Facially Neutral Criteria and Discrimination Under Title VII: "Built-In Headwinds" or Permissible Practices?

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FACIALLY NEUTRAL CRITERIA
AND DISCRIMINATION UNDER TITLE VII:
"BUILT-IN HEADWINDS"
OR PERMISSIBLE PRACTICES?

Although the Equal Employment Opportunity Act of 1972,1 amending Title VII of the 1964 Civil Rights Act (Title VII),2 enlarged the scope of the 1964 Civil Rights Act,3 and although the new Act strengthened the enforcement powers of the Equal Employment Opportunity Commission (EEOC),4 very few changes were made in any of the Title VII provisions defining unlawful discriminatory practices5

However, it is important to note that Congress expressly incorporated in the new Act the interpretations given to Title VII by the courts of all provisions not affected by the Act.6 The various court interpretations, although numerous, are not exhaustive and many interpretative problems still cloud the operation of Title VII. One such problem is the question of how Title VII affects those practices which are neutral in form, but which, when placed into operation, have discriminatory effects.

This article discusses how Title VII affects the operation of these facially neutral practices and attempts to determine when such practices are unlawful under Title VII. It also discusses the possible effects of the Equal Employment Opportunity Act of 1972 on this problem.

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3 For example, the Equal Employment Opportunity Act of 1972, § 2(2), amends the definition of "employer" found in 42 U.S.C. § 2000e(b) (1970) so that an "employer" now means "a person engaged in an industry affecting commerce who has fifteen or more employees . . ." instead of twenty-five employees as was required before the amendment.
4 The EEOC, in cases where the respondent is not a government, a governmental agency, or a political subdivision, may file a civil action against the respondent in an appropriate federal district court if it has been unable to eliminate an unlawful discriminatory practice by the usual informal methods of conference, conciliation, and persuasion. See § 4(a) of the Equal Employment Opportunity Act of 1972, supra note 1, amending 42 U.S.C. §§ 2000e-5(a), (f)(1) (1970).

In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.
Because Title VII has such a large scope, the discussion here is limited to the statute's treatment of racial discrimination. Since the Title was enacted primarily to deal with the problem of racial discrimination against Blacks and since Blacks comprise the largest group of victims of racial discrimination, this article focuses primarily on discrimination against Blacks even though Title VII prohibits discrimination against any racial group. Most of the discussion, however, does pertain to any racial discrimination.

I. INTENT IN TITLE VII RACIAL DISCRIMINATION CASES

Under Subsection 706(g), the only discriminatory practices which may be remedied by the courts are those which were "intentionally engaged in." Prior to the Supreme Court's decision in *Griggs v. Duke Power Co.*, there were two lines of interpretation of the phrase "intentionally engaged in." Some courts investigated the employer's subjective intentions and motivations and held that the employer's practices could result in unlawful discrimination only if a subjective purpose to discriminate were found. Other courts looked only to the practice itself and held it to discriminate unlawfully on the sole basis that resulting consequences discriminated against racial minorities.

The *Griggs* decisions in the district court and the court of appeals and the district court decision in *Parham v. Southwestern Bell Telephone Company* illustrate the first position. The lower courts in *Griggs* reviewed respondent Duke Power Company's actions and found that diploma and test requirements had been adopted by the company without any purpose or intention to discriminate against Blacks. Both courts further found that the requirements were applied evenhandedly to both Blacks and Whites and that the company had acted in good faith and without any purpose to discriminate. They concluded that al-

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8 Under §§ 8(a), (c) of the Equal Employment Opportunity Act of 1972, supra note 1, amending 42 U.S.C. §§ 2000e-2, -3 (1970), it is unlawful for an employer to discriminate on the basis of "race, color, religion, sex, or national origin." No words limiting the terms "color," "race," or "national origin" to Blacks can be found in any part of Title VII.
9 42 U.S.C. § 2000e-5(g) (1970), as amended, § 4(a) of the Equal Employment Opportunity Act of 1972, supra note 1. It should be emphasized that the language "intentionally engaged in" was not changed by the new Act.
though the results of performance of Blacks and Whites were disparate, this did not show that the use of these requirements was an "intentionally engaged in...unlawful employment practice" prohibited by Title VII. This conclusion rested on the dual grounds that although the tests were not specifically job related, they did serve a business purpose, i.e., making sure all employees had attained a certain level of educational competence, and that the company had not established the requirements for purposes of discrimination.  

This position was also advanced by the district court in Parham:

In their thorough brief counsel for plaintiff earnestly contend that irrespective of the subjective good faith and efforts of the defendant to refrain from discrimination the hiring policies and practices which defendant has followed and which it is now following are inherently discriminatory in that they inevitably tend to discourage or disqualify Negro applicants for employment. It is urged that defendant’s requirement that all of its employees must have completed a high school education is irrelevant to the needs of defendant’s business and bears more heavily upon Negroes than upon whites, and the same complaint is made about the defendant’s policy against hiring “unwed mothers.”

That argument may be interesting sociologically, but this Court is not willing to read into the Act any requirement that an employer tailor his hiring requirements to meet the needs of deprived minorities. If he adopts his criteria in good faith and for what reasonably appear to him to be valid reasons, and if the criteria are not themselves based on race, the Court does not think that they are prohibited by the Act merely because many Negroes on account of cultural and economic deprivations may not be able to meet them.

On the other hand, the courts adopting the objective approach were concerned primarily with the effects or consequences of an employer’s policy rather than the motivation or design behind it. The “intentionally engaged in” clause of Subsection 706(g) was read to require only that the employer meant to do what he did. In

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14 292 F. Supp. at 250-51 (M.D.N.C. 1968), and 420 F.2d at 1233–36 (4th Cir. 1970). The court of appeals considered the fact that the company was willing to pay for the education of incumbent Blacks so that they could meet the requirements and be eligible for advancement as strong evidence of the company’s lack of purpose to discriminate. Id. at 1233 n.6.

other words, it was not necessary to prove that the employer intended to discriminate. All that was required was proof that the employer intentionally effectuated the policy or rule which had discriminatory effects. This "effect oriented" approach to Subsection 706(g) of Title VII was explained by the court in Local 189, Papermakers v. United States:

Section 706(g) limits injunctive . . . relief to cases in which the employer or union has "intentionally engaged in" an unlawful employment practice. Again, the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental.

In attempting to weigh the two positions, consideration of the stated purpose of Title VII gives support to this latter view. The Act is not a criminal statute which requires mens rea but is "regulatory social legislation designed to change conduct and eradicate discriminatory social practices." In order to achieve this goal, which in itself is objective in nature, the preferable test would clearly appear to be one which focuses upon the actual effect of the action, not the subjective motivation or purpose underlying it. The Title VII phrase "intentionally engaged in" has been analogized to the term "intention to discriminate" under Subsection 8(a)(3) of the National Labor Relations Act. Since "the Supreme Court has held that the intention under that regulatory social legislation is satisfied if the consequences were foreseeable," it has been argued that the operation of Title VII "does not turn on the subjective feelings of employers, unions, and other respondents."

Indeed if the operation of Title VII were to hinge upon a determination of a respondent's subjective intent, the remedial effect of this legislation would be greatly diluted. The subjective standard is at best illusory and almost impossible to prove, and in

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16 In Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), the district court held:

Good faith in the origination or application of the policy is not a defense.

An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent.


See also Case Comment, 6 GEORGIA L. REV. 194, 198 (1971); Recent Developments, supra note 7, at 147, 157; Note, 49 TEXAS L. REV. 141, 145 (1970); and Case Comment, 47 NOTRE DAME L. REV. 381 (1971).

18 416 F.2d 980, 996-97 (5th Cir. 1969) (emphasis in original).


20 Id. at 475 n.21.

21 Id. See NLRB v. Great Dane Trailers, 388 U.S. 26, 36 (1967).

22 Blumrosen, supra note 19, at 475.
all probability nothing short of an admission would adequately satisfy the test. Furthermore, Title VII is not meant to punish the "wrong thinking" or consciously racially prejudiced respondent; its goal is to afford employment opportunity not limited or diminished as a result of racial group membership. Obviously it would be counterproductive if the remedial force of the law were empowered to step in only where the respondent subjectively intended to deny employment opportunity on racial grounds. The legislation is able to serve its function and purpose only when it makes available a remedy to cure discrimination which actually exists, not merely discrimination which was purposefully intended to exist.

The Equal Employment Opportunity Commission discussed this interpretation of Title VII in one of its decisions:

Respondent, like so many employers, tends to view allegations of discrimination as if they were comparable to criminal allegations. In this view, the charge connotes hostility, mistrust, or devaluation of an individual, a firm, or an institution. Thus, the conclusion is easily reached that the one charged with an act of discrimination possesses an evil state of mind. It then becomes difficult for the one charged to focus attention objectively on the description of the discriminatory act. It should be axiomatic that Title VII enforcement clearly does not have such import. Its underlying purpose is to define those employment situations that tend to judge, limit, segregate, or classify employees on criteria which prove to have a demonstrable racial effect without a reasonably necessary business motive. When viewed against this backdrop, it becomes clear that Congress, through the Commission, sought to provide a remedy to adjust the needless employment hardships facing minority workers whether they are occasioned by purposeful discrimination or result from the arbitrary operation of a personnel system.\textsuperscript{23}

It appears that the \textit{Griggs} decision in the Supreme Court\textsuperscript{24} resolves the interpretative difficulties surrounding the term "intentionally engaged in." In adopting the objective view, Mr. Chief Justice Burger, writing for a unanimous court, stated:

\begin{quote}
[\textit{G}]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
\end{quote}

\textsuperscript{23} EEOC Case No. 6-8-7426.
The company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.\textsuperscript{25}

As a result of the \textit{Griggs} decision, the gravamen of a Title VII violation is not the motivation or good faith of the employer in devising or applying a rule or practice, but the intentional use of a rule which has the prohibited effect of promoting racial discrimination. In this light, the mere fact that an employer consciously devised a certain policy should be enough, in and of itself, to satisfy the "intentionally engaged in" requirement of Subsection 706(g) if it could be demonstrated that the policy has the prohibited effect. This means that the key focal point of a Title VII discrimination action is the content of the challenged rule. This in turn implies that policies which discriminate on their face are clearly prohibited under Title VII because of the strong language in Subsection 703(a) to the effect that race per se cannot be a valid criterion for an employment decision.\textsuperscript{26} However, when we move away from these obvious cases toward those involving apparently neutral policies, a new and more complex set of rules must be followed to determine the presence or absence of a Title VII violation.

\section{II. How Neutral Rules Become Discriminatory}

The investigation of racially neutral rules is an outgrowth of the purposes and goals of Title VII. The laws prohibiting racial dis-

\textsuperscript{25} \textit{Id.} at 432 (emphasis in original).


\begin{itemize}
  \item It shall be an unlawful employment practice for an employer—
  \begin{itemize}
    \item (1) to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
    \item (2) to limit, segregate, or classify his employees or applicants for employment 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.
  \end{itemize}
\end{itemize}

Apparently the underlying assumption is that race by itself is irrelevant to job performance and therefore is not a permissible basis for employment classification. This idea is further substantiated by the fact that classifications drawn along racial lines are not included in the bona fide occupation qualification exception contained in 42 U.S.C. § 2000e-2(e) (1970), even though this exception is extended to classifications based on religion, sex, or national origin.
crimination in employment are linked to the goal of securing a position of "equality" for Blacks. The problem is to define "equality." It has been noted that there are two senses to "equality": equal treatment and equal achievement. The notion behind equal treatment is that race should be ignored in any employment decision, while the notion behind equal achievement is that the actual distribution of jobs, both in quantity and quality, should be proportionate.

Theoretically, equal treatment should lead to equal achievement. That is, if Blacks and Whites are placed on an equal footing at the start of the employment race, and if all participants in the race are treated equally, the end result should be equal achievement. However, the many years of racial prejudice have left a disproportionally large number of Blacks impoverished, unemployed, and undereducated. As a result,

even if color is not given any weight in employment decisions, and in that sense equal treatment [is] obtained, substantial inequalities by race in the distribution of jobs will persist in the immediate and foreseeable future.

It was this disparity in economic and societal position that was one of the prime motivating factors culminating in the passage of the Civil Rights Act of 1964: On this basis, the legislative history of the 1964 Act arguably indicates that Title VII follows an equal achievement approach. However, some have maintained that a color blindness requirement is embedded in Title VII.

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27 See note 7 and accompanying text supra.
28 Fiss, supra note 7, at 237–38.
29 Id.
30 Id. at 238.
31 U.S. BUREAU OF THE CENSUS, 1971 STATISTICAL ABSTRACT 324, Table No. 518 (1971). The figures indicate that 32.3 percent of all Blacks are considered to be in poverty (using the Government's poverty standards) while only 9.5 percent of all Whites are considered to be in poverty.
32 Id. at 210, Table No. 327. The figures indicate that as of May, 1971 the unemployment rate for non-White males was 8.1 percent while only 5.1 percent for Whites. These figures indicate that 10.8 percent of all non-White female potential employees were unemployed as compared to 6.5 percent for their White counterparts.
33 Id. at 108-09, Table No. 162, 164. Evidence indicates that the median number of years of schooling completed by Blacks as of 1970 was 9.9 years while this same median was 12.2 for Whites. As of 1970, the proportion of Blacks 25 years and older who had completed high school was only 33.7 percent (only 4.5 percent had completed college) as compared to a figure of 55.2 percent (11.0 percent had completed college) for the members of any race but Black. Note that these figures highlight the educational plight of Blacks without even discussing the quality of the education received.
34 Fiss, supra note 7, at 238.
35 See note 7 and accompanying text supra.
36 See, e.g., Fiss, supra note 7, at 237.

Thus, it would follow that the goal of Title VII is to enhance the economic and societal position of Blacks without radically affecting the economic and societal position of Whites.\textsuperscript{37}

In spite of such arguments, the courts recently have exhibited more concern with the results of rules created by employers than with the neutrality of treatment afforded by the use of these rules.\textsuperscript{38} In fact, the courts have clearly indicated that neutral rules which preserve the effects of past discrimination are subject to attack under Title VII.\textsuperscript{39} Furthermore, some courts have indicated that neutral rules which preserve the present status imposed on Blacks because of racial prejudice in general may also violate Title VII.\textsuperscript{40}

It must be emphasized, however, that the language and structure of Title VII cannot be ignored, even in light of achieving the goals of Title VII. It can be argued, therefore, that if a rule does not on its face judge an individual on the basis of his race, then it does not fall within the purview of Title VII. In response to this argument it has been suggested that a rule neutral on its face but discriminatory in effect should be viewed as the “functional equivalent” of a rule judging an employee on the basis of his race.\textsuperscript{41} A two-step process in establishing functional equivalence has been proposed. The first step is to show that use of the rule, like the use of race, will result in an unfavorably differential impact on Blacks; the second step is to show that the rule, like race, judges the individual in a manner not considered to be an accurate prediction of the individual’s productivity.\textsuperscript{42}

\textsuperscript{37} Fiss, \textit{supra} note 7, at 265.

\textsuperscript{38} See notes \textit{16}–\textit{25} and accompanying text \textit{supra}.

\textsuperscript{39} By holding that Title VII is geared toward the remedy of discriminatory consequences of neutral employment practices, the Supreme Court in \textit{Griggs} put to rest the arguments made by the district court that the prospectivity aspects of Title VII insulated “residual” discrimination arising from prior inequitable treatment. 401 U.S. 424, 430–31 (1971). It should be noted that the court of appeals also had reversed the district court as to this point although it consequently denied relief because of the employer’s lack of discriminatory purpose. 420 F.2d 1225, 1230 (4th Cir. 1970).

The court of appeals in Local 189, Papermakers v. United States, 416 F.2d 980, 994 (5th Cir. 1969), offered the following explanation of why Title VII has this reach:

When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes ongoing discrimination, unless the incidents are limited to those that safety and efficiency require.

\textit{See also} Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

\textsuperscript{40} See part IV \textit{infra}.

\textsuperscript{41} Fiss, \textit{supra} note 7, at 296–304.

\textsuperscript{42} Id. at 299.
This approach apparently has been adopted by Griggs. The Supreme Court, while examining the merits of a test used by the employer to determine prospective employees’ qualifications and of a requirement that all employees have a high school diploma, specifically noted that the “Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” The Court then engaged in a two-step analysis to determine if the neutral rule had violated Title VII. The Court first determined that the employer’s test and diploma requirements effectively discriminated against prospective employees on the basis of race. It held:

Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.

The Court then examined under the rubric of “business necessity” whether or not the two criteria in question were related to job performance. It found that “neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs.”

The Supreme Court has thus indicated that it views the use of neutral rules which have discriminatory effects as the functional equivalent of the use of rules which judge an employee on the basis of race. In order to examine this doctrine more thoroughly, it is necessary to discuss individually each step of the two-step plan of analysis.

A. The Determination of Discrimination—The Use of Statistics

Although Griggs did not answer the question of how much proof is needed to establish the presence of impermissible racial discrimination, several other cases do seem to provide an an-

44 Id. at 428, 430–33.
45 Id. at 430.
46 Id. at 431.
47 Id. The Court pointed to evidence which demonstrated that employees who had not completed high school or who had not taken the ability tests were performing satisfactorily in the departments to which the testing and diploma criteria now applied. The Court also noted the promotion record of present employees who would not meet the new criteria. To the Court this suggested “the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company.” Id. at 432.
In the majority of Title VII cases employing statistics, statistical evidence of small numbers of Blacks employed by a company is presented along with statistical evidence as to the presence of a disproportionally larger number of available Black workers. When this disparity is great, some case law suggests that this showing alone is sufficient to establish a prima facie case of Title VII violation. The burden of proof is then shifted from the plaintiff to the respondent employer or union. In order to sustain his burden, the respondent must offer evidence either as to business necessity which in some way justifies or excuses the disparity or as to the unreliability of the statistics, e.g., there is a lack of qualified Blacks available.

One of the reasons that statistics alone may establish a prima facie case is that these statistics may be the only objective proof available to a plaintiff and, absent their use, the plaintiff would be unable to expose impermissible discrimination which he knows exists but which is veiled by ostensibly neutral procedures. Since employers may justify the challenged practice on the basis that it has an essential purpose and function in the operation of their businesses, it is quite reasonable that the employer be called upon to state and prove this purpose when the effects of it are challenged. The employer, with his knowledge of the particular alleged necessity, is in a far better position to prove its existence than is a plaintiff to prove its nonexistence.

Some cases have found statistics to be even more conclusive.

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48 This article does not deal with the problem of whether Title VII applies only to those actions where the sole reason for the conduct is illegal or whether it also applies to those actions where the illegal conduct is only a partial factor in the employer's policy. This question has largely been answered in King v. Laborers Local 818, 433 F.2d 273 (6th Cir. 1971). See also Comments, The Partial Factor Test in Title VII Discrimination, 1972 WASH. U.L.Q. 368.


50 See United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972); and United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 n.7 (8th Cir. 1969).

51 United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972), established that in a Title VII suit, when lopsided statistics are shown which present a prima facie case, an inference of discrimination arises from the statistics themselves. As a result, the burden of coming forward with evidence is not on the Attorney General but on the company. In other words, the company must show the lack of available qualified Blacks. The Attorney General does not initially have to show the availability of qualified workers. See also Note, 3 SETON HALL L. REV. 143, 155-56 (1971).

52 Fiss, supra note 7, at 297-98. Furthermore, the court in Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971), felt that "In racial discrimination cases statistics often demonstrate more than the testimony of many witnesses . . . ." Id. at 247 (emphasis added).
The *Parham* case\(^{53}\) held that the statistics showing that almost no Blacks were employed by the company and that the few who were employed held only the most menial positions established a Title VII violation as a matter of law.\(^{54}\) A plain reading of this holding leads to the conclusion that the business necessity doctrine will neither be recognized nor given weight in cases where statistical evidence conclusively establishes a discriminatory effect. *United States v. Ironworkers Local 86*,\(^{55}\) while not explicitly rejecting the idea that in a particular factual situation statistics might prove discrimination as a matter of law, cautions against their improper use:

> Of course, as is the case with all statistics, their use is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn.\(^{56}\)

The effect of *Parham* may, however, be limited by the peculiar factual situation which that case presented. Although the Court found a Title VII violation, no remedy was ordered as the Court also found that the company had already begun an affirmative action plan which was deemed sufficient to remedy the situation.\(^{57}\) Absent the existence of this plan, it is unclear whether or not the court would still have taken its stand based on statistical evidence alone, or whether it would have found it judicious to base its finding of discrimination on additional evidence of discriminatory practices. If it had taken the latter course, an assertion of business necessity by the company might have become an appropriate consideration.

Thus, as a general principle, the courts are probably not yet willing to throw out the business necessity doctrine when faced with statistical evidence of discriminatory effects. However, when the statistics are very persuasive, it is possible that they will require a higher showing of business necessity to justify the disparities.

### B. The Business Necessity Doctrine

Even if a neutral rule has a discriminatory effect on Blacks, case law seems to indicate that if the rule in question is grounded


\(^{54}\) *Id.* at 426.


\(^{56}\) 443 F.2d at 551 (footnote omitted).

\(^{57}\) 433 F.2d at 429.
in "business necessity," it will withstand attack under Title VII.\textsuperscript{58} The business necessity defense is not mentioned in the Civil Rights Act of 1964 but rather has been developed by the courts for dealing with cases involving employment practices which are neutral on their face.\textsuperscript{59} The purpose of this test is to determine whether the employment rule in question is based on "an over-riding legitimate, nonracial purpose" or if it is to be treated as one based primarily on racial concerns (i.e., concerns which have no relevance to productivity and are predetermined apart from the control of any individual involved).\textsuperscript{60}

It is not exactly clear what constitutes "an overriding legitimate, nonracial business purpose" which is "essential to the safe and efficient operation"\textsuperscript{61} of a business. In applying Title VII to facially neutral rules which in fact had discriminatory effects, the Supreme Court in \textit{Griggs} noted, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."\textsuperscript{62}

In striking down the use of certain testing and educational requirements which the company argued were used to "improve the overall quality of the work force,"\textsuperscript{63} the Supreme Court observed that upon the evidence presented, it was apparent that employees who entered before the requirements were instituted and did not in fact meet the requirements "continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used."\textsuperscript{64} The Court then stated that criteria which operate as "'built-in headwinds' for minority groups and are unrelated to measuring job capability" were not protected by "good intent or absence of discriminatory intent."\textsuperscript{65}

One federal district court, in \textit{Johnson v. Pike Corp. of America},\textsuperscript{66} has interpreted \textit{Griggs} to mean that an employer's use of neutral rules which may have discriminatory racial effects may not be justified on the grounds that these rules save the employer from inconvenience, annoyance, or even expense.\textsuperscript{67} The rule must

\textsuperscript{58} See note 62 and the accompanying text infra.
\textsuperscript{59} See Recent Cases, 85 HARV. L. REV. 1482, 1484 n.15 (1972).
\textsuperscript{60} See Local 189, Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir.), cert. denied, 397 U.S. 919 (1969).
\textsuperscript{61} 416 F.2d at 989-90.
\textsuperscript{62} 401 U.S. 424, 431 (1971).
\textsuperscript{63} \textit{Id}.
\textsuperscript{64} \textit{Id.} at 431-32 (footnote omitted).
\textsuperscript{65} \textit{Id.} at 432.
\textsuperscript{66} 332 F. Supp. 490 (C.D. Cal. 1971).
\textsuperscript{67} The district court specifically held:
pertain to the employee's ability to carry out his duties before it can be justified as a business necessity.\textsuperscript{68} It has been argued that this interpretation of \textit{Griggs} is unnecessarily broad and that the business necessity defense should be considered by a reviewing court whenever an employment practice is designed to test not only an employee's job skills but also his overall productivity.\textsuperscript{69} However, even that argument contends that a business necessity defense should arise only where "substantial cost" to the employer is involved and only where the "discriminatory effects are minimal."\textsuperscript{70}

While it is indeed doubtful that most courts will consistently go as far as the \textit{Johnson} court,\textsuperscript{71} it seems certain that a mere showing of the achievement of some vague business purpose will not suffice to establish business necessity. In some cases, in the face of apparent business necessity, it may be relevant to inquire into the availability of a satisfactory alternative practice which would achieve the same business end and which would also alleviate racial discrimination. In \textit{Local 189, Papermakers v. United States},\textsuperscript{72} the court was confronted with a seniority system which locked incumbent Black employees into previously imposed racially divided classifications. The court seemed to indicate that even though the present seniority system may have satisfied some business purpose, the employer was under a duty to find a similar proposal which alleviated the discriminatory effects of past racial classification.\textsuperscript{73} It is important to note that the factual situation in \textit{Local 189, Papermakers} involved a seniority system

\textsuperscript{68} Id. at 495.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 1487.
\textsuperscript{71} Arguably, the \textit{Johnson} court itself would not stringently apply the same standard in a different factual situation. In \textit{Johnson} the rule in question authorized discharge of employees whose wages had been garnished several times. The court, in rejecting the company's arguments that the administrative expense and time consumed in responding to garnishments detracted from efficient running of the business and therefore comprised sufficient business necessity to justify dismissals, pointed to the differential impact on Blacks which this requirement had and stated that the company's arguments did not adequately justify this discrimination. However, if the number of garnishments were to be increased from "several" to one hundred, it seems probable that even this court would give more weight to the company's arguments. In essence, it is possible that even the \textit{Johnson} court might be presented with a future state of facts that might lead it to retreat from the stringent position it has taken and to consider the degree aspect by indulging in some form of balancing.
\textsuperscript{72} 416 F.2d 980 (5th Cir.), cert. denied, 397 U.S. 919 (1969).
\textsuperscript{73} Id. at 990.
which the court felt was preserving the effects of prior racial discrimination. It thus is not clear whether inquiry into alternative methods must be made only when the situation involves a neutral rule preserving past discrimination or whenever the situation involves any practice that differentiates between people on the basis of race.

After the foregoing discussion it should now be helpful to examine specific examples of facially neutral rules which may have a discriminatory impact and to examine how the courts have dealt with them. To date, it appears that such neutral rules subject to attack under Title VII have fallen into two major categories: (1) those which preserve the effects of the employer's past racial discrimination and (2) those which preserve and/or augment the effects of societal racial discrimination generally. Each category and the examples thereunder are discussed separately.

III. PRESENT EFFECTS OF PAST DISCRIMINATION

A number of courts has recently held that effects of past discrimination may result in present and future discrimination.\(^{74}\) As a result, these courts have assumed the duty of striking down policies which perpetuate discriminatory effects. Examples of such policies which have come under Title VII attack are (1) ability tests, (2) seniority systems, and (3) recruitment practices.\(^{75}\)

\section*{A. Ability Tests}

Among the more frequently challenged facially neutral criteria are ability tests.\(^{76}\) Assuming no unfairness in the administration or scoring, an ability test would not appear to be a racially discriminatory device which would run afoul of the purpose of Title VII. Since one of the goals of Title VII is to rid the employment process of irrelevant criteria based on impermissible racial classifications, the fairly administered ability test seems to fall easily within the scope of permitted activities under Title VII. However,

\(^{74}\) See Case Comments, 47 NOTRE DAME LAW. 381, 388 (1971). See also notes 27-47 and accompanying text supra.

\(^{75}\) This article will not discuss the possible discriminatory impact of an employer's decision to move his plant from a city into a predominantly White suburban area. This topic has been thoroughly discussed in an excellent article by Blumrosen, The Duty to Plan for Fair Employment: Plant Location in White Suburbia, 25 RUTGERS L. REV. 383 (1971).

\(^{76}\) The use of ability tests has sharply increased since the passage of the 1964 Civil Rights Act and as a result there has been a corresponding increase in the "employment of doubtful testing practices which . . . have discriminatory effects." Case Note, 40 FORDHAM L. REV. 350, 353 (1971).
closer scrutiny reveals that such a device may be employed to obtain the same effect as a policy of overt racial discrimination. Therefore, viewed under the functional equivalence rationale, ability tests in certain circumstances may be facially neutral rules imbued with the infirmity of racial discrimination.

The question arising with regard to the use of some standardized ability tests is "whether giving preference to those with superior ability to score well on tests may constitute unlawful racial discrimination." Ability tests have been shown to measure past learning. It has also been stated that:

[T]ests measure how well a person has assimilated the knowledge and skills that the particular test is measuring. . . . [C]rucial factors in a person's score are the quality and extent of his past schooling and training and the degree of correlation between his cultural milieu and that which serves as the test's point of reference.

It has not been denied that Blacks and other racial minorities generally obtain lower average scores on these standardized tests than do Whites. Viewed in terms of the functional equivalence standard, it has been argued that use of tests in which Blacks consistently score significantly lower than Whites is analogous to a racially discriminatory employment practice unless the test is proven to be a valid predictor of job performance and thus comes within the business necessity doctrine.

Apart from this general evidence, the threshold issue is still whether or not the use of these tests is blanketly protected by Subsection 703(h) of Title VII. Phrased in another manner,

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79 Cooper & Sobol, supra note 77, at 1639.
80 [The] general patterns of racial discrimination, lesser educational and cultural opportunities for black people, and cultural separatism that have marked our society for generations have impeded blacks in attaining the background necessary for success in existing standardized tests. Id. at 1640.
81 The Supreme Court in Griggs noted:
The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negros. This consequence would appear to be directly traceable to race . . . . Because they are Negros, petitioners have long received inferior education in segregated schools . . . .
83 See Developments, supra note 7, at 1123.
84 This subsection is codified at 42 U.S.C. § 2000e-2(h) (1970) and reads in part:
does this subsection absolutely sanction the use of all "professionally developed ability tests," or does the proviso, "not designed, intended or used to discriminate because of race," limit the range of protected tests?

In response to this interpretative difficulty it has been suggested that a "professionally developed test" for purposes of Subsection 703(h) is "one which has been measured and tailored by the standards of psychological testers to the needs of the particular job" and that this term "must refer to the test as applied, since the user of the test and not its writer is subject to the jurisdiction of the Commission and the courts." Viewed in this manner, Subsection 703(h) does not negate the directive of Subsection 703(a) but merely protects tests which, although they have an adverse impact on Blacks, are actually valid and do in fact test skills necessary for the particular job.

Pursuant to its powers under the 1964 Civil Rights Act, the EEOC has issued guidelines regarding the use of tests in employment. If the use of a particular test results in adverse impact on minority groups, the guidelines state that its use constitutes discrimination prohibited by Title VII unless the test is properly validated and the employer demonstrates that no alternative procedure is available which would have a lesser differential impact. The guidelines posit several possible methods of validation which the EEOC deems acceptable. The standards proposed for each method are generally high and would not consider opinions

Notwithstanding any other provision of this subchapter, . . . nor shall it 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 . . . .

84 Blumrosen, supra note 19, at 505.
85 Id. at 506.
86 See text accompanying note 26 supra.
87 The legislative history of Title VII of the 1964 Civil Rights Act supports this interpretation. For a detailed analysis of this history see Note, supra note 51, at 148–52.
88 In Griggs, the Supreme Court's interpretation of the legislative history was:

This language in the original Tower amendment indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible to misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

89 29 C.F.R. § 1607 (1972).
90 Id. at § 1607.3.
91 Id. at §§ 1607.4-.5. According to these guidelines, an employer using ability tests must have available for inspection evidence which indicates that the tests do not discriminate unlawfully. Such evidence must include empirical evidence based on studies "employing generally accepted procedures for determining criterion related validity . . . ."
Id. at § 1607.5.
of the employer or his staff sufficient unless they were supported by "hard" data. The purpose of the validation is to establish that the test used actually measures the skills or predicts performance necessary for the job in question. If this is not established, the discrimination which results is not protected by the job relatedness standard of the business necessity doctrine.\(^9\)

The problem now is to examine just how far the courts have accepted the EEOC guidelines; for although the guidelines impose a heavy burden upon the employer to justify his testing procedure once it is under attack, the courts have not always abided by the guidelines mandate. The court of appeals in \textit{Griggs} rejected the argument that tests must be job related in order to be protected by Subsection 703(h).\(^9\) The court recognized that the EEOC guidelines required job relatedness but concluded that this standard was not only not mandated by the Act but was also contradictory to congressional intent.\(^9\) The court further stated that although other courts have held that the statutory gloss provided by an agency charged with administration of a statute is "entitled to great weight," there is no mandate that "an EEOC interpretation is binding upon the courts." \(^9\)

Relying in part on the decision of the court of appeals in \textit{Griggs}, the court in \textit{Broussard v. Schlumberger Well Services}\(^9\) held that the testing requirements in issue were not shown to be discriminatory. This decision is a hybrid in that while it rejected the argument that the use of any test not professionally validated as to job relatedness is a discriminatory practice, the court at the same time observed that the tests used were, in a practical sense, job related. The plaintiff charging discrimination in the testing requirement had not been allowed to take the written test which was a prerequisite to promotion as he had failed the practical examination which was a prerequisite to the written test.\(^9\) The

Furthermore, the guidelines establish certain minimum criteria which these studies must satisfy before they constitute evidence of validity. For example, the studies demonstrating the usefulness of the exam must be made on a representative sample "of the normal or typical candidate group for the . . . jobs in question." \textit{Id.}

Even the conditions under which the exams are given are regulated. The tests "must be administered and scored under controlled and standardized conditions . . . ." \textit{Id.}

\(^{91}\) \textit{Id.} at § 1607.3.
\(^{92}\) 420 F.2d 1225, 1234–35 (4th Cir. 1970).
\(^{93}\) \textit{Id.} at 1233, 1235.

\(^{94}\) \textit{Id.} at 1234. Although the holding of this court rejecting the necessity of job relatedness is clearly not supportable in light of later case law, the case is illustrative of one line of judicial opinion regarding deference to the standards of the EEOC guidelines.

\(^{96}\) \textit{Id.} at 512. It should be noted, however, that the exact nature of the "practical test" involved was not stated in the opinion. The court did, however, mention that "The supervisor's estimate of [plaintiff's] ability is a product of business judgment, which this Court will not second guess." \textit{Id.} It is possible, therefore, that further inspection might
court's finding was that there was no racial motivation in the refusal to allow plaintiff to take the written test, and therefore the plaintiff had failed to show that the testing requirement had discriminatory effects.\(^9\) Still, this decision apparently stands for the proposition that if discriminatory effects are proved, then an investigation of the job relatedness of the test will be necessary.\(^8\) Although the case is often cited as being out of phase with the EEOC guidelines, the only point of division seems to be the type of validation required. While the guidelines call for technical validation of job relatedness, the court in *Broussard* approved practical validation.\(^9\) In light of what both the EEOC and other courts have actually accepted as validation of job relatedness, the two standards apparently are not in conflict.

In *United States v. H. K. Porter Co.*,\(^{100}\) a case often considered as endorsing and supporting the guidelines, the court, while stating that it agreed “in principle” with the guidelines requirement of job relatedness, also stated that professional validation, although desirable, was not absolutely required.\(^{101}\) In explanation of this position the court wrote:

> If this statute is to be construed as requiring test validation, the important aspect of the matter is not to be able to say that it has been conducted by a professional psychologist but to be satisfied that it has been conducted fairly and properly.\(^{102}\)

In holding the use of the tests in question to be lawful under Title VII, the court relied on the word of the company's personnel director who had what the court termed “requisite quali-

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\(^9\) This observation is merely speculative, however, since very little on this point was included in the opinion. See *United States v. Central Motor Lines, Inc.*, 338 F. Supp. 532 (W.D.N.C. 1971), finding a Title VII violation in the use of preemployment tests where the determination of a passing score was at the subjective discretion of the employer on an individual basis. The tests here also had not been shown to be successful predictors of job performance, and the testing program had been used in the past to discriminate against Blacks.

\(^8\) The court held specifically:

> The Court is not persuaded that the failure to allow Mr. Larry to take the written examination for First Class Painter was racially motivated. A man must prove himself on the job before he is allowed to take the written examination. The supervisor's estimate of Mr. Larry's ability is a product of business judgment, which this Court will not second-guess.

315 F. Supp. at 512.

\(^9\) Id.

\(^8\) This attitude is found in the court's statement that the employee must “prove himself on the job” before being permitted to take the written test and that the tests involved here “were job related in the very practical way that a typing test is related to the job of typing.” Id.


\(^{101}\) Id. at 76, 78.

\(^{102}\) Id. at 76.
The court also observed that although the director had conducted no "test validation as such," he had "taken steps which comprise the basic elements of validation."104

In Arrington v. Massachusetts Bay Transportation Authority,105 a case involving use of tests by the state transit authority, the analysis, although based on the thirteenth and fourteenth amendments and on two federal statutes,106 is useful in identifying the difficulty involved under Title VII:

The difficult issue in situations such as these is the determination of the level of business relevance necessary to justify the utilization of a test. It is one thing to demand that a test be designed to measure abilities relevant to job performance and be an accurate determinant of those abilities, but quite another to decide what showing is adequate to indicate that a particular test is performing that function successfully.107

While the court held the use of the tests invalid on the grounds that they were not job related and produced a "de-facto racial pattern of classification adversely affecting... minority groups,"108 it did not clearly enunciate the standard it used in determining job relatedness. From the court's language, however, it may be inferred that the standard was more stringent than that used in Porter.109

A very strong statement in support of job relatedness is found in Hicks v. Crown Zellerbach Corp.110 Here the court stated absolutely that use of tests must be shown to be a business necessity in order to escape Title VII censure if the test results substantially prefer Whites over Blacks.111 The court not only adopted the standard that the "skills measured by the tests must...
be shown to be relevant to the employer's job performance needs,'" which is clearly consistent with the guidelines, but also categorically stated that because of the great degree of uncertainty involved in any decision as to which test is proper for the circumstances, coupled with the disparity in the quality of education available to Blacks as compared with Whites and the basic assumption underlying most tests that "persons have had relatively equal exposure to educational materials," a careful professional study regarding the use of the test is essential.

As a result, the court held the testing program at issue unlawful since the company had not made such a study and had adopted the program solely upon the recommendations of its personnel department and since the experts who offered testimony at trial had agreed that the tests had "no relevance to lower and middle jobs in the plant." The court also ruled that the use of the tests did not fall within the protection of Subsection 703(h) of Title VII since the tests were at least "'used to discriminate' because they greatly prefer whites to Negroes without business necessity."

The court further held that:

To interpret § 703(h) as protecting use of tests which are not shown to be job related would be to drastically undercut the overall legislative purpose of Title VII, which is to eliminate all unjustified impediments to the realization of full equal employment opportunity for Negroes.

By way of remedy, the court not only permanently enjoined the use of the tests for Blacks, but also prohibited the institution of any other testing program until its validity had been shown to the court to have been arrived at using EEOC guidelines principles.

Although the Supreme Court in its decision in Griggs does not in explicit language go as far as the Hicks court did regarding the necessity of careful professional study, the Court did expressly accept the guidelines position that tests must be job related in order to be acceptable under Subsection 703(h). The Court also noted that the "'administrative interpretation of the Act by the

\[112\] Id.

\[113\] Specifically, the court ruled:

Without such study, no employer can have any confidence in the reasonableness or validity of his tests; and he therefore cannot in good faith assert that business necessity demands that these tests of unknown value be used. Title VII does not permit an employer to engage in unsubstantiated speculation at the expense of Negro workers.

\[114\] Id.

\[115\] Id. at 320.

\[116\] Id. at 321.

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enforcing agency is entitled to great deference."\textsuperscript{118} Furthermore, the Court did include in a footnote\textsuperscript{119} language from the guidelines requiring "hard" data in demonstration of the correlation between the tests used and the particular employment task. Therefore, in weighing arguments as to whether the Court accepts the guidelines entirely or whether it leaves open the possibility of proving job relatedness by a procedure unacceptable under the guidelines, the former argument would seem to be the more weighty.\textsuperscript{120}

In summary, some courts recently have held that the use of some ability tests may result in racial discrimination which is prohibited under Title VII. In order to determine the job relatedness of the ability tests in question, it appears that these courts have largely adopted the stringent guidelines published by the EEOC. Some have suggested that these decisions may eventually lead employers to the complete abandonment of ability tests.\textsuperscript{121} Regardless of such potential effects, it is clear that courts today are taking a long hard look at the use of any ability tests to determine job qualifications.

B. Seniority Systems

Seniority rules are the basis of another significant group of Title VII cases. Seniority systems which are based solely on the number of years a given employee has performed a certain job serve useful functions in today's business world\textsuperscript{122} and would appear to allow an employer to make decisions pertaining to job advancement without reference to race. However, severe problems have

\textsuperscript{118} Id. at 433-34.
\textsuperscript{119} Id. at 433 n.9.
\textsuperscript{120} One author has written:

One major consequence of Griggs v. Duke Power Co. . . . is to endow the EEOC with the important function of issuing guidelines which, if within the parameters marked by legislative intent, will be held to have the force of congressional enactment.

\textsuperscript{121} See Blumrosen, supra note 75, at 388. Case Notes, supra note 7, at 193.

\textsuperscript{122} The seniority system . . . continues to perform at least four important functions. First, by eliminating the opportunity for discrimination, a seniority system helps to counteract any antiunion bias that is not eliminated by federal legislation. Secondly, the protection provided by a seniority system is part of the quid pro quo for employee loyalty. Thirdly, although the turnover of younger workers may be increased, a seniority system usually reduces the overall rate of employee turnover, builds morale, and reduces the number of grievances. Fourthly, a seniority system protects older workers from the job instability and economic insecurity that accompanies rapid technological change.

arisen with seniority systems which have been found to lock Blacks into less desirable job positions imposed on them as a result of past racial discrimination.

The difficulty arising with seniority rules relates to how lines of progression should be merged when plants previously engaged in formal racial segregation attempt to comply with Title VII. The general pattern is that the best departments or jobs were reserved to Whites. When formal segregation ceased, the separate White and Black progression lines were usually merged, allowing Black employees to transfer into the entry level jobs in formerly "White-only" departments. Although as a result of the mergers Blacks were in the same departments or lines of progression as Whites, or were entitled to enter them, they often found themselves in positions inferior to those occupied by Whites having fewer years of plant seniority.\(^{123}\)

Title VII in Subsection 703(h) speaks to seniority systems in the following manner:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system... provided that such differences are not the result of an intention to discriminate because of race... .\(^{124}\)

The legislative history of this provision is quite sparse and consists mainly of examples of what the Congress did not desire to be a part of Title VII. When the Mansfield-Dirksen amendment (now the seniority clause of Subsection 703(h)) was introduced, Senator Humphrey, who had worked on the amendment, stated that it served merely to clarify congressional intent and that the "provision makes clear that it is only discrimination on account of race... that is forbidden by the title."\(^{125}\)

The three foremost cases in this area, *Quarles v. Phillip Morris, Inc.*, \(^{126}\) *Local 189, Papermakers v. United States*,\(^{127}\) and *United States v. H. K. Porter Co.*\(^{128}\) were decided on generally similar factual situations. In these three cases, after racially segregated lines of job progression were abandoned and the lines of progression merged, Blacks found themselves lower in priority

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\(^{123}\) Id. at 695-98.


\(^{125}\) 110 CONG. REC. 12723 (1964).


classifications for promotion rights and job security than Whites who had fewer years of plant seniority. This occurred since promotion and job security were based upon departmental or job seniority and in this regard only the time spent by Blacks in newly available, previously White jobs was considered.

In Quarles and in Local 189, Papermakers, the courts held that as to Black employees hired during the time of dual progression lines, applications of the present systems were unlawful in that they perpetuated the discriminatory effects of the companies’ prior discriminatory hiring policies and were without any justification in business necessity. The courts also held that in order for a seniority system to be a bona fide one so as to be protected by Subsection 703(h) of Title VIII, it must not without business necessity carry forward the effects of prior discrimination. By way of remedy, both courts adopted the “rightful place” doctrine which in effect based the future awarding of jobs on plant, not departmental, seniority. Under this plan incumbent Whites would not lose their current jobs to incumbent Blacks with more plant seniority, but the result would decrease the promotional advantage previously accorded incumbent Whites by virtue of their departmental seniority. In response to an argument that this was discrimination against the incumbent Whites, Judge Butzner in Quarles stated:

The departmental seniority rights of white employees... are not vested, indefeasible rights. They are expectancies derived from the collective bargaining agreements, and are subject to modification.

In Porter, the court held the seniority system at issue did not violate Title VII. However, the court stated it did not reject Quarles or the district court’s decision in Local 189, Papermakers, but that Porter was distinguishable on its facts. The court’s efforts at distinguishing these cases appears unsatisfactory, though, since the major points of difference to which the court referred seem irrelevant to the core issue, i.e., whether or not present reliance on departmental seniority from previously White lines of progression constitutes unlawful racial discrimination.

129 279 F. Supp. at 510-19 and 416 F.2d at 987-95.
130 279 F.2d at 520-21 and 416 F.2d at 988-92.
131 279 F. Supp. at 520.
132 296 F. Supp. at 56.
133 Id. at 63.
134 These differences were that Blacks had the opportunity over six years to move up to or to transfer to previously White jobs (although their plant seniority would then become irrelevant and they would have the status of new workers for promotion purposes) and that many Black workers failed to move into these positions. Id. at 63–64.
Evidently the court justified its position on this issue by relying on the prospective nature of Title VII. However, by dismissing the issue in this manner, the court ignored the fact that the seniority system's carry-forward without business necessity of the effects of prior discrimination is in itself a present discrimination which is remediable by Title VII. The Supreme Court's later decision in Griggs in effect affirmed the position taken in Quarles and Local 189, Papermakers and rejected the position taken in Porter, since it held Title VII applicable to discrimination resulting from the use of facially neutral rules which carry forward the effects of prior discrimination and which are not shown to be sheltered by the business necessity justification.\footnote{See notes 43-46 and accompanying text supra.}

Apparent in Quarles and Local 189, Papermakers is the fact that in order to evaluate effectively a seniority system which is ostensibly neutral, its implications must be thoroughly examined, and the availability of alternatives with a less devastating effect must be considered. An essential part of this process is an investigation of the presence of underlying business necessity if it is alleged by the employer. In both Quarles and Local 189, Papermakers, the courts recognized that in certain departmental seniority rules there is the basic and valid business justification that employees must acquire certain skills and qualifications before progressing to certain other jobs. In order to honor this necessity, the courts explicitly stated that the rightful place doctrine did not require that Black employees without adequate skills or qualifications be moved to jobs which they could not properly fill.\footnote{279 F. Supp. at 520-21 and 416 F.2d at 988.} However, they were to be allowed to fill these jobs based on their plant seniority if they already had sufficient qualifications or when, after having been provided the opportunity, they had acquired the requisite skills. In this manner, safety and efficiency in running the business would not be jeopardized, and the right of the Black workers not to be objects of racial discrimination would also be protected.

In light of such precedent, the February, 1972, court of appeals decision in United States v. St. Louis-San Francisco Ry.\footnote{4 F.E.P. Cases 397 (8th Cir. 1972).} appeared to be contrary to a developing trend. The requested remedy, an order allowing reclassification of Black train porters as brakemen without the loss of their accumulated seniority, was denied under the business necessity doctrine. The court found unquestionable prior discrimination\footnote{Until 1949 an agreement existed between the company and the union to employ} but held that because of the
differences in function and complexity between the two positions, the seniority lines could not be merged as requested since it was essential to safety and efficiency that experience be obtained at the various levels of progression.\textsuperscript{139}

In March, 1972, the Court of Appeals for the Eighth Circuit granted the United States' petition for rehearing en banc.\textsuperscript{140} Judge Ross, who had dissented from the original decision, wrote the majority opinion on rehearing en banc.\textsuperscript{141} He reasoned that since the district courts have discretion to tailor remedies to obtain compliance with Title VII, the needs of both sides could be met by an application of the rightful place doctrine similar to its application in \textit{Quarles} and \textit{Local 189, Papermakers}.\textsuperscript{142} The court reversed and remanded and provided the district court with guidelines for fashioning a remedy.\textsuperscript{143}

The guidelines as framed supported the fact that the majority of the former porters had performed brakeman functions in addition to their other duties as porters and therefore had experience. They also reflected the fact that porters who had switched over to brakemen, albeit without their seniority, had been given neither special training nor student runs and had been allowed to begin their braking duties immediately after they had passed a physical examination. The company admitted that these men performed satisfactorily.\textsuperscript{144} This set of facts led the court to the conclusion that a complete loss of seniority was not a business necessity.

\textbf{C. Recruitment Practices}

A leading author has argued that Subsection 703(a) of Title

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\textsuperscript{139} The court held:

Not only is there a functional difference between the crafts of train porters and brakemen, but Frisco's seniority system is based on a recognition that a brakeman's job is complex and hazardous, requiring related experience in safety and repair work at the various levels of job progression. Reclassification with carry-over seniority, under these circumstances, could occur only at the expense of safety and efficiency.

\textsuperscript{140} 4 F.E.P. Cases 528 (8th Cir. 1972).

\textsuperscript{141} 4 F.E.P. Cases 853 (8th Cir. 1972).

\textsuperscript{142} Id. at 859.

\textsuperscript{143} These guidelines stated \textit{inter alia} that the company must offer brakeman jobs to all the former porters; no other new brakemen were to be hired until all former porters had been offered positions as brakemen; the company must implement a training program; former porters successfully completing the training program may earn seniority credit for 100 percent of the time spent in training and retain 50 percent of their porter seniority. \textit{Id.} at 859-860.

\textsuperscript{144} Id. at 858.
VII imposes a duty of fair recruitment upon employers. Regarding the section defining equal employment opportunity in a draft of Title VII, the Senate Committee on Labor and Public Welfare stated: "The bill defines equal employment opportunity in broad terms to include a wide range of incidents and facilities, and encompasses all aspects of discrimination because of race..." Since the definitional portion of Title VII is not significantly different from the draft interpreted by the Committee, the Committee interpretation can arguably be taken as substantiating the proposition that there is a duty of fair recruitment.

The case law also supports this position. Courts have held that some recruitment practices, though neutral on their face, had impermissible discriminatory effects and that these practices were not justifiable on the grounds of business necessity. For example, in United States v. IBEW Local 38, the union effectively controlled allocation of available jobs through its hiring hall and referral system. The union would fill jobs first with eligible journeymen who were members of the local and then would refer other persons. The district court had found that the two methods of becoming a journeyman electrician, i.e., completion of the union’s apprenticeship program and passing the union’s journeyman examination, had been closed to Blacks. Consequently, Blacks were effectively barred from employment in the trade regardless of their qualifications. The court found that in spite of the fact that the union had formally relaxed its ban on Blacks, one year prior to the filing of the complaint of 3,487 persons referred out by the hiring hall only two were Black. As of the filing of the complaint, only two of 1,318 union members were Black, and of 255 apprentices only three were Black. It was also found that the union contract covered 75 percent of all the electrical

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145 144 See Blumrosen, supra note 19, at 472–76. Blumrosen supports his position using a two-part analysis based on the language found in §§ 703(a)(1) and (a)(2). He first argues that an employer wishing to perpetuate an all White work force might be tempted to use recruitment methods which fail to give Blacks notice of available employment. According to Blumrosen, it is this situation, not legislative redundancy, which prompted the inclusion in § 703(a)(1) of the word "fail" as well as the word "refuse" in reference to hiring.
146 Secondly Blumrosen argues that when an employer uses recruitment practices which perpetuate the employer's past discriminatory practices, he is in effect perpetuating segregation by depriving Blacks of employment opportunities. Blumrosen argues such uses should constitute "segregation" under § 703(a)(2).
148 Blumrosen, supra note 19, at 473.
150 428 F.2d at 146–48.
151 Id. at 151.
152 Id.
construction work done in Cleveland, Ohio. In light of these facts, the court of appeals held the union in violation of Title VII because of the use of practices which perpetuated the effects of prior racial discrimination. In arriving at this decision the court mentioned the fact that the district court had refused to order the union to give notice to the Black community that it had ended its recognized discriminatory practices. Apparently the appellate court would have approved such an order as one form of affirmative action to overcome the effects of the union's discriminatory recruitment practices.

A nepotistic recruiting system was struck down as a Title VII violation in *Local 53, Asbestos Workers v. Vogler.* The system precluded Black membership in the union by restricting membership to those who had obtained written recommendations from three union members, had obtained the approval of a majority of the union members, and also had four years improver or helper experience. Even if a Black person could comply with the first two requirements, he could not comply with the third, since improver membership was restricted to sons of members or close relatives who resided in a member's household. The court of appeals affirmed the district court's order which directed the union to develop objective criteria for union membership. The court also stated that while the nepotism requirement was at least partially based on aims other than racial discrimination and although it was applied evenhandedly to both Blacks and Whites, it was not justified by any business necessity. Therefore, since the union was all White, the nepotistic rule served to preclude permanently any Black membership.

A very strong statement regarding recruitment was made by the district court in *United States v. Ironworkers Local 86.* In this action the United States sought to enjoin several unions and apprenticeship committees from engaging in racial discrimination with reference to union membership requirements, work referral opportunities, and apprenticeship training programs. The court, after examining individually the activities of each defendant, noted that where union membership was virtually all White, the union had the affirmative duty to disseminate complete and accu-

153 Id.
154 Id.
155 Id. at 150.
157 Id. at 1054–55.
rate information regarding job openings and membership requirements to Blacks.\textsuperscript{159} Furthermore, the court held that the defendant must not only refrain from future discrimination but must also undertake "whatever affirmative action may be necessary to assure those discriminated against the full enjoyment of their right to equal employment opportunities."\textsuperscript{160}

Although all three of these cases generally support the fair recruitment principle, \textit{Ironworkers Local 86} goes furthest in establishing fair recruitment as an affirmative duty under Title VII. The approach in that case has gained recent support. In \textit{United States v. Central Motor Lines, Inc.},\textsuperscript{161} the court imposed the requirement that if a company has had all White jobs in the past, "it is unlawful for it to limit notice of future opportunities in such classifications to word-of-mouth recruitment."\textsuperscript{162} The court held that Title VII also imposed a duty on the defendants to "undertake affirmative action to vitiate effects of a discriminatory reputation in the Black community."\textsuperscript{163} The EEOC has also adopted the view that there is an affirmative duty of fair recruitment under Title VII.\textsuperscript{164}

Fair job recruitment is a crucial first step in insuring racial equality. As a result, the courts have demonstrated that apparently neutral recruitment practices which preserve past discrimination are subject to Title VII attack. Furthermore, the courts are

\begin{itemize}
\item \textsuperscript{159} 315 F. Supp. at 1235-36. The following conclusions of law found in the court's opinion are instructive:
\item 3. Where union membership is virtually all white, it is unlawful for a union and its apprenticeship committee to limit information with regard to membership, work referral opportunities, and apprenticeship training to union members and other whites.
\item 4. It is unlawful for a union and its apprenticeship committee to give false, misleading or incomplete information to blacks because of their race, or to fail or refuse to inform them of the procedures for application for membership, referral or apprenticeship training.
\item 6. It is unlawful for a union or apprenticeship committee actively to attempt to recruit whites while making no effort to recruit blacks.
\item 10. In proving a pattern or practice of racial discrimination, evidence of the discriminatory reputation of a union and its joint apprenticeship program is relevant and admissible. Such evidence is admissible to show how and why blacks may have been discouraged from applying for membership, referral or apprenticeship, and how and why some of those who did apply may have been discouraged from pursuing their applications vigorously. It is also admissible because it has a direct bearing on the nature and extent of the appropriate relief to which the Government is entitled.
\end{itemize}

\textit{Id.} at 1236-37.

\textsuperscript{160} \textit{Id.} at 1236-37.

\textsuperscript{161} 338 F. Supp. 532 (W.D.N.C. 1971).

\textsuperscript{162} \textit{Id.} at 558.

\textsuperscript{163} \textit{Id.} at 559.

\textsuperscript{164} EEOC Dec. No. 72-0703, 4 F.E.P. Cases 435, 437 (1971).
beginning to indicate that recruitment practices which do not promote a policy of affirmative recruitment to overcome past discriminatory practices are not sufficient to withstand the sanctions of Title VII.

IV. EMPLOYER RULES PRESERVING SOCIETAL RACIAL DISCRIMINATION

The preceding discussion has revolved around situations in which, for the most part, facially neutral rules or practices have been found to carry forward the effects of prior discrimination engaged in by an employer or a union. The criteria to be discussed in this section differ from those previously discussed in that their use has been declared unlawful under Title VII absent any evidence of prior discrimination by the particular employer. The prior discrimination involved with these rules is chargeable to society at large although this finding is not the paramount rationale upon which the use of these criteria has been declared unlawful. Rather, the criteria, although neutral in form, are illegitimate because they preserve or augment the effects of racial discrimination.

A. Arrest Records

It has been noted that the use of arrest records by employers may conflict with Title VII since the use of such records may have a discriminatory impact on racial minorities. An example of this conflict is Gregory v. Litton Systems, Inc. In Gregory the company followed a policy of not hiring persons, regardless of race, who had suffered arrest on "a number of occasions." In order to effectuate this policy, once a job offer was extended and accepted, but before the prospective employee began his duties, he was required to provide the company with a


166 See also Steele, A Suggested Legislative Device for Dealing with Abuses of Criminal Records, 6 U. MICH. J.L. REF. 32, 39-42 (1972).

167 316 F. Supp. at 402.
list of all his arrests for other than minor traffic violations. In the instant case, plaintiff, a Black person, was successful in the pre-employment process until the company received his arrest list which contained fourteen arrests, none of which had ended in conviction and thirteen of which had occurred more than ten years previously. The company then withdrew its employment offer, and the plaintiff filed suit.

The court held that even though the company's policy apparently had been administered fairly to both Blacks and Whites, it was unlawful under Title VII. The court based this finding on the grounds that because Blacks, in proportion to their numbers, are arrested significantly more frequently than Whites, a policy of not hiring persons if they have been arrested once or more "discriminates in fact" against Black applicants. The court added that the presence or absence of an arrest record without any convictions was "irrelevant to...suitability or qualification for employment," that there was no evidence correlating this information with inefficiency or dishonesty in job performance, and that there was no business necessity justification shown which would override the discriminatory effects. As a remedy, the court enjoined not only the company's obtaining this information from the applicant, but also its seeking or attempting to obtain the information from other sources. The court awarded plaintiff money damages in the amount of the difference between the amount he earned from the date of withdrawal of the offer and the amount he would have earned during that period had he been hired.

The EEOC has also followed this approach. It held there was reasonable cause to find a Title VII violation where an employer dismissed a Black employee who had failed to supply a complete list of his arrests which had not ended in convictions. Citing Gregory, the Commission stated that because of the disproportionate number of Blacks arrested, Blacks comprise "a vastly disproportionate percentage of persons dissuaded from making application with respondent, because of the chilling effect of respondent's arrest record inquiry." The Commission further stated that since it was unlawful for the company to request arrest record information, it was likewise unlawful for the company to dismiss an employee for his failure to supply such information.

\[^{168}\text{Id. at } 403.\]
\[^{169}\text{Id.}\]
\[^{170}\text{Id.}\]
\[^{171}\text{Id. at } 404.\]
\[^{172}\text{EEOC Dec. No. 71-2089, } 4\text{ F.E.P. Cases } 148\text{ (1971).}\]
\[^{173}\text{Id. at } 149\text{ (footnote omitted).}\]
\[^{174}\text{Id. at } 149-50.\]
In response to the employer's allegation that he also had other reasons for dismissing the charging party, the Commission replied:

It is now well settled that, where an employer has mixed motives for discharging an employee, and any one of those reasons is unlawful, the nondiscriminatory nature of the other motives does not preclude a finding of reasonable cause to believe that the employer has engaged in an unlawful employment practice within the meaning of Title VII of the Act.\textsuperscript{175}

\textit{B. Garnishments}

The recent \textit{Johnson} case\textsuperscript{176} struck down an employer's rule providing for the termination of employment of persons who had suffered several garnishments.\textsuperscript{177} The \textit{Johnson} court based its opinion to a large degree on its reading of the Supreme Court's holdings in \textit{Griggs}.\textsuperscript{178} Although the conclusion reached in \textit{Johnson} may be a desirable one, the court's reliance upon \textit{Griggs} as explicitly mandating this result is questionable.

The \textit{Johnson} court stated that although \textit{Griggs} dealt with a factual situation in which the neutral criteria used by the company had the effect of carrying forward the effects of pre-Title VII discriminatory practices, this was not a controlling factor in the Supreme Court's decision.\textsuperscript{179} The evidence which the court used in support of its conclusion is not persuasive. The court stated that the prior discrimination referred to in \textit{Griggs} was the inferior education of Blacks and since this was the result of both present as well as past discrimination in education, the distinction between past and present discrimination was rendered immaterial by \textit{Griggs}.\textsuperscript{180} The basic fault with the court's argument is the fact that the prior discrimination referred to in the \textit{Griggs} decision was that of the company, \textit{i.e.}, the fact that the jobs in question had previously been open only to White employees pursuant to the company's practice of preferring Whites over Blacks. The Court cited the inferior educational opportunities available to Blacks only as evidence of why the company's criteria had such a differential impact on Blacks, not as the gravamen of the Title VII violation found. The violation in \textit{Griggs} was the use of ostensibly

\textsuperscript{175} Id. at 150 n.6.
\textsuperscript{176} Id. at 494-97.
\textsuperscript{177} Id. at 493-97.
\textsuperscript{178} Id. at 494.
\textsuperscript{179} Id. at 494.
\textsuperscript{180} Id. at 490.
neutral criteria which were not based on business necessity and which had the consequence of continuing the company's prior discriminatory policies by operating to "'freeze' the status quo of prior discriminatory employment practices." 181

The court in Johnson should have instead relied upon the holding in Gregory which was based on implications which were drawn from the Griggs decision and the purposes underlying Title VII, rather than relying as it did on a literal application of the Griggs opinion itself. The Johnson court could have fashioned a stronger opinion by arguing that since a major purpose of Title VII is to remedy racial discrimination in employment which is the result of the use of criteria which are irrelevant to job performance, the use of such criteria can no longer be tolerated. When use of these irrelevant criteria has the actual consequence or the foreseeable consequence 182 of denying Blacks equal employment opportunities, use of these criteria as the basis of an employment decision may be viewed as the functional equivalent of the use of race as the basis of that decision. 183

It must be emphasized in dealing with this type of facially neutral criteria that there is no need to demonstrate that the employer has any intent to discriminate on a racial basis 184 or has in fact discriminated in the past. The crucial factor is that if there is no business necessity for a practice which discriminates against Blacks, there is no legitimate reason for allowing continued use of the practice. 185

V. EFFECTS OF THE NEW LAW

The 1972 amendments to Title VII 186 attempt to clear up some of the interpretative problems which have hindered the effectiveness of Title VII. The amendments also appear to codify some of the interpretations of Title VII found in case law. 187

The additions to Subsections 703(a)(2) and 703(c)(2) make it unlawful under Title VII for employers and unions to discriminate

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181 401 U.S. at 430 (1971).
182 The EEOC has recently used the foreseeable effects test in EEOC Dec. No. 72-0427, 4 F.E.P. Cases 304 (1971) (credit ratings and arrest records) and in EEOC Dec. No. 72-0996, 4 F.E.P. Cases 480 (1972) (arrest records).
183 See notes 41-47 and accompanying text supra.
184 Indeed there is no necessity for this implication in dealing with any facially neutral criterion. See notes 9-26 and accompanying text supra.
186 See note 6 and accompanying text supra.
against applicants for employment or for membership in a union on the basis of race, color, religion, or national origin. Consequently, the Title has come several steps closer to a codification of the duty of fair recruitment. Also, by way of incorporation of the Vogler decision, Congress apparently has adopted the position that union membership requirements which carry forward the present effects of past discrimination are unlawful.

The conference report on the amended Subsection 706(g) apparently affirms the results in Gregory and Johnson. The report, in dealing with the scope of relief under that subsection, states that it “also requires that persons aggrieved by the consequences and effects” of unlawful discrimination be put to the greatest possible degree in the position they would have had but for the unlawful discrimination. Since there is no mention that effects here refer only to the present effects of past discrimination, it is not unreasonable to assume that it is the congressional intention to allow affirmative action to remedy all racially discriminatory consequences not grounded in business necessity.

It is important to note that the Equal Employment Opportunity Act of 1972 was passed after Griggs and after many other crucial decisions had been handed down by the courts. The Congress could have easily limited the developing doctrine by restricting the terms of the statute. Instead of narrowing Title VII, however, the Congress openly adopted the developing case law and tried to make Title VII more amenable to the new doctrine. Thus, although the new law does not greatly change the language of the 1964 Civil Rights Act, it has indeed altered the 1964 Act by incorporating the expanding court doctrines.

VI. Conclusion

The interpretation given the “intentionally engaged in” language...
guage of Subsection 706(g) by the Supreme Court in *Griggs* and by subsequent courts clearly indicates a finding of some subjective purpose to discriminate is not required. A practice that is discriminatory cannot be saved from being struck down because the employer or union demonstrated no intention to discriminate or even instituted the practice in good faith. In making a finding of discrimination, the essential factor for investigation is not the employer's or union's motivation for choosing the criterion but the resulting or foreseeable effects of the choice.

Title VII clearly extends remedies to practices which are overtly discriminatory. However, it also apparently allows remedies for practices which, though fair in form, are discriminatory in effect when these practices are not justified by business necessity. The majority of cases in this latter category has dealt with facially neutral practices which carry forward the effects of prior discriminatory practices. Recently, however, situations in which facially neutral criteria have been found to have racially discriminatory effects and no basis in business necessity have been held violative of Title VII without any showing of prior discrimination. The interpretation of Subsection 706(g) as amended by the Equal Employment Opportunity Act of 1972 gives support to such holdings. To paraphrase the Supreme Court in *Griggs*, it seems clear that Title VII will not tolerate practices (be they neutral on their face, neutral in terms of underlying intent, or neutral in their application) if the result of such practices is to bring about either a consequence, an effect, or an impact upon the protected class that will operate as "built-in headwinds" against the congressionally mandated goal of equal employment opportunity.

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