CIVIL RIGHTS—RESTRICTING THE USE OF GENERAL APTITUDE TESTS AS EMPLOYMENT CRITERIA—*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Willie Griggs and his co-plaintiffs, in a class action,[1] comprised thirteen of the fourteen Negroes employed by the defendant in its Eden, North Carolina, power plant.[2] The plaintiffs sought an injunction in federal district court to halt alleged discriminatory employment practices in violation of title VII provisions of the Civil Rights Act of 1964. Plaintiffs were all employed in the labor department, to which blacks, prior to the Act, had been relegated as a matter of policy.[3]

In 1955, the defendant instituted a policy requiring a high school diploma or its equivalent as a prerequisite to employment in every department except labor. On July 2, 1965, the same day title VII of the Act became effective, the defendant instituted a new policy requiring satisfactory scores on two general aptitude tests, in addition to a high school diploma, for initial assignment to any department except labor.[4] In September, 1965, this policy was modified to allow employees from the coal-handling and labor departments, without high school diplomas, to transfer to other departments by passing the aforementioned intelligence tests.

The plaintiffs' theory was that, due to prior overt discrimination in job assignment, blacks hired before the imposition of the testing re-

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1 When efforts to secure voluntary compliance with title VII provisions have failed, 42 U.S.C. § 2000e-5(e) (1970) provides for a civil action to be brought against the respondent named in the charge "(1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

2 Defendant is a public utility serving both North and South Carolina. For a discussion of Negro employment in the public utilities field *see* B. ANDERSON, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970).

3 Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968). Wherein the district court made a finding of fact that, prior to the Civil Rights Act, the defendant overtly discriminated against blacks by relegating them to the labor department. The other departments were (1) coal-handling, (2) maintenance, (3) laboratory and test, and (4) operations. *Id.* at 245.

4 *Id.* at 245-46. The tests referred to are the Wonderlic Personnel Test—"a very general test with questions on arithmetic, vocabulary, and verbal reasoning which appear to be highly related to formal education"; and the Bennett Test of Mechanical Comprehension, "which questions understanding of basic physical principles . . . ." Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1642-43 (1969). In one study which included these tests, 58% of the whites tested passed, while only 6% of the blacks tested received passing scores. *See* Decision of EEOC, CCH EMPLOYMENT PRACTICES GUIDE, ¶ 17,304.53 (1966).

quirements were assigned only to the labor department, while whites of similar educational background were assigned, performed capably, and were promoted in the other departments. Furthermore, the present requirements for transfer, which the white contemporaries of these blacks had not been required to meet, operated to maintain the status quo by "freezing" these blacks in the labor department. In addition, due to the use of the requirements as a condition of employment as well as transfer, blacks hired after the imposition of the requirements were excluded from initial assignment or transfer to the "desirable" departments at a far greater rate than whites. Plaintiffs claimed that these requirements, which operated to continue the effects of past discrimination as well as presently discriminating against blacks, were instituted without business necessity, and were thus proscribed by title VII, 42 U.S.C. § 2000e-2(a) (1970) which provides in part:

> It shall be an unlawful employment practice for an employer—
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> . . . .
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides in part:

> Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

The procedure of selecting an employee from a group of applicants is of necessity a "discriminatory" process. The employer must impose certain requirements to insure that the applicant who is selected has the necessary qualifications for the job. Recognizing the necessity of such procedures, the questions in determining if the job requirement is valid under the Act are: (1) whether the requirement does result in discrimination on the basis of race, color, religion, sex or national origin; and (2) whether it is a valid selection instrument, notwithstanding its de facto discriminatory result.

In determining the validity of the test the question has been posed in terms of "job-relatedness," that is, the correlation between the skills measured by the test and the skills needed for the particular job the

applicant is seeking.[5] There are generally two levels of job-relatedness which have been proposed as a criteria for determining the validity of a particular job requirement under title VII. They are "business purpose" and "business necessity."[6] "Business necessity" denotes a high degree of job-relatedness, that is, something fundamental or essential to the particular job the applicant is seeking.[7] An example of this would be that a typist be able to type, or a bookkeeper be able to add. "Business purpose," on the other hand, denotes a lesser degree of job-relatedness in that the skills and qualities needed to meet the job requirement, though not fundamental, are considered to be "desirable" either for the particular job the applicant seeks or a future position he may attain.[8] If the test does not meet the requirement of job-relatedness, the next issue to be determined in order to impose liability on the employer, is whether the "intent to discriminate," as required by the Act, is proven. Remedial action can be taken by the court only if it "finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . ."[9]

In *Griggs*, the district court held that title VII was intended for prospective application only, and that neutral practices which served a valid business purpose, though perpetuating the effects of past discrimination, were beyond the purview of the Act.[10] The court accepted

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5 *See* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 696 (1968).

6 *See* Robinson v. Lorillard Corp., 319 F. Supp. 835, 841 (M.D.N.C. 1970).

7 *See* Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970), *modified*, 321 F. Supp. 1241 (1971).

8 Griggs v. Duke Power Co., 420 F.2d 1225, 1231-32 (4th Cir. 1970).

9 42 U.S.C. § 2000e-5(g) (1970).

10 292 F. Supp. at 249. *Contra*, Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (court struck down restrictions on transfers from previously all black departments). The district court distinguished *Quarles* on the basis that Phillip Morris exhibited no legitimate business purpose for its transfer restrictions. 292 F. Supp. at 249. With this exception, *Quarles* has been largely followed in cases where seemingly neutral practices served to perpetuate the effects of pre-Act discrimination. *See, e.g.*, United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970) (defendant's stringent requirements for transfer and promotion served to keep blacks in the menial job category they were assigned to before the Act); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (departmental seniority system maintained departmental segregation); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) (trade union requirements for referral, consisting of prior work experience under collective bargaining agreement, discriminated against blacks who had been barred from the union prior to the Act); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (union's present restriction of membership to relatives of past or present members eliminated blacks); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968) (prior experience under collective bargaining agreement required for referral for jobs).

improving the overall quality of the working force as a valid business purpose, rejected the Equal Employment Opportunity Commission's guidelines as not controlling and held that "[n]owhere does the Act require . . . tests which accurately measure the ability and skills required of a particular job or group of jobs."[11]

On appeal, the court of appeals reversed the district court in part, holding that present consequences of past discrimination are within the reach of the Act.[12] Thus, the court found that the six plaintiffs hired before the imposition of the educational requirements were entitled to relief, since the defendant was imposing qualifications on them that their white counterparts did not have to meet.[13] However, the court of appeals concurred with the district court in holding that tests which serve a valid business purpose were lawful, despite the EEOC guidelines requiring business necessity, not business purpose, to be used as the criterion.[14] Examining the overall conduct of the defendant in relation to race, the court concluded that when a test serves a valid business purpose and there is no other evidence of intentional discrimination, there is no violation of title VII of the Act.[15]

The Supreme Court considered the legality of the defendant's educational and testing requirements on a writ of certiorari.[16] The Court held that valid business necessity, not business purpose, was the criterion for legality under title VII, thus supporting the EEOC guidelines for job-relatedness.[17] The Court further declared that the burden of proof with respect to the relationship of a given requirement to the job in question was placed by Congress on the employer.[18] Concerning whether or not unintentional discrimination was proscribed by the Act, the Court held that an assessment of the employer's conduct so as

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11 292 F. Supp. at 250. The Equal Employment Opportunity Commission's *Guidelines on Employee Selection Procedures,* 29 C.F.R. § 1607.4(c) (1971) [hereinafter cited as EEOC *Guidelines*] provides:

> Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the jobs for which candidates are being evaluated.

12 420 F.2d at 1230.

13 *Id.* at 1231. The court ordered that the seniority rights of the six blacks hired before the imposition of the educational and testing requirements be considered on a plant-wide rather than a departmental basis.

14 *Id.* at 1235.

15 *Id.* at 1232.

16 401 U.S. 424 (1971).

17 *Id.* at 431.

18 *Id.* at 432.

to label intent as either "good" or "discriminatory" was irrelevant to the issue.[19]

The requisite intent needed in order for an employer to be held liable under the Act has been determined by applying either the "subjective" or "objective" test. The "subjective test" of an employer's intent concerns itself with a general appraisal of the defendant's conduct in order to detect discriminatory design or intent. In rejecting as a valid criterion the classification of intent as either "good" or "discriminatory," the Supreme Court adopted an objective standard to determine whether or not tests are designed, intended, or used to discriminate. This objective approach, concerning itself with the effects of an employer's policy rather than the motivation or design behind it, is referred to as the "effect oriented" approach and had found solid judicial support prior to the Court's ruling.[20]

Since courts are virtually unanimous in holding that a defendant's conduct prior to the effective date of the Civil Rights Act is relevant in determining whether or not present policies are intended to discriminate,[21] both approaches will usually yield the same result when a defendant has indulged in prior overt discrimination and has done little to correct past inequites. However, when the defendant has not practiced overtly discriminatory policies, or has progressed in revising such policies, courts relying on the subjective approach have arrived at conclusions different from that of the Supreme Court in the same or similar situations.

In the case of *Parham v. Southwestern Bell Telephone Co.*,[22] the plaintiff contended, *inter alia*, that "irrespective of the subjective good faith and efforts of the defendant to refrain from discrimination," the requirement of a high school diploma was "inherently discriminatory" and "irrelevant to the needs of defendant's business."[23] The court, having recounted the efforts made by defendant to recruit "qualified" black

19 *Id.* The Court's holding was based on its interpretation of the legislative intent behind 42 U.S.C. § 2000e-2(h) (1970).

20 *E.g.*, Papermakers Local 189 v. United States, 416 F.2d 980, 996. *Accord*, Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970) (defendant's use of test scores held to be invalid criterion for promotion and transfer when it served to perpetuate effects of prior discrimination); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970) (use of arrest record as a hiring criterion held to be discriminatory against blacks). *See* United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970) (departmental seniority system perpetuating effects of prior discrimination in job assignment and transfer held unlawful).

21 *See, e.g.*, cases cited note 10 *supra*.

22 60 CCH Lab. Cas. 6742 (E.D. Ark. 1969), *rev'd*, 433 F.2d 421 (8th Cir. 1970).

23 *Id.* at 6748.

employees, rejected the plaintiff's contention, and held defendant's requirements valid, since such criteria were adopted "in good faith and for what reasonably appear to him to be valid reasons . . . ."[24] Likewise, in *Griggs*, the court of appeals employed the subjective test in reviewing the efforts made by the defendant, which included the discontinuance of overtly discriminatory policies, and a plan to encourage employees to further their education by sharing the costs. It was concluded that the defendant adopted the test requirements "with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement."[25]

The issue of the requisite intent, subjective versus objective, needed to violate the Act appears to derive from two differing interpretations of intent, one based in criminal law, and the other in tort law. Intent in criminal law "is the attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow."[26] In tort law, however, intent is a "broader" concept since "[i]t must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does."[27]

An examination of the legislative history of the Civil Rights Act, particularly the congressional debates preceding its passage, supports the conclusion that Congress had the "broader" tort concept of intent in mind when the Act was drafted. Originally, in one of the initial drafts, the word "willfully" was used in place of "intentionally" in 42 U.S.C. § 2000e-5(g) describing the conduct of the employer that would be subject to an injunction:

> "The words 'willful' and 'willfully' as ordinarily employed, mean nothing more than that the person, of whose actions or de-

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24 *Id.* at 6749. Upon appeal, the court of appeals did not decide the question of the alleged discriminatory nature of the high school requirement because of insufficient data. However, the question was remanded to the lower court to be decided consistent with the appellate court's holding, arrived at by an objective approach to the question of intent, that the defendant's conduct was discriminatory during the period in question. 433 F.2d at 426-28.

25 420 F.2d at 1232. Judge Sobeloff, in a separate opinion, rejected the subjective test used by the majority, stating:

> Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent.

Id. at 1246 (dissenting in part and concurring in part).

26 R. PERKINS, CRIMINAL LAW ch. 7, § 1, at 746 (2d. ed. 1969) (quoting from MARKBY, ELEMENTS OF LAW § 220 (4th ed. 1889)).

27 W. PROSSER, LAW OF TORTS § 8, at 32 (3d. ed. 1964).

> fault the expressions are used, knows what he is doing, intends what he is doing, and is a free agent; that is, that what has been done arises from the spontaneous action of his will. . . ."
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> "The terms are also employed to denote an intentional act . . . as distinguished from an accidental act, an act done by accident, or accidentally, or carelessly, thoughtlessly, heedlessly, or inadvertently, or otherwise beyond the control of the person charged."
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> This is precisely the situation which might exist if the words are not added to title VII. Accidental, inadvertent, heedless, unintended acts could subject an employer to charges under the present language.[28]

Subsequently, the section was changed by substituting "intentionally" for "willfully" and Senator Humphrey commented on this change:

> This is a clarifying change. Since the title [VII] bars only discrimination because of race, color, religion, sex, or natural origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate.[29]

In explaining the meaning of "intent" as used in the Act, Senators Humphrey and Tower made it clear that it was not the purpose of title VII to proscribe discriminatory practices that were "heedless," "inadvertent," and "accidental." By inserting the word "intentionally" into the Act, the purpose was merely to exclude such acts, and was not meant to exclude those consequences that were "substantially certain to follow" an employer's deliberate actions. Therefore, it would appear that these consequences were intended by the framers of the Act to be unlawful. Thus it follows that the "broader" tort concept of intent, as previously defined, is the one which should be applied when construing title VII.

> [T]itle VII is a species of statutory tort and is to be viewed in light of the applicable doctrines of tort law, adapted to effectuate the public interest represented by the statute. This tort would be classified as an intentional tort at common law. This "intention" has nothing to do with the *mens rea* of the criminal law. Rather, it involves awareness that the acts of the defendant would inflict harm on the plaintiff. . . . The narrow concept of intent espoused

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28 110 CONG. REC. 8194 (1964) (remarks of Senator Dirksen) (footnote omitted) (quoting from 94 C.J.S. *Willful* 622 (1956)).

29 110 CONG. REC. 12723-24 (1964) (remarks of Senator Humphrey).

> by those who would restrict the application of title VII . . . has no place in the modern law of tort. If the defendant is aware that his action is reasonably certain to adversely affect persons because of their race, he has the intention required by the law of tort.[30]

To disregard the legislative history and adopt the "subjective approach" would lead one to the conclusion that "[u]nless informed in no uncertain terms that a test is discriminatory or positive evidence establishes discrimination, section . . . [2000e-2(h)] lends extensive protection to the employer."[31] Thus, there is ample support for the Supreme Court's adoption of the "objective approach" to the issue of intent.

Turning to the issue of the job-relatedness of tests, an examination of title VII litigation reveals that aptitude testing is but one of many areas in which the business-purpose versus business-necessity issue has been involved. Other areas include nepotism,[32] departmental as opposed to plant-wide seniority systems,[33] trade union requirements for membership and referral,[34] job-transfer restrictions[35] and the use of arrest records as a hiring criterion.[36] The courts have been virtually unanimous in these areas in holding that business necessity and not business purpose is the criterion for any requirement which adversely affects persons as a race.

The issue of the job-relatedness of aptitude tests is primarily concerned with a legislative history that lends itself to more than one interpretation. The controversy originated with the decision of a hearing examiner for the Illinois Fair Employment Practices Commission, wherein the examiner, ignoring any justification for the test, suggested that aptitude tests in which whites consistently outperformed blacks could never be used.[37] As a result, some Congressmen feared that title

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30 Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 281 (1969) (footnotes omitted).

31 Kovarsky, *Testing and the Civil Rights Act*, 15 How. L.J. 227, 240 (1969).

32 Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

33 Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970) (departmental seniority system served to confine blacks to low paying departments); United States v. Continental Can Co., 319 F. Supp. 161 (E.D. Va. 1970) (departmental seniority system served to confine blacks to low-paying departments with a loss in seniority if a transfer should be made to another department).

34 United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

35 Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (restriction of black city truck drivers from transferring to higher paying over-the-road routes was held to be invalid and unjustifiable).

36 Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970).

37 Decision of the hearings examiner in *In re* Myart v. Motorola, Inc., reproduced in 110 CONG. REC. 5662-64 (1964). The plaintiff took a general ability test as a prerequisite to employment with defendant, and filed a complaint with the Commission when he was

VII would be construed to produce similar decisions, since testing was, in a sense, a system of classification which would, in many instances, adversely affect blacks.[38] The floor managers of the bill, Senators Clark and Case, issued an interpretive memorandum:

> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes . . . and he may hire, assign, and promote on the basis of test performance.[39]

Senator Tower, not satisfied, proposed an amendment to title VII which would allow professionally developed ability tests when "such test is designed to determine or predict whether such individual is suitable or trainable *with respect to his employment in the particular business or enterprise involved* . . . ."[40] This amendment was rejected as too loosely worded and protecting professionally developed ability tests that operated to discriminate.[41] The amendment was reworded and adopted as the "test clause" in section 2000e-2(h), which allowed an employer to use a professionally-developed ability test when such test or its use was "not designed, intended or used to discriminate . . . ."[42]

The majority of the court of appeals in *Griggs* construed section 2000e-2(h) in light of the Clark-Case memorandum to mean that an employer could set any qualification he desired for a job, and concluded that "[a]t no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill required by a specific job or group of jobs."[43] However, Judge Sobeloff, dissenting in part, argued that " '[q]ualification' implies qualification *for* something."[44] Indeed, Senator Tower evidently had that "something" in mind when, as previously mentioned, he used the phrase "with respect to his employment in the particular business or enterprise." This wording supports the conclusion that the

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not offered a job. It was in the ensuing hearing that the examiner categorized testing which eliminated blacks at a greater rate than whites as discrimination per se.

38 110 CONG. REC. 5614-16 (1964) (remarks of Senator Ervin); *Id.* at 5999-6000 (remarks of Senator Smathers); *Id.* at 7012-13 (remarks of Senator Holland); *Id.* at 8447 (remarks of Senator Hill); *Id.* at 9024 (remarks of Senator Tower); *Id.* at 9025-26 (remarks of Senator Talmadge); *Id.* at 9599-600 (remarks of Senators Ellender & Fulbright).

39 110 CONG. REC. 7213 (1964) (memorandum of Senators Clark & Case).

40 *Id.* at 13492 (remarks of Senator Tower) (emphasis added).

41 *Id.* at 13503-04 (remarks of Senators Case & Humphrey).

42 42 U.S.C. § 2000e-2(h) (1970).

43 420 F.2d at 1235.

44 *Id.* at 1242.

issue for debate was not whether a test must be job-related, but that Senator Tower and his supporters were seeking only to protect the use of job-related tests. The Supreme Court, in its discussion of the legislative history, pointed out that the memorandum referred to by the court of appeals was in regard to the constitutionality of title VII, and that a later memorandum, dealing specifically with the debate over tests, stated that title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.*"[45] Since this memorandum was issued to quell doubts of the opposition, it supports the conclusion that Congress did not intend to give blanket approval to the use of all tests but only to allow the use of tests which were in fact job-related.

Within the sphere of aptitude tests, business-necessity dictates that "the skills measured by the tests must be shown to be relevant to the employer's job performance needs."[46] By adopting a nebulous business purpose criterion, the most difficult tests could be sanctioned under the guise of improving the general quality of the work force. The defendant, Duke Power Company, based its defense on the claim that requiring abilities in excess of those needed at entry-level or near-entry-level jobs was necessary to maintain its promotion-from-within policy by insuring that all its employees had the potential to advance.[47] But recognizing the pyramid structure of business organization, it seems "unnecessary and, indeed, wasteful to require the potential for promotion to the top in each low level employee."[48]

Thus, promotion-from-within policies and the legal requirement for job-relatedness combine to present a difficult situation:

> Because of the promotion-from-within policy, skill potentials in no way related to the entry-level jobs are demanded to ensure that the employee will be able to advance through the occupational hierarchy. This policy has become increasingly important as companies attempt to adjust to changing manpower requirements.
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> . . . While this manpower staffing strategy may reduce hiring costs, it imposes direct costs upon the community in the form of job opportunities lost to disadvantaged workers.[49]

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45 401 U.S. at 434. The memorandum is found at 110 CONG. REC. 7247 (1964) (memorandum of Senators Clark & Case).

46 Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 319 (E.D. La. 1970), *modified*, 321 F. Supp. 1241 (1971).

47 420 F.2d at 1231.

48 Cooper & Sobol, *supra* note 4, at 1648.

49 B. ANDERSON, *supra* note 2, at 159.

The EEOC, in its guidelines for employers, has attempted to compromise. These guidelines permit tests which evaluate applicants for higher-level jobs "[i]f job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level . . . ."[50] Usually, when faced with problems of statutory construction, courts show "great deference to the interpretation given the statute by the officers or agency charged with its administration."[51] Nevertheless, the court of appeals rejected the EEOC guidelines as "clearly contrary to compelling legislative history . . . ."[52] The Supreme Court, using its own interpretation of the legislative intent behind the Act, cited the guidelines as controlling and declared that "[t]he touchstone is business necessity."[53]

It is important to note, in reference to the EEOC guidelines, that had the defendant in *Griggs* made a satisfactory showing of employee progression to higher levels "within a reasonable period of time and in a great majority of cases," its testing requirements might have been within the sphere of business necessity. However, the Court pointed out that "[i]n the context of this case, it is unnecessary to reach the question . . . . [since] the Company has made no such showing."[54]

The *Griggs* Court stated that: "The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability."[55] This pronouncement is in full accordance with the criticism being leveled at testing devices by judicial authority and experts in the testing field. There are, of course, justifications for various types of tests. A test which is narrow in scope, such as a typing test for typists, is certainly justifiable. Even the broader and more complex intelligence and

50 EEOC *Guidelines*, 29 C.F.R. § 1607.4(c)(1) (1971).

51 Udall v. Tallman, 380 U.S. 1, 17, *rehearing denied*, 380 U.S. 989 (1965) (Department of the Interior interpretation of executive orders pertaining to certain lands as not barring oil and gas leases given controlling weight by the court as consistent with the orders in question); Power Reactor Dev. Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961) (Atomic Energy Commission interpretation of statutory licensing procedure for atomic reactor construction upheld as reasonable); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (EEOC's narrow interpretation of "bona fide occupational qualifications" which can legally entitle an employer to refuse a female applicant a certain job on the basis of sex alone, upheld by court); Cox v. United States Gypsum Co., 284 F. Supp. 74, 78 (N.D. Ind. 1968) (EEOC's determination that 90 day period allowed for filing charges of unlawful employment practice begins to run the day of a job lay-off, upheld by court).

52 420 F.2d at 1234.

53 401 U.S. at 431.

54 *Id.* at 432.

55 *Id.* at 433.

aptitude tests, though often unrelated to the skills required by the job, at least appear more objective in design than the impressions of an interviewer.

The problem with general "intelligence" and "aptitude" tests is that they have little ability to predict future performance in relation to how an employee will grasp the demands of his job and absorb the skills needed to progress. "All ability tests—intelligence, aptitude, and achievement—measure what the individual *has* learned—and they often measure with similar content and similar process."[56] The fact that tests actually measure what an applicant has learned in the past reveals why Negro performance is often inferior to white.

> A basic assumption underlying prediction from test scores is what might be called the "equal exposure" assumption. A test measures how well a person has learned various skills and retained certain information. To the extent an entire group tested has had equal opportunity to learn these skills and information, test scores might be expected to bear some relationship to how well persons in the group can learn something else, such as doing a job . . . . But when this equal exposure assumption is false—as it surely is in the case of comparisons between blacks and white . . . "[t]he whole thing falls to pot."[57]

Another barrier to accurate prediction of blacks' abilities is that of language.

> The less satisfactory performance . . . can be attributed to a language barrier, . . . an unfamiliarity with the spoken word in the middle-class white neighborhood . . . . The fact is indisputable that tests too often reflect the social structure of our society rather than reaching for those with the potential to perform a job.[58]

For these reasons, developing an aptitude test that is valid for different cultural groups is a difficult proposition. "Validity" implies a correlation between test performance and job performance. A test may

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56 Wesman, *Intelligent Testing*, 23 AM. PSYCHOLOGIST 267, 269 (1968).

57 Cooper & Sobol, *supra* note 4, at 1644-45 (footnote omitted).

> An eminent industrial psychologist in the field of aptitude testing, Dr. Edwin Ghiselli of the University of California, recently reviewed all the available data on the predictive power of standardized aptitude tests and was forced to conclude that in trades and crafts aptitude tests "do not well predict success on the actual jobs," and that in industrial occupations "the general picture is one of quite limited predictive power."

Id. at 1643-44 (footnotes omitted). *See* E. GHISELLI, THE VALIDITY OF OCCUPATIONAL APTITUDE TESTS 51, 57 (1966). *See also* Hobson v. Hansen, 269 F. Supp. 401, 484-85 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (the practice of assigning children to "faster" or "slower" learning groups on the basis of test scores held unlawful).

58 Kovarsky, *Some Social and Legal Aspects of Testing Under the Civil Rights Act*, 20 LAB. L.J. 346, 347 (1969).

be invalid for blacks and whites, in which case it is of no use.[59] More often, a test is valid for whites and not blacks. In this case, EEOC guidelines direct that the test be used only for the group for which it is valid.[60] It is possible that a test may be valid for blacks and whites, with whites consistently scoring higher. In this case, the EEOC directs that the cutoff scores be adjusted (lower passing marks for blacks) so as to predict the same probability of job success in both groups.[61] The use of different standards, however, has met with opposition in the courts.[62]

The EEOC guidelines put a heavy weight on validation by equating an unvalidated test that adversely affects "classes protected by title VII" with discrimination per se when the employer had the option to use other selection procedures.[63] However, in *United States v. H.K. Porter Co.* the court declared:

> [T]o find racial discrimination . . . there should be at least some evidence that the use of an aptitude test which has not been validated has resulted in discrimination and not merely the abstract proposition that test validation is desirable.[64]

But in *Hicks v. Crown Zellerbach Corp.* the court adopted a "discrimination per se" rule, stating:

> Since it is clear that Crown Zellerbach has engaged in no significant study to support its testing program, the program is unlawful.[65]

In *Griggs*, the Supreme Court held:

> What Congress has forbidden is giving these devices and mechanisms controlling force unless they are *demonstrably* a reasonable measure of job performance.[66]

Since the burden of proof as to job-relatedness has been shifted to the employer, and the only method of demonstrating job-relatedness would be a validity study, it appears that the Court here has, in effect, adopted

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59 For a discussion of the variations in validity for blacks and whites taking the same tests *see* Note, *supra* note 5, at 696-706.

60 EEOC *Guidelines*, 29 C.F.R. § 1607.5 (1971).

61 *Id.*

62 United States v. H.K. Porter Co., 296 F. Supp. 40, 79 (N.D. Ala. 1968) (court rejected blacks' claim that defendant's use of tests and seniority provisions as criteria for transfer from previously all-black lines of progression was discriminatory). The court, in discussing the possibilities of different standards for blacks and whites, stated that "it is obvious enough that the use of different tests or different standards for Negroes and whites would itself constitute prohibited discrimination," and concluded it was up to Congress to allow different standards. *Id.*

63 EEOC *Guidelines*, 29 C.F.R. § 1607.3 (1971).

64 296 F. Supp. 40, 76-77 (N.D. Ala. 1968).

65 319 F. Supp. 314, 319 (E.D. La. 1970), *modified*, 321 F. Supp. 1241 (E.D. La. 1971).

66 401 U.S. at 436 (emphasis added).

the *Hicks* "discrimination per se" rule. The Court's strong support for the EEOC interpretation of the Act strengthens this conclusion.

The Court's holding that the burden of proof is on the employer with respect to the job-relatedness of a given requirement should have a significant impact on both employers and lower courts. Perhaps the most important aspect will be that it may induce employers to conduct acceptable validity studies and resolve any inequities without court action and injunctive relief.

From a legal standpoint, shifting the burden of proof to the employer is sound. A test which adversely affects blacks will be unlawful under the general language of section 2000e-2(a) since it is a method of classification. But a valid test constitutes an exception, since it is specifically excluded from that general prohibition by section 2000e-2(h). There is a line of authority holding that the party asserting an exception to a remedial statute has the burden of proving that exception.[67]

From a practical standpoint, this shifting of the burden is equally justified since the employer controls the testing situation. In most cases the employer will either have developed a test for his own use, adopted a test used by another employer for similar jobs (synthetic validation), or adapted a widely used test to fit his requirements.[68] In any case, the reasoning that led to the choice of a given test, to include any technical support for the choice, is within the exclusive possession of the employer. Secondly, job studies necessary to ascertain validity are time-consuming and expensive.[69] In many instances, employers will have conducted such studies to support their choice of a test, or a study may have been made by the employer or a consulting firm as part of an effort to promote overall efficiency. Thus, to compel a plaintiff to produce evidence of non-validity would, in most instances, be too heavy a burden.

Until now, the vast majority of title VII cases have involved defendants with histories of prior "overt" discrimination in varying degrees. These policies have usually resulted either in (1) some identifiable

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67 *See* Walling v. General Indus. Co., 330 U.S. 545, 547-48 (1947) (burden of proof placed on employer to show certain employees were in an "executive" capacity and thus not subject to "overtime" provisions of the Fair Labor Standards Act); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969) (burden of proof placed on employer to show that "bona fide job qualifications" entitled him to refuse plaintiff a job on the basis of sex alone). *See also* A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) (burden of proof placed on employer to show that he was not sufficiently engaged in interstate commerce to be subject to the wage and hour provisions of the Fair Labor Standards Act); Kovarsky, *supra* note 31, at 235-37; Kovarsky, *supra* note 58, at 356.

68 Note, *supra* note 5, at 700.

69 For a discussion of this validation procedure *see id.* at 696-98.

group of black employees locked in some category, department, or line of progression,[70] or (2) the complete, or near complete, absence of blacks in a company or trade union, in which case discrimination is inferred on a purely statistical basis.[71] The common denominator in these cases is the relatively obvious discriminatory pattern that can be ascertained when a judicial inquiry does not concern itself with the aforementioned "subjective approach" to discrimination. The need for judicial intervention is obvious, and the applicability of title VII relief is clearly warranted.

The situation becomes somewhat muddled when the defendant has no "overtly discriminatory" history, and thus no identifiable group of black employees as evidence of such policies. Even a statistical inquiry into defendant's payroll may reveal a proportionate representation of blacks. In the case of *Gregory v. Litton Systems, Inc.*,[72] the plaintiff was refused employment on the basis of an arrest record (arrested fourteen times with no convictions). The defendant practices a standard policy of refusing employment to persons arrested "on a number of occasions" for crimes other than minor traffic violations. The court found that such a criterion was not warranted by business necessity.[73] The court found that such a requirement adversely affected blacks as a race since "Negroes are arrested substantially more frequently than whites in proportion to their numbers."[74] The first two requirements for a title VII violation having been found, the court disposed of the third: "An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent."[75] There was no other evidence of discrimination, statistical or otherwise.

Though *Gregory* preceded the Supreme Court's decision in *Griggs*, it appears to be a valid application of the Court's holding. Examining both cases, one may conclude that, in the future, many more employers

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70 Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); United States v. Continental Can Co., 319 F. Supp. 161 (E.D. Va. 1970); United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970); United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

71 Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

72 316 F. Supp. 401 (C.D. Cal. 1970).

73 *Id.* at 403.

74 *Id.*

75 *Id.*

without histories of prior overt discrimination will be called upon to defend various selection procedures on the basis of purely statistical evidence, and in racial discrimination, "statistics often tell much, and Courts listen."[76] With an objective approach to the issue of discriminatory intent, all the gestures made by an employer toward minority groups, no matter how genuine, will be irrelevant, and the burden of proof as to job-relatedness will be heavy.

Stephen Horn

[76] Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), *aff'd*, 371 U.S. 37 (1962).