on whether to apply the Griggs principle to employment decisions based on subjective judgments. The Griggs principle has been applied to "subjective judgments" in the Second, "old" Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits. However, nearly half the circuits, following the lead of Pouncy v. Prudential Insurance Co.,99 hold that Griggs is not applicable to "subjective judgments." They require a plaintiff who challenges a pattern of subjective decisions to proceed under the disparate treatment approach. This view is held by the First, Fourth, "new" Fifth, Eighth and Tenth circuits. The Fifth, Eighth and Tenth Circuits are on both sides of the issue.100 The Seventh Circuit has tentatively decided to apply Griggs to


96. 457 F.2d at 359.

97. The first major conciliation agreement under Title VII required identification of black workers "qualified" to become supervisors. In administering the agreement, the government found that there were no uniform standards, other than a recommendation from the candidate's supervisor. All the supervisors were white and few blacks had ever become supervisors. White foremen were then asked to identify those black workers who in their view were qualified for supervisors. They identified 150 of the 400 eligible blacks as qualified. See A. Blumrosen, BLACK EMPLOYMENT AND THE LAW 358-59 (1971).

98. Discretionary Decisionmaking, supra note 13, would consider the nature of the employer, the decisionmaking process used, possible bias in measurement methods and whether the job being filled required the exercise of discretion.

99. 668 F.2d 795 (5th Cir. 1982). In Page v. U.S. Indus., Inc., 726 F.2d 1038, 1045 (5th Cir. 1984), the 5th Circuit itself did apply disparate impact analysis to a "subjective judgment" system, relying on the statement in Teamsters v. United States, 431 U.S. at 335-36 n.15, that, "either theory may . . . be applied to a particular set of facts."

100. The restriction of Griggs to specific identified employment practices was articulated in
subjective judgment cases and the Third Circuit has not addressed this issue.

This difference in approach is important because of the consequences which flow from the choice of analysis. Disparate impact is easier to establish than disparate treatment. Proof of "disparate impact" need not rise to the level of statistical significance. Once disparate impact is shown, the burden is on the employer to justify its system as a "business necessity." In contrast, the disparate treatment approach places a heavier burden on the plaintiff because it requires proof of discriminatory intent. Plaintiff's statistical evidence must meet the standard of "statistical significance." Plaintiff has the burden of persuasion at all times. Defendant can justify its actions if it has a "legitimate busi-

Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982). The court suggested that "disparate impact" raised an inference of intentional discrimination, that its extension to matters of subjective judgment was unfair to employers because they would be required to justify specific practices which had not been shown to have disparate impact, and would pose problems of establishing "causation." Id. at 800. Pouncy was followed without discussion of its reasoning in the Sixth Circuit, Geisler v. Folsom, 735 F.2d 991 (6th Cir. 1984); the Fourth Circuit, EEOC v. Federal Reserve Bank, 698 F.2d 633, 638 (4th Cir. 1984), rev'd, 467 U.S. 867 (1984); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); in the "new" Fifth Circuit, Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1202 (5th Cir. 1984), cert. denied, 469 U.S. 1073 (1985); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188 (5th Cir. 1983); Carpenter v. Stephen F. Austin St. Univ., 706 F.2d 608, 620-21 (5th Cir. 1983); the Eighth Circuit, Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981). The Tenth Circuit refused to find a practice to which Griggs could apply in dealing with the "subjective judgment" in Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982).

The courts which do apply Griggs to subjective judgments are: The Second Circuit, Zahorik v. Cornell Univ., 729 F.2d 85, 95-96 (2d Cir. 1984) ("Business Necessity" justified use of subjective judgments in University tenure process); the "old" Fifth, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (the grandfather of the cases suggesting that subjective judgments are a fertile ground for discrimination); one decision in the "new" Fifth Circuit, Page v. U.S. Indus., Inc., 726 F.2d 1038, 1045 (5th Cir. 1984); the Sixth Circuit, Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88, 93 n.10 (6th Cir. 1982); the Eighth Circuit, EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986); the Ninth Circuit, Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc); the Tenth Circuit, Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981); the Eleventh Circuit, Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (relying on former rule in 5th Circuit and adding support for view from Supreme Court decisions, legislative history and the risk that exclusion of subjective judgments from the Griggs principle would expand employer reliance on subjective decisionmaking); and the District of Columbia Circuit, Seger v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2357 (1985). Seger refuted the analysis in Pouncy in two ways; first, the application of Griggs to subjective judgments would force the employer to identify and defend only those parts of the process which had adverse impact, 738 F.2d at 1271, and secondly, that Griggs was not simply a surrogate for proof of intention, but an independent starting point in statutory analysis. 738 F.2d at 1266.

101. Regner v. City of Chicago, 789 F.2d 534, 539 (7th Cir. 1986).

102. "Statistical significance" is that convention among statisticians which is a sufficient statistical difference from an expected value to disprove the null hypothesis that the observed relationship is a matter of accident. See, e.g., Page v. U.S. Indus., Inc., 726 F.2d at 1047-51. The "Eighty Percent" or "4/5th" Rule of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1986), is intended to simplify a finding of disparate impact. It does not necessarily yield "statistical significance." See supra note 13.
ness reason," a less onerous formulation than showing "business necessity." The reason for this difference in formulation is that a "legitimate business reason" negatives the discriminatory intent required in disparate treatment cases even though it may not rise to the level of "business necessity." Furthermore, the disparate treatment case is individualized, making it more difficult to maintain a class action than under the Griggs type analysis.

The federal agencies have concluded that subjective judgments are subject to the Griggs principle. The Uniform Guidelines on Employee Selection Procedures (UGESP), adopted after notice and comment rulemaking procedures by the EEOC, the Departments of Labor and Justice, and the Civil Service Commission, take the position that subjective judgments constitute a "Selection Procedure" which must be validated or altered, if it has adverse impact. As a practical matter, the decision to apply a disparate impact analysis to subjective decisionmaking may often determine the issue of liability favorably to employees because of the difficulties of establishing the necessity for the use of the process.

103. See Player, Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inference as a Talisman for Analysis, 36 MERCER L. REV. 855, 856-57 (1985).

104. This is particularly true since General Tel. Co. v. Falcon, 457 U.S. 147 (1982) narrowed the application of FED. R. CIV. P. 23 in discrimination cases. See also Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 947, 1004-06 (1982).

105. See 29 C.F.R. § 1607.1B (1986). Subjective judgments seeking "interpersonal skills" or "leadership ability" must, under the UGESP, be validated under a theory of "content validity," 29 C.F.R. § 1607.14(c)(1) or "construct validity" which is difficult to establish. 29 C.F.R. § 1607.14(d)(1).

106. Employers have lost the reported cases which apply disparate impact theory to subjective decisions. See infra note 149. One decision to the contrary is Zahorik v. Cornell Univ., 729 F.2d 85, 95-96 (9th Cir. 1984) where the Ninth Circuit not only found that there was no disparate impact, but also found that the University's procedure in denying professors tenure was the academic equivalent of a business necessity.

CHART I

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B. What Constitutes a “Subjective Judgment” Case

The standardless individualized personnel decision based on the unguided discretion of a supervisor would seem to be archetypical of the kind of “subjective judgment” we are considering.\(^{107}\) We should also include those decision processes which require that objective factors be taken into account in arriving at a decision, but do not assign weights to the objective factors. They become unstructured inputs into a “net” subjective judgment. However, two courts of appeals have erroneously characterized employer systems which had “objective” dimensions as being subjective, one of which was subsequently reversed. A panel of the Ninth Circuit in \textit{Atonio v. Wards Cove Packing Co.},\(^{108}\) held that a “word of mouth” recruitment system involves subjective judgment and was therefore immune from the disparate impact principle. This conclusion was wrong, and was reversed by the court of appeals \textit{en banc}.\(^{109}\) A decision to rely on “word of mouth” recruitment is a decision to adopt a system or method of accomplishing the hiring task. While the system may incorporate a “subjective judgment” as to who is notified, this does not destroy the fact that the system as such can be observed and described.\(^{110}\)

Similarly, in \textit{Hawkins v. Bounds},\(^{111}\) the Tenth Circuit held that the practice of assigning particular employees to temporary duty in higher level positions so that they could acquire experience which would give them an advantage in securing the position permanently, was a “subjective” decision. This conclusion is also erroneous. The practice of assigning individuals temporarily to higher level jobs and then relying on the experience they obtain in those jobs is not itself subjective. It is capable of proof and evaluation in precisely the same manner as a written test or education requirement.\(^{112}\) The identity of the persons who are assigned may be established by subjective decisionmaking, but that does not make the practice itself, “subjective.” The concept of “subjective decisions” should be applied to individualized personnel actions made without the use of generalized “objective criteria,” and to decisions which “take account” of objective factors, but are not limited to a consideration

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107. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972).
108. 768 F.2d 1120, \textit{rev'd}, 810 F.2d 1477 (9th Cir. 1987) (en banc).
109. 810 F.2d 1477 (9th Cir. 1987) (en banc).
111. 752 F.2d 500, 503 (10th Cir. 1985). The court applied the Griggs principle.
112. See Wilmore v. City of Wilmington, 669 F.2d 667, 671-72 (3rd Cir. 1983).
of these factors and allow the decision maker substantial unstructured leeway in judgment.

C. Arguments Concerning the Application of *Griggs* to Subjective Judgments

The difference among the circuits concerning the application of *Griggs* to subjective judgments conceals a dispute about the *Griggs* concept itself. The courts which refuse to apply *Griggs* to the subjective judgment process consider that the disparate impact doctrine is a surrogate or proxy method of proving deliberate discrimination. They interpret *Griggs* as acknowledging the difficulty of proving intentional discrimination by making it easier for the plaintiff to establish a *prima facie* case and placing a heavy burden on the defendants to justify their practices. But beneath these "procedural" rules, the quest is still for "intent." In that quest, it is unfair to require the employer to defend a range of practices in order to respond to a general challenge to the use of subjective judgments.

The courts which do apply *Griggs* to subjective judgments adopt a fundamentally different approach. "Intentional discrimination" is simply not at issue. *Griggs* bans practices which, regardless of intent, have an unjustified disparate impact on minorities. The particular cause or source of the impact may not matter at all, and may never be identified. *Griggs* was intended to minimize the significance of all non-job-related criteria which restrict opportunities of disfavored groups. It was not concerned with the fault of the employer; in the *Griggs* decision itself, the "fault" lay in the inferior educational opportunities afforded blacks by the state, not with the employer.

Under this view, when the plaintiff has demonstrated that subjective judgments have a disparate impact, the employer is required to justify them by as rigorous an analysis as the situation permits. This approach presupposes that there still exists a subtle predisposition to assume that

113. See *supra* note 100. This view is articulated in Justice Powell's dissent in Connecticut v. Teal, 457 U.S. 440, 458-59 (1982): "In disparate-impact cases . . . the plaintiff seeks to carry his burden of proof by way of inference—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group. . . . From such a showing a fair inference then may be drawn that the rejected applicant . . . was himself a victim. . . ." It is also found in *Pouncy*, 668 F.2d 795.

114. This approach is articulated in Justice Brennan's opinion in Connecticut v. Teal, 457 U.S. at 448. "When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity 'because of . . . race. . . .' " My own view agrees with Justice Brennan on the scope of *Griggs*, but with Justice Powell on the application of *Griggs* in *Teal*. See *Group Interest, supra* note 71.
minorities and women are less able than white males. While we no longer utilize crude stereotypes of race or sex inferiority, our subjective judgments are still likely to tilt against minorities and women. The adverse impact principle applied to the overall process is an effective way to counter this tilt because it requires the employer to justify its decisional process.

D. Precedent, Policy, and Practicality Concerning the Subjective Judgment Issue

1. Precedent

The question of which approach is "preferable" requires a consideration of precedent and policy. The legislative history is of little assistance. Language in Supreme Court opinions supports the view that the Griggs principle applies to subjective judgments which produce disparate impact. At the same time, the facts in all of the Supreme Court disparate impact cases involve specific practices, not generalized subjective hiring practices. Thus, the courts which limit Griggs to specific practices interpret the Supreme Court decisions in light of those facts.

The Supreme Court cases which do involve "subjective judgments" have been analyzed in terms of intentional discrimination. In McDonnell Douglas v. Green, the employer did not want to hire a specific em-

116. See supra note 69 and accompanying text.
117. Griggs, 401 U.S. 424 (1971) itself applied to "practices, procedures or tests," id. at 430, "tests or criteria for employment or promotion," id. at 431, "the consequences of employment practices, employment procedures or testing mechanisms," id. at 432, "broad and general testing devices," id. at 433 and "testing or measuring procedures," id. at 436.
118. Griggs involved a high school diploma requirement and two written tests. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) involved a written test; Dothard v. Rawlinson, 433 U.S. 321 (1977) involved height and weight requirements; Connecticut v. Teal, 457 U.S. 440 (1982) involved a written test. The written test in Albemarle, was faulted by the Court in part because the test scores were validated by unstructured subjective supervisory judgments. The Court said that "[t]here is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind." 422 U.S. at 433.
ployee because of his past "disruptive tactics." The Court concluded that this "predictive evaluation" had to be measured by an "intent" standard. In *Texas Department of Community Affairs v. Burdine*, the Court held that a conclusion that plaintiff "did not get along well" with other workers was a "legitimate nondiscriminatory reason" for discharge of a supervisor. This conclusion is normally based on a series of observations and not on a single incident. It is not readily subject to documentation, or to refutation on cross-examination. This rationale is typical of cases in which "subjective judgment" is used. Another example is *Hazelwood School District v. United States* which involved subjective judgments in teacher selection. *Hazelwood* was tried as an intent case.

2. Policy

The *Griggs* principle was designed to prevent discrimination in the general society from unnecessarily limiting employment opportunities. This was illustrated in *Griggs* by Chief Justice Burger's analysis of the relation between discrimination in education and opportunities to vote and to work.

In the present case, "whites register far better on the Company's alternative requirements" [in securing a passing score on a written test] than Negroes. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools . . .

In *Gaston County v. United States* . . . because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race.

This illustration of how inferior education can interfere with employment and voting rights, demonstrates the linkage between subordination of minorities in one area of life and their opportunities in another: a linkage which the law was intended to cut, in the absence of demonstrated necessity. The more general form of this reasoning is as follows: the restriction of opportunities for minorities and women in many areas of life was the subject of the Civil Rights Act. Congress intended to prevent any unnecessary extension of these restrictions from one area of life to another. Title VII should be interpreted to carry out this objective.

120. *450 U.S. 248, 251 (1981).*
122. *Griggs, 401 U.S. at 430.*
123. *See Affirmative Action Guidelines, 29 C.F.R. § 1608.1 (1986).*
objective; rather it permits employers "in good faith" to transpose restrictions in education into a denial of employment. Therefore, the court will devise and apply a concept of discrimination which is more consonant with the legislative objective, which focuses on "the consequences of employment practices, not simply the motivation." 124 This is the "underlying reasoning" of the *Griggs* opinion and should guide its application to the subjective judgment issue. 125

In light of the vast improvement in minority-female employment opportunities since *Griggs*, some reassessment of *Griggs* was inevitable, and has taken place. 126 While some have suggested that this is due to the more conservative attitude of the administration in recent years, I believe that this more conservative attitude is a political response to changing public opinion. The general public is less sympathetic to conditions of minorities today because, in part, of the visible improvement in minority and female job situations. 127 Public support for goals and timetables deteriorated after the visible improvement in minority and female opportunities described above had taken place. By 1980, there was a significant sense that vigorous affirmative action was no longer necessary because "things were better." 128 Older persons saw the improvement as substantial, younger persons could not believe that the world of 1950's-60's had been as racist-sexist, and some middle aged workers did not want to see their opportunities restricted. Building on this change in public attitude, the Reagan Administration began to retrench the federal posture toward minorities. This visible improvement in minority opportunity was also bound to affect the judicial perception of the problem—the judges "situation sense" as Karl Llewellyn put it. 129

Fourteen years ago, I suggested that improved minority opportunities would lead to a reassessment of the application of *Griggs*. 130 The

125. *Strangers in Paradise*, supra note 10. Helfand & Pemberton, *supra* note 69, suggest that the absence of a clearly articulated general rationale for the *Griggs* principle has engendered a variety of attacks upon it. They find their rationale in *Teal*’s focus on the word "opportunities" in the statute. Justice Powell’s "substitute for intent" rationale is also found in *Teal*, 457 U.S. 440.
128. See *New Patterns*, *supra* note 89, suggesting that the improvement was more visible than real. *Politics*, *supra* note 28, demonstrates the crucial role of public opinion in securing the passage of the Civil Rights Act, and suggests that ‘political leaders’ followed the public mood but did not create it.
130. *Strangers in Paradise*, *supra* note 10, at 102, 106:

This article has been concerned with the positive scope of the *Griggs* principle because of
time for that reassessment has arrived as the differences in the courts of appeal about the scope of Griggs indicate. The question of whether Griggs is applicable to "subjective judgments" provides an excellent opportunity for such a reconsideration by the Supreme Court. However, in undertaking this reconsideration, the court should not eliminate general categories of employment decisions from the disparate impact principle.

In my view, it is erroneous to exempt any generic type of employment practice from the operation of the Griggs principle. Griggs should continue to apply to the totality of practices, including subjective judgments, of employers whose work forces reflect the continued restriction or exclusion of minorities/women. However, those employers who have contributed to improvement of minority/female opportunity for a general category of employees should no longer be subject to as rigorous application of the Griggs principle with respect to that category of employees.\textsuperscript{131} In relaxing the application of Griggs in such a situation, more leeway may be given to the use of subjective judgments. This principle must be applied with care. The focus should be on categories of employees as defined by the EEOC in EEO-1 forms, or categories used by the Bureau of Labor Statistics. The focus should not be on the total work force of the employer, because this would permit relaxed scrutiny of those who employed minorities or women primarily in lower ranked jobs. Thus, for example, in a case involving lawyers the employer could show its inclusion of minorities or women in the class of professionals as a

the outer reaches of Griggs will determine the extent to which the law will cope with inequality in employment opportunities. Yet, it is also necessary to consider the other side of the coin, the question of Griggs' limits. If discrimination is defined by the presence of "built in headwinds" against minority groups, then the absence of this adverse effect on minorities would force plaintiffs back to the evil-motive and equal-treatment tests of discrimination.

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Griggs does not demand that the work force of each large employer should be a microcosm of the total population or labor force. Griggs only requires that the structures responsible for restricting minority opportunity be destroyed. \textellipsis Therefore, numerical standards are an appropriate tool. But carried to a pseudological conclusion, such standards would structure opportunities on society along lines of race, national origin and sex. The individualist strain in our traditions stands against that proposition. \textellipsis Thus, the use of this third concept of discrimination should be decreased, and the range of employer discretion increased, as the crude consequences of minority subordination are eliminated. We will revert back toward evil-motive and equal-treatment concepts of discrimination when the social system operates in a fairer way.

\textsuperscript{131} This is the fundamental principle behind my support for the "Bottom Line" concept. See Bottom Line, supra note 86; Group Interest, supra note 71. The Griggs principle contains a self limiting element in the concept of "disparate impact." When employment practices do not produce such impact, the concept is inapplicable. The text here suggests a relaxation of Griggs with respect to employer practices concerning classes of employees as defined by the Bureau of Census or EEO-1 categories.
reason for released application of *Griggs* to subjective judgments, but not its inclusion of minorities or women as clericals or blue collar workers.

The difference between types of employers is illustrated by a comparison of two cases: *Rowe v. General Motors,*\(^{132}\) and *EEOC v. Sears, Roebuck, Inc.*\(^{133}\) Both cases involved subjective judgments, and both involved a defense that the employer had taken affirmative action. But in *Rowe*, the affirmative action consisted of "good intentions" which had not been translated into reality; there were no black supervisors. In *Sears*, the district court stated:

> During the period from 1973 through 1980, Sears never hired fewer than 20 percent women into full time commission sales and 37 percent women into part time commission sales in any year. Sears hired as many as 40 percent women into full time commission sales, and 52 percent women into part time commission sales. Between 1973 and 1979, the female percentage of full time commission sales hires doubled from 20 to 40 percent.

> From 1974 through 1980, Sears promoted 11,428 noncommission salespersons to commission sales at 992 Sears stores across the nation. Of those promotions, 53.5 percent went to women. . . . The female proportion of promotions from noncommission to part time commission sales exceeded 50 percent in every year from 1974 through 1980, reaching a high of 62.2 percent in 1975.

> The female percentage of commission sales promotions varied substantially by product line. For both full time and part time employees, the proportion of women promoted into commission sales has always exceeded the proportion of women hired to sell both products in which women have been more interested and products which women have not been very interested in selling. . . . This is the result of the success of Sears' affirmative action efforts in promoting women into commission sales who otherwise would not have applied for the positions.\(^{134}\)

This "effective affirmative action" justification reflects the social progress which has been achieved under Title VII. The *Griggs* principle should be eased with respect to those employees who have participated meaningfully in the process but should remain in full force with respect to those who have not.\(^{135}\) This approach rejects the suggestion in *Pouncy*, that the *Griggs* principle should not apply under any circumstances to employer decisions based on subjective judgments.

\(^{132}\) 457 F.2d 358, 359 (5th Cir. 1972).

\(^{133}\) 628 F. Supp. 1264 (N.D. Ill. 1986).

\(^{134}\) Id. at 1319 (citations omitted).

3. Practicality

What are the practical consequences of applying the disparate impact concept to employment decisions based on "subjective judgments"? Professor Bartholet has suggested that employers will be required to "objectify" their decisions by paying attention to "rational" considerations.\(^\text{136}\) Professor Maltz has argued that this would make the decisional process too costly and time consuming, even if it improved the quality of the decisions.\(^\text{137}\)

Professor Lamber would apply \textit{Griggs} to cases involving the use of subjective judgments unless the employer was filling jobs the performance of which required making of "discretionary" or "subjective" decisions.\(^\text{138}\) This formulation, while more refined, would still exclude huge numbers of jobs from the ambit of \textit{Griggs}, regardless of the employer's overall posture toward minorities or women. Since I do not believe these personnel decisions can be fully "objectified," nor do I believe that employers should be given a method by which they may exclude minorities or women through the use of subjective judgments, I approach the matter somewhat differently than Professors Bartholet, Maltz or Lamber.

The procedures used in a "subjective judgment" case illuminate the doctrinal problem. Employers almost always defend their decisions on the ground that they selected the "better qualified candidate."\(^\text{139}\) The "disparate impact" standard requires the employer to establish that the selection process was justified by the business necessity of obtaining "better qualified" workers. In proving disparate impact, plaintiffs claim a disparity between proportion of minorities in the pool of candidates and in the group selected. Employers may argue that the comparison is improper because minorities or women in the pool are not qualified.\(^\text{140}\) This was essentially the defense raised in \textit{EEOC v. Sears, Roebuck, Inc.}\(^\text{141}\) This defense requires identification of "objective" criteria against which to measure the pool.

If the disparate impact statistics do produce a \textit{prima facie} case of

\(^{136}\) Bartholet, \textit{supra} note 104, at 957-58, 989-98.


\(^{138}\) \textit{Discretionary Decisionmaking}, \textit{supra} note 13.

\(^{139}\) To the extent that the employer used "objective criteria" the Uniform Guidelines on Employee Selection Procedures are applicable. Where "subjective standards" are used, it does not hurt to insist that they be in writing, but it does not advance matters much to have a written policy that states only that the employer will promote "the best qualified candidate."

\(^{140}\) \textit{EEOC v. IBM}, 583 F. Supp. 875 (D. Md. 1984). The courts agree that the "pool" is to be defined by "objective" standards.

\(^{141}\) \textit{See supra} notes 133-34 and accompanying text.
discrimination, the employer then bears the burden of demonstrating the "business necessity" for using the subjective method of selection. The employer may argue that there is no other practical way to select candidates for the position. The premise of this argument is that there are no "objective" methods of deciding which candidate will do "better" in situations as yet unforeseen, in which they will be required to exercise independent judgment. As part of this argument, the employer should also demonstrate that the approach using subjective judgments has produced satisfactory candidates. While this is not evidence that objective standards would not produce such candidates and has an element of the self-serving and self-proving, it is essential that the employer establish that its system "works." This demonstration is furthered by comparative evidence which seeks to explain, albeit on subjective grounds, why the decisionmaker preferred a white/male over a minority/female. The employer may also seek to establish business necessity by showing that there is no alternative with lesser disparate impact which will "equally serve" the interest in production.

If the employer is unable to rebut the prima facie case or establish business necessity, the court may declare the practice discriminatory, enjoin it and require defendant to develop a system which meets legal standards.

After a finding of discrimination, the matter goes into "second

142. EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986); Caviale v. Wisconsin Dep't of Health & Human Serv., 744 F.2d 1289 (7th Cir. 1984).

143. This is the gist of Prof. Lamber's argument. See Discretionary Decisionmaking, supra note 13.

144. The explanatory power required of the employer will necessarily be in inverse relation to the degree of disparate impact. The "inexorable zero" should require extraordinary strong comparative evidence. For this reason, the decision in Namenwirth v. Board of Regents of the Univ. of Wis., 769 F.2d 1235 (7th Cir. 1985), cert. denied, 106 S. Ct. 2743 (1985) is wrong. The defendant's comparative evidence was weak, and its record of inclusion of females was negligible. Many university denial of tenure cases fit the mold of the subjective judgment issue considered here. After the "objective evidence" of scholarly contribution and reputation is considered, there remains an irreducible subjective estimate of the candidates potential as scholar, teacher and colleague. Even the so called "subjective evidence" of scholarly reputation is a matter on which scholars may differ widely. See Lempert, From the Editor, 19 LAW & SOC. REV. 529, 530-33 (1985) describing the variation in reviews of scholarly manuscripts.

145. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). This aspect of the defendant's case is much like the elements of a bona fide occupational qualification under the Age Discrimination Act, where the Supreme Court has indicated that a compulsory retirement age limit below that permitted by the statute will be allowed only if (1) all or substantially all those identified for retirement will be unable to perform the functions of the job and (2) it is not possible to individualize decisions as to the capability of individuals to perform. Western Airlines v. Criswell, 105 S. Ct. 2743 (1985).

146. See Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). This will necessitate, in all probability, a narrowing of the range of subjective judgments by adding "objective" components to the decisional process, or by removing the "subjective" requirements. It might require replacing the "subjective" standard with another formulation, depending on the proof. See Caviale v. Wisconsin Dep't of Health & Human Serv., 744 F.2d 1289
stage" proceedings, in which members of the class come forward with the benefit of the finding of overall discrimination, and seek individual relief. The employer can defend against each individual claim on the ground that it did not discriminate because the candidate who was preferred was "better qualified." 147

Thus there are three stages in the "disparate impact" case where the employer can press the "better qualified candidate" argument: (1) in rebutting the statistical claim of impact discrimination; (2) in justifying selection decisions based on business necessity and (3) in demonstrating that a given plaintiff was not a victim of any discrimination which had been found. Since the proof is similar in all situations, employers are well advised to present it in the first stage, as part of a rebuttal to the statistical claim of disparate impact.

This discussion illustrates the functional consequence of a showing of disparate impact of subjective employment procedures. It places the burden of demonstrating the utility of the procedures and the results achieved by it on the employer. Given the vast number of personnel decisions favoring minorities and women which have been made in the past fifteen years, it is highly appropriate to place this burden of judicial scrutiny on those employers who have not made such decisions, but have continued older practices of restriction. 148 If the consequence of imposing the burden is that the subjective judgment process is found illegal, the employer is properly required to reform that system, even at a risk of loss of some hypothetical efficiency.

The conclusion of this analysis is that where the employer has (a) not participated meaningfully in affirmative action and (b) has utilized subjective judgments in decision making which (c) have had a disparate impact on minorities and/or women, the employer must demonstrate that its judgments have taken full account of objective criteria and appear under a searching examination to result in the selection of the better qualified candidates than practical alternative procedures would produce.

(7th Cir. 1984). It may also lead to the imposition of "Goals and Timetables" to assure that the revised procedures do not continue their exclusionary effect. 147 B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1454 (2d ed. 1983).

148. The McDonnell Douglas Court recognized that statistics showing the restriction or exclusion of minorities are relevant in evaluating individual cases. 411 U.S. at 805 n.19. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-78 (1978) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) make the point that the defendant does not have to maximize the employment or promotion of minorities or demonstrate that it has hired the better qualified candidate. However, neither case suggests that an employer may adopt a practice which minimizes the hiring or promotion of minorities or may hire a lesser qualified white candidate. This would be contrary to both Griggs and McDonnell Douglas. See EEOC v. Rath Packing Co., 787 F.2d at 333.
This is a narrower concept than others might propose. Professor Bartholet believes that Title VII law, which requires use of objective standards with respect to blue collar workers, can be applied in these cases.\textsuperscript{149} I disagree. The subjectivity inherent in decisions about “jobs in high places” cannot be readily squeezed out, as we who participate in promotion and tenure decisions know.\textsuperscript{150} These “subjective” decisions involve a prediction by hiring officials of how competing candidates will deal with situations whose contours are not yet known. There is no known way to “objectify” these decisions.

In suggesting an examination of affirmative action results as an alternative to “objectification” I have drawn on some experience as a labor arbitrator. Except in the relatively rare case where a witness was demonstrated to be untrustworthy, my search as an arbitrator was always for some extrinsic evidence to support or refute the testimony. Since the ultimate issue in “intent” cases is the “state of mind” of the actor, and one ultimate issue in an “impact” case is the validity of the employer’s justification, a quest for extrinsic objective evidence of the attitude of the employer is appropriate. The most reliable guide to this “state of mind” are statistics which demonstrate either exclusion or inclusion of minorities or women.\textsuperscript{151} This approach will help workers in jobs with few minority or female incumbents. Employers will find it difficult to satisfy the Griggs principle where they have used subjective judgments in an exclusionary manner. They will and should lose most such cases.\textsuperscript{152} But it will not help workers once the employment statistics are no longer so one-sided. In those cases employees will lose unless they can establish disparate treatment.\textsuperscript{153} This result is an appropriate “reward” for those employers who have included minorities and women in their work force. The approach suggested here will encourage employers to increase mi-

\textsuperscript{149} See supra note 104 and accompanying text.


\textsuperscript{151} McDonnell Douglas Corp. v. Green, 411 U.S. at 804-05 and Furnco Constr. Co. v. Waters, 438 U.S. at 850 both acknowledge the relevance of evidence of affirmative action.

\textsuperscript{152} EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986); Hawkin v. Bounds, 752 F.2d 500 (10th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985) (analyzed as disparate treatment); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Crawford v. Western Elec. Co., 745 F.2d 1373 (11th Cir. 1984); Mozee v. Jefferson, Inc., 746 F.2d 365 (7th Cir. 1984); Caviale v. Wisconsin Dep’t of Health & Human Serv., 744 F.2d at 1289.

nority and female participation in the work force, in order to reduce the risk of a finding of discrimination in particular cases.

E. The "Subjective Judgment" Issue in the Cases

In an attempt to identify the factors that appear to influence judicial decisionmaking in subjective judgment cases, all cases under the category "Promotion"—etc., in Volumes 34 through 36 of the Fair Employment Practice, covering cases reported between March 3, 1984 and February 23, 1985 were individually examined.154 Most of the cases studied were decided after the recent pronouncement concerning the processing of individual claims by the Supreme Court155 and therefore presumably followed the Supreme Court instructions concerning the trial of these claims.

My conclusions from this analysis are as follows:

(1) Where courts have upheld the employer’s subjective decision denying plaintiff’s promotion, or upholding a discharge, the most prominent factor reported in the opinions has been the positive equal employment results:156

(a) The presence of members of the same race or sex as the plaintiff in the job or job group which plaintiff sought has been relied upon in upholding job denials based on subjective judgments;157

(b) The presence of members of plaintiff’s racial or sex group in the reviewing or decisionmaking process has been relied upon as a basis for

154. The Index Headings for the cases studied were: Race Discrimination; 108.3178; Promotion; Selection of Supervisor and 108.3185—Evaluation of Employees Merit Selection; Sex Discrimination; 108.4164 Promotion; filling of vacancies; selection, 108.4251—Evaluation of employees: merit systems in general.


upholding a subjective decision;\textsuperscript{158}

(c) In discharge cases based on "subjective considerations," the presence of members of plaintiff's race or sex in the group not terminated has been considered important in upholding the discharge.\textsuperscript{159}

(2) In disparate treatment cases, the courts have accepted a "better qualified" defense of a subjective promotional process, based on the following types of evidence:

(a) Person appointed had greater prior experience in comparable position,\textsuperscript{160} a record of steadier employment,\textsuperscript{161} better supervision ratings concerning interpersonal skills,\textsuperscript{162} or greater achievement recognition\textsuperscript{163} than did plaintiff;

(b) Persons with whom employer did business either favored the person who obtained the position which plaintiff sought,\textsuperscript{164} or objected to the poor performance of the plaintiff;\textsuperscript{165}

(c) Supervisors preferred a "research oriented" assistant, greater "leadership skills," or greater "enthusiasm".\textsuperscript{166}


\textsuperscript{164} Wear v. Webb Co., 572 F. Supp. 1257 (D. Minn. 1983) (outside consultant and a major contractor for employer concluded that person who was given job had better qualifications).


\textsuperscript{166} Burrows v. Chemed Corp., 743 F.2d 612 (8th Cir. 1984) (research oriented); Lujan v.
(d) Specific incidents of untrustworthiness or unreliability of plaintiff,\textsuperscript{167} or plaintiff’s failure of a possibly valid performance test,\textsuperscript{168} were accepted as reasons for rejecting plaintiff.

(3) In contrast, courts have found that employers failed to “articulate a nondiscriminatory reason” for rejecting the plaintiff on “subjective judgment” grounds where:

(a) Supervisors who made decision testified that their motives were pure, but gave no additional explanation;\textsuperscript{169}

(b) Defense that plaintiff has performed inadequately was not addressed to the time frame of plaintiff’s \textit{prima facie} case;\textsuperscript{170}

(c) Defendant which relied unsuccessfully on rebuttal of plaintiff’s statistics, did not introduce either “business necessity” or “business reason” justification;\textsuperscript{171}

(d) Defendant’s witness admitted race was a factor;\textsuperscript{172}

(e) Defendant’s “lack of qualifications” defense found implausible.\textsuperscript{173}

(4) The courts found that the employer failed to rebut a \textit{prima facie} case, or that its position was a pretext, where:

(a) an alleged experience requirement\textsuperscript{174} or an alleged reorganiza-
tion was non-existent;

(b) Employer's explanation was not believed because of restriction or exclusion of persons of plaintiff's race or sex;

(c) Employer's claim that plaintiff had not applied or that employer was unaware of plaintiff's interest was rejected where the vacancies were not posted and plaintiff had indicated general interest in promotion;

(d) Racial slurs of selection officials indicated bias in decision;

(e) Evidence from third parties established that employing official showed bias against working professional women;

(f) Plaintiff's alleged poor performance was found to be excellent.

(5) Subjective judgment as a method of decision has been found invalid under the disparate impact standard. Employers have not successfully established a "business necessity" defense to such systems.

This survey of the "subjective judgment" cases supports the thesis suggested earlier. First, the general pattern of inclusion or exclusion of minorities/women from the job group involved in each case is most important evidence in both impact and treatment cases. Second, other "objective evidence" is important in deciding the "subjective judgment" cases. Third, while one case did suggest that employer reliance on subjective judgments could be justified under business necessity standards, the court required the employer to demonstrate the connection between its choice of "objective standards" and the subjective qualities it seeks.

Thus the conclusion that the Griggs principle should be applied to subjective judgments is buttressed by the cases which demonstrate that the courts do take account of the employer's pattern of inclusion or exclusion of minorities and women in this type of case.


178. Bibbs v. Block, 749 F.2d 508, 509 (8th Cir. 1984), vacated, 778 F.2d 1318 (1985). However, there are many cases in which allegations of racial slurs were either not credited, or held insignificant with respect to the motivation for the decision.


181. See supra text accompanying note 152.

182. Caviale v. Wisconsin Dep't of Health & Human Serv., 744 F.2d 1289 (7th Cir. 1984).
F. Subjective Judgments in Support of Informal Affirmative Action: Foresight or Hindsight

How have subjective judgment decisions favoring minorities and women fared under the law? They should have fared well, because the optimum form of affirmative action is the recognition of qualifications of minority and female candidates which would go unnoticed under a regime of discriminatory stereotypes. Thus, a process of "leaning over backwards," or looking for the strong points in minority or female candidates should be encouraged. Furthermore, many decisions under formal affirmative action programs ultimately require the conclusion that a minority or female candidate is sufficiently qualified and that a white or male candidate is not sufficiently superior to justify an override of affirmative action goals. Therefore, no matter how "objective" an affirmative action plan may be, it is likely to encompass subjective judgments comparing the qualities of the various candidates. Since formal affirmative action plans have been approved, we would expect sympathetic treatment by courts and agencies of "informal" affirmative action.

But this has not been the case. Neither the agencies nor the courts have been sympathetic to the decisional process of a small employer who does not have an elaborate affirmative action apparatus, but decides to hire a minority or female, when the decision is rooted in a sense that the employer should increase its minority or female work force. This is a particularly strange result in light of the emphasis on voluntary compliance with EEO policies which runs through the cases and administrative regulations.

The explanation for this lacuna in the law is somewhat complex. The administrative agencies, the EEOC and OFCCP, in their regulations concerning affirmative action emphasized the need for planning by the employer. Under the OFCCP regulations, an affirmative action plan was the key enforcement tool which the agency devised. Under EEOC affirmative action guidelines, the employer's "plan" was designed to provide a justification for affirmative action, as well as a mechanism for it. Thus, both agencies adopted what might be called the "Washington my-

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185. See Genesis, supra note 18.
186. See 29 C.F.R. § 1608.4 (1986). The Guidelines do not require that a plan be in writing, 29 C.F.R. § 1608.4(2)(ii)(d) (1986), nor that it follow a particular form. Therefore it could be argued that an "intuitive" affirmative action decision could be justified under the guidelines. But the primary focus of the Guidelines is on a written formal plan.
“Legacy of Griggs” of shaping regulations around the image of large corporate bureaucracies which engaged in formal planning. The situation of the smaller employer whose “planning” is informal at best, and may simply represent an informed hunch about how to proceed, was not directly addressed by the drafters of the regulations.

Similarly, the two courts of appeal which have considered the problem of informal affirmative action became preoccupied with the need for a plan. The concern of the Seventh Circuit in *Lehman v. Yellow Freight Systems*, 187 was that “unplanned affirmative action” might ripen unfairly into “reverse discrimination.” Therefore, said the court, affirmative action without a plan was reverse discrimination, even if the facts and circumstances under which the action was taken would, in hindsight, have justified it. 188 This decision was followed by the Fourth Circuit in a case involving an employer who did not hire a white police officer only days before an affirmative action plan for hiring minorities went into effect. 189

Both of these decisions are wrong. Informal affirmative action is the best way to include minorities and women in the work force. It takes place with a minimum of tension and publicity. Positive evaluations of minorities and women may ultimately become part of the ordinary stream of hiring and promotion decisions. Taking race and sex positively into account for the purposes of inclusion is a legitimate consideration at this point in our history. An employer who has no organized plan, but simply decides to include minorities and women when it is practical and convenient to do so should not be penalized under the anti-discrimination law, if its decision is justified in hindsight. If facts concerning that employer’s practices warrant affirmative action under the Supreme Court opinions and the EEOC guidelines, the employer should not be found in violation of the statute because it did not go through a formal planning process. 190

There may come a time when this “hindsight” test for reverse discrimination should be abolished, and the employer required to justify, in advance, any use of race or sex as a positive element in the employment decision or simply prohibited from any such use. But the statistics cited

187. 651 F.2d 520 (7th Cir. 1981).
188. The court stated that the action taken by the employer in hiring black workers would have been lawful if there had been a plan with a time limit. Id. at 527 n.16.
189. Lilly v. City of Beckley, 615 F. Supp. 137, aff’d, 797 F.2d 791 (9th Cir. 1986).
190. There is a separate problem with respect to governmental employers who may be required by constitutional considerations to have a factual basis in advance of their actions. See Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986). A further problem exists as to whether Congress, in extending Title VII to state and local governments, could supersede such requirements. See Katzenbach v. Morgan, 384 U.S. 641 (1966). See Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442 (1987) for a discussion of these problems.
at the beginning of this article, impressive as they are, do not suggest that this time has arrived. As a consequence informal affirmative action should be encouraged, as Justice Powell suggested some years ago in *Bakke*, as preferable even to the formal programs which are still so necessary for continued social progress.

IV. CONCLUSION

While the time has not come to abandon *Griggs*, it is appropriate to reconsider the entire gamut of Equal Opportunity Programs which were designed in the 1940’s and implemented in the 1960’s. Twelve years ago, I suggested that we should have public discussion of the question of when it would be appropriate to reduce or modify formal affirmative action requirements.\(^{191}\) The discussion never took place, because neither the supporters nor opponents of affirmative action wanted it. But events forced the issue. The visible improvement in employment opportunities for minorities and women, which resulted from processes unleashed and channeled by Title VII and *Griggs*, produced a lessening in public support for affirmative action. Therefore, the issue moved to the political forum where the Reagan Administration’s anti-affirmative action stance emerged. I believe the political forces are still roughly in balance on the issue of affirmative action. It remains useful to discuss the continued efficacy of some of the mechanisms to address discrimination which were so painfully developed in the sixties, and to ask whether additional approaches are now needed. However, the old debate about “affirmative action versus reverse discrimination” is sterile.

Our success in opening occupations to minorities and women has outstripped the ideologies of both the Civil Rights Movement and those who would limit affirmative action in the name of color blindness. The dialogue about “affirmative action versus reverse discrimination” should be set aside in favor of a consideration of additional approaches to the more complex problems of disadvantaged persons in the present environment. Present reality should become the foundation for a new analysis of contemporary needs and values. Affirmative action programs should be continued as necessary, but not sufficient conditions for minority/female progress.

Current social and economic realities call for additional measures. I have suggested elsewhere a partial agenda which addresses the contem-

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porary problems of disadvantaged persons.\textsuperscript{192} The Civil Rights Movement should concern itself with taxation of the poor, converting interest and charitable deductions to tax credits, the thirty-two hour work week, ensuring safety of persons and property in the cities, insisting on improved educational opportunity for central cities students, and protecting jobs from foreign law wage competition.

These matters are not exclusively or even primarily the concern of minorities and women. They have become a concern to the Civil Rights Movement because of the successes of the programs of the sixties. To a greater extent than ever before, minorities and women now share some of the same problems as their white and male counterparts.\textsuperscript{193} The ultimate legacy of \textit{Griggs}, then, is the opportunity to extend protection to all who face the "built in headwinds" that flow from birth under unfavorable circumstances. This is not a new notion.

Justice Powell's explanation that \textit{Griggs} was concerned that "childhood deficiencies in education and background . . . resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden"\textsuperscript{194} on minorities, echoes a similar sentiment in an earlier setting. President Wilson's first inaugural address put it this way:

There can be no equality or opportunity, the first essential of justice in the body politic, if men and women and children be not shielded in their lives, their very vitality, from the consequences of great industrial and social processes which they can not alter, control, or singly cope with.\textsuperscript{195}

The history of \textit{Griggs} sketched here is, finally, another episode in the quest, begun in the Declaration and the Constitution, for a society in which the blessings of liberty are shared by all.

\textsuperscript{192} See Expanding Affirmative Action, supra note 127.
\textsuperscript{194} See supra text accompanying note 10.
\textsuperscript{195} 50 Cong. Rec. 3, 63d Cong., 1 Sess., Mar. 4, 1913.
APPENDIX I


<table>
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<tr>
<th></th>
<th>Charges</th>
<th>Settlements Favoring Complainants</th>
<th>% Charges Settled</th>
<th>Suits</th>
<th>% Charges Sued Upon</th>
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The annual figures for charges, settlements and suits are as follows:

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