EMPLOYMENT DISCRIMINATION:
The Burden Is On Business

Griggs v. Duke Power Co.¹

Congress expressly proscribed the use of all racially discriminatory employment criteria in an attempt to afford equal opportunity to all people when it adopted Title VII of the Civil Rights Act of 1964.² Nevertheless, seven years later, a far greater proportion of blacks remain unemployed than whites.³ While other factors help to maintain high rates of unemployment among blacks, lingering racial discrimination is clearly also at fault. The blanket prohibition of all forms of overt discrimination merely forced the substitution of subtler devices that, though neutral in appearance, achieved the same result. Employers, in attempting to comply with the legislative mandate while maintaining basically white work forces, instituted "objective" qualifications such as scores on standardized tests and minimal educational levels. Their assumption was that these criteria, by providing a quantitative measurement of ability, would avoid the appearance of personal prejudice inherent in the more conventional techniques used by hiring personnel. Blacks claimed, however, that such tests introduced their own elements of racial bias.⁴ This bias stemmed from a long history of racial segregation and separatism in the United States that prevented minority groups from obtaining the same education, cultural stimulants, and test-taking skills that have been available to others.⁵

The problem confronting Congress and the courts was how to neutralize the employer's discretion racially without interfering with his valid institutional interests. Congress attempted to reconcile these

   It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to 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 (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.
4. See Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 COLUM. L. REV. 691 (1968) [hereinafter cited as Legal Implications]. The inadequacies of such tests have been examined by other writers and will not be treated in any detail here. See E. Ghiessi, The Validity of Occupational Aptitude Tests (1961); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); Cooper & Sobel, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969).
5. Any standard affected by these discriminatory patterns will have an adverse impact on job opportunities for blacks. This is especially true of employment testing in which the "crucial 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." Cooper & Sobel, supra note 4, at 1639. Testing, then, rests on an "equal exposure" assumption which is clearly fallacious in comparing blacks and whites. Id.
interests in the act by allowing employers to utilize “bona fide occupational qualification[s]”\textsuperscript{6} or “professionally developed ability test[s]”\textsuperscript{7} to screen prospective employees. Neither phrase explained whether a company was to be limited to those qualifications and tests that measured skills and abilities for a specific job, or whether more general traits were measurable; nor did they place the burden of proving compliance or non-compliance or indicate the nature and quantum of proof required. The primary question raised was whether there could be a genuine business purpose in setting requirements that were not ultimately tied to the performance of a given job or set of jobs. The Equal Employment Opportunity Commission, in its Guidelines for Employee Selection Procedures,\textsuperscript{8} suggested that there could not be such a purpose, and that only a job-related criterion would permit the use of qualifications or tests that could be shown to discriminate racially.\textsuperscript{9} However, the EEOC has been endowed with interpretive rather than legislative powers, so that its determinations achieve the force of law only when judicially enforced.\textsuperscript{10} The profusion of litigation over the above statutory language, the sharp divergence of the determinations produced, and the overall failure of the Act to end racial discrimination in employment clearly evidenced the need for a conclusive judicial evaluation of the scope of an employer’s discretion.

The Supreme Court, in \textit{Griggs v. Duke Power Co.},\textsuperscript{11} was called on to decide whether an employment policy which required an applicant either to have completed high school or passed a standardized intelligence test violated Title VII of the Civil Rights Act when neither standard was shown to be related to successful job performance, both standards operated to exclude a disproportionate number of Negroes, and the jobs in question had previously been filled only by whites. In this case, several black employees of the Duke Power Company\textsuperscript{12} ...
stituted a class action in which they sought to have the use of the testing and educational standards enjoined. Duke Power, prior to the Act, had followed a policy of overt discrimination by confining those blacks hired to the labor department, in which the highest paying jobs paid less than the lowest paying jobs in the four departments in which only whites were employed. In 1955, management adopted a new policy in which both hiring of personnel in all departments but labor and interdepartmental transfers between other departments were conditioned upon the employee's having the equivalent of a high school education. In 1965, the company established an alternative policy whereby those without high school educations could obtain interdepartmental transfers by passing two general intelligence tests.

The plaintiffs put forth two main contentions. The first was that the testing and high school requirements perpetuated the effects of Duke Power's previous practice of overt discrimination. The reasoning behind this allegation was that since white employees without a high school education had been employed directly into the more desirable jobs prior to the institution of educational restrictions, they could now move freely into more lucrative jobs, while blacks, formerly hired into only the labor department, were forced to meet the new requirements to obtain any improvement in job position. Second, plaintiffs asserted that the requirements were invalid under Title VII because they were not based on any showing that they were job-related, as required by the EEOC Guidelines.

The district court held that because the 1964 Civil Rights Act did not offer any relief from past discriminatory acts, the results of past discrimination would not be disturbed as long as present practices were not discriminatory. The court of appeals, however, reversed the district court on this point, holding that the six plaintiffs hired prior to the adoption of the educational requirements should not be subject to the educational or testing requirements. Both courts denied

13. Duke Power's work force was divided into five departments. There were three "inside" departments, operations, maintenance, and testing, all having comparable wage rates. Of the two "outside" departments, labor was an unskilled department into which blacks were hired, and coal handling, into which blacks had not been allowed, was a step above labor having wage rates comparable to the inside departments. Id. at 427.

In August, 1966, a Negro was first assigned to a department other than labor. The employee, a high school graduate with thirteen years at Duke Power, was promoted to coal handling five months after charges were filed with the EEOC. Id. n.2.

14. Those tests, added at the request of the coal handling department, were the Wonderlic Test and the Bennett Mechanical Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. Id. at 428. For a discussion of these two tests, see Cooper & Sobel, supra note 4, at 1641-42.

15. Present white non-graduate applicants must meet the Company's new standards. Plaintiffs do not assert that these individuals are hired on a different basis than are Negroes. Their argument, rather, is that black employees are "frozen" out of better jobs. See note 24 infra.


relief to those plaintiffs hired after the requirements were adopted on the ground that they were given the same consideration as every new white employee. Furthermore, both courts held that the requirements did not have to be job-related, a decision in direct contradiction to the Equal Employment Opportunity Commission's Guidelines. Instead, a showing of "genuine business purpose," in the absence of intent to discriminate, would justify the utilization of unrelated tests to determine employment qualifications. The questions then, as presented to the Supreme Court, were whether the educational and testing requirements were in fact discriminatory; whether a court in considering a charge of present discrimination must consider the company's past pattern of giving preference to whites; and whether a showing of general business convenience rather than a job-related need for the requirements satisfied the standards imposed by Title VII on employers.

The Court's response was written by Chief Justice Burger:

[T]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. 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.

While the Chief Justice's language seems emphatic, it did not answer all of the questions that could be raised by those determined to avoid the broadest possible reading of Title VII. Nor did the decision resolve the question of the consideration to be given other guidelines promulgated by the EEOC.

I. Present Effects Of Past Discrimination

One of the troublesome problems faced by the federal courts in construing Title VII has been whether the Act was intended to have prospective application only. The facts in Griggs indicated that those incumbent black employees hired prior to the adoption of the educa-

18. The EEOC, in the Guidelines on Employment Testing Procedures, stated that the term "professionally developed ability test" meant a test which "measures the knowledge or skills required by the particular job." Griggs v. Duke Power Co., 401 U.S. 424, 433 n.9 (1971).

19. 420 F.2d at 1235 n.8. Duke Power's business purpose is the desire to train its own employees for supervisory positions, and to upgrade the intelligence level of its employees so that progression upward through the Company could be accomplished. Id. at 1231.

20. Lack of intent was predicated upon three facts: (1) The educational requirements had been instituted nine years prior to the passage of the Civil Rights Act; (2) whites as well as blacks were adversely affected; and (3) Duke paid the major portion of employee expenses for those desiring education. Id. at 1232-33.

21. In his court of appeals dissent, Judge Sobeloff, responding to the plaintiffs' allegation that centuries of discrimination have placed blacks at a disadvantage in competing with whites for jobs requiring testing or educational minimums causing a denial of jobs they have the ability to perform, included a challenge to the Supreme Court stating that "[o]n this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric." Id. at 1237-38.

22. 401 U.S. at 431.
tional and testing standards had been locked into the labor department by the new policies. The Company did not deny that fact but based its defense upon the proposition that the present consequences of past discrimination were outside the coverage of the Act. The Court in Griggs firmly resolved the invalidity of that contention, stating:

The objective of Congress in the enactment of Title VII . . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. 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.23

By holding that employment practices which perpetuate the effects of past discrimination fall within the Title VII prohibition, the Supreme Court adopted the rationale of several lower courts which had condemned the "freezing" effect produced by prior discriminatory policies.24 While the decision by no means rules out an employer's right to justify suspect standards in terms of his business needs, it makes it clear that by building a neutral superstructure upon discriminatory racial patterns erected in the past he may fall within the Title VII ban.

II. SHIFTING THE BURDEN OF PROOF

A. Intent: Plaintiff's Burden

In section 706(g) of Title VII,25 Congress provided that to be entitled to relief, a complainant must show that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice. But this language does not clearly establish whether a showing of discriminatory purpose is necessary, or whether it is enough to prove that the respondent meant to use a particular practice and that the practice resulted in discrimination.26 Consequently,

23. 401 U.S. at 429-30.
24. See, e.g., United States v. Local 189, United Papermakers, 282 F. Supp. 39 (E.D. La. 1968), aff'd, 416 F.2d 980 (5th Cir. 1969); Quares v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). In these cases, job seniority systems which had the effect of perpetuating past discrimination were struck down. Judge Butzner held in Quares, "that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." 279 F. Supp. at 516. See also Local 53, Int'l Ass'n of Heat & Frost I. & A. Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (union membership).
26. The latter view was adopted by the Fifth Circuit in Local 189, United Papermakers v. United States, 416 F.2d 960, 996-97 (5th Cir. 1969), where the defendants persisted in their conduct after its racial consequences had become evident.
the courts and commentators were divided on whether a subjective test of an employer’s intent or an objective standard of awareness of effective discrimination was needed. In *Griggs*, the court of appeals concluded that intent to discriminate was a necessary element of a cause of action under section 703(h) of the Act. Finding that at the time it adopted its diploma and test requirements Duke Power did not have the requisite intent to discriminate, and that it did not use those criteria with the conscious purpose to discriminate against blacks, the court dismissed the claim.

In overruling the Fourth Circuit, the Supreme Court explained that although the lower court did not err in determining that Duke Power did not intentionally discriminate, “good 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.” The Court further indicated that the specific language in section 703(h) permitting certain tests that are not “designed, intended, or used to discriminate” offered an alternative objective basis by which to find a violation, because “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” By applying this objective requirement to the area of employment discrimination, the Court was treating employment discrimination the same as other racial problem areas to which an objective standard had already been applied.

Several advantages can be gained by this effect-oriented approach. When the evidence demonstrates that the employment practices adversely affect a minority group, a finding of discrimination is supported without reference to the employer’s intentions. On the other hand, requiring a complainant to prove what was on the mind of an employer at the time he instituted a new practice would usually be an insuperable burden. For one thing, he must rely heavily on such external in-

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28. 420 F.2d at 1232.
29. Id.
30. 401 U.S. at 432.
31. Id. at 433.
32. Id. at 432.

34. See Affeldt, *supra* note 33, at 4–5. That author feels that [if] the courts . . . adopt the hostile motive test approach by insisting that the charging party must prove that the employer or union had the specific intent to discriminate against him because of race, etc., there is little hope that Title VII will add any dimension of freedom to our society. Such a private law definition of discrimination resting upon the fault or culpability of the respondent would make the Act virtually unenforceable. . . . Title VII is not a criminal statute designed to penalize respondents for entertaining bad thoughts about minority groups, but a regulatory statute aimed at controlling anti-social conduct.

*Id.*
dicator as statistics, which may not be sufficient to prove intent to discriminate.\textsuperscript{35} He would also be faced with the task of rebutting all of the employer's possible justifications. Furthermore, since the employer frequently has no discriminatory intent in using seemingly objective requirements, a subjective approach would be ineffective regardless of the onerousness of the results of his practices. Indeed, by following the narrow approach of the Fourth Circuit in \textit{Griggs}, the broad scope and purposes of Title VII\textsuperscript{36} as evidenced in section 703(a) would be negated.

At the same time, however, the Supreme Court's decision in \textit{Griggs} did not put to rest all the questions that have arisen with regard to the element of intent that a plaintiff must prove. It appears, in spite of the broad language used in many sections of the opinion, that the complainant must demonstrate that the employment standard in question does have a differential impact based on race; absent this effect, the employer's standard does not violate the Act.\textsuperscript{37} But the Court did not indicate exactly how substantial that impact must be.\textsuperscript{38} For example, one district court, in a case preceding \textit{Griggs}, held that the fact that five to ten percent more blacks might fail a test was no justification for imposing different standards.\textsuperscript{39} Another found that a difference of fifty-five percent in the passing rates of the two races would make the test illegal.\textsuperscript{40} The percentages in \textit{Griggs} fall between those two cases.\textsuperscript{41} Whether the Supreme Court in \textit{Griggs} was saying

\textsuperscript{36} Congressional intent is manifest in the following statement by the House Judiciary Committee in H.R. Rep. No. 914:
In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

Considerable progress has been made in eliminating discrimination in many areas because of local initiative either in the form of State laws and local ordinances or as the result of voluntary action. Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes evermore obvious.

It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve . . . . It would prohibit discrimination in employment . . . .

\textsuperscript{37} The Court initially stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 431 (emphasis added). The Court later went on to state that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." \textit{Id.} at 432. It appears that the Court would be unable to proscribe any standard which has not been shown to have a discriminatory effect.

\textsuperscript{38} The EEOC Guidelines are hinted at as one possible source for an answer. \textit{Id.} at 433-34.

\textsuperscript{41} The EEOC found in one case that use of a battery of tests, including the Wonderlic and Bennett Tests used by Duke Power Company in the instant case,
that both tests would be illegal as a matter of law, or whether it was merely stating that future cases will be decided on the percentages is unclear.\textsuperscript{42} The fact that the Court did not refer to any need to show \textit{substantiality} of the disparate effect might be an indication that \textit{any} showing of a differential effect by race will invalidate the criterion.

\textbf{B. Job-Relatedness: Defendant's Burden}

Disagreement over the right of an employer to give tests which might discriminate racially because of the unequal backgrounds of applicants arose prior to the adoption of Title VII. A hearing examiner for the Illinois Fair Employment Practices Committee held, in \textit{Myart v. Motorola},\textsuperscript{43} that all tests which had discriminatory effects were unlawful, even if the tests provided accurate measurements of the characteristics an employer wished to find in his employees. Congress examined the Illinois case and introduced section 703(h) to protect the employer's right to administer suitable employment tests; but the legislative history of the drafting of the section does not indicate whether the lawmakers intended to authorize all tests that were reliable indicators of whatever they sought to measure, or only those tests that measured ability to do a particular job. This ambiguity is evident both in the contradictory statements of Senator Tower who introduced the section,\textsuperscript{44} and in the contradictory readings of the legislative history by the Fourth Circuit and the Supreme Court.\textsuperscript{45}

As a result, two distinct interpretations of the phrase "professionally developed ability test" emerged. The first, adopted by the district court and the Fourth Circuit in \textit{Griggs}, would permit an employer to use any general intelligence test that has been prepared by a qualified tester. As the district court explained:

\begin{quote}
The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall
\end{quote}

resulted in fifty-eight percent of whites passing the tests, as compared with only six percent of blacks. With regard to the education requirement, 1960 census statistics for North Carolina show that, while thirty-four percent of white males had completed high school, only twelve percent of Negro males had done so. 401 U.S. 424, 430 n.6 (1971).

\textsuperscript{42} Even experts on testing have not reached any agreement on the minimal percentage of racial differential that is permissible. \textit{See}, \textit{e.g.}, Cooper \& Sobel, \textit{supra} note 4, at 1640-41, 1644, 1664-65; \textit{Legal Implications, supra} note 4, at 701-03.

\textsuperscript{43} The findings of the \textit{Myart} hearing are presented in full in 110 CONG. REC. 5662-64 (1964). In \textit{Myart}, a black job applicant contended that his rejection was due to the discriminatory effect of an intelligence test he was required to take.

\textsuperscript{44} He first stated that § 703(h) was to protect an employer's right to "give general ability and intelligence tests to determine the trainability of prospective employees." 110 CONG. REC. 13492 (1964). In elaborating, he explained that the new section would protect the employer's right to determine the "professional competence or ability or trainability or suitability of a person to do a job." \textit{Id.} (emphasis added).

mechanical comprehension of the average high school graduate, regardless of race . . . . The evidence establishes that the tests were professionally developed to perform this function and therefore are in compliance with the Act. 46

The EEOC rejected this interpretation and demanded that the test bear some relationship to the skills or abilities needed for the job in question. 47 The debate encompassed differing theories as to which party had the burden of proving compliance or non-compliance with the Act.

These questions were silenced by the Supreme Court's determination that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 48 What this means, concluded the Chief Justice, "is that any tests used must measure the person for the job and not the person in the abstract." 49 After Griggs, then, once the complainant has established the existence of discrimination under Title VII, the burden shifts and the employer must show that his standards are so appropriately related to the specific employment activity that they will enhance the successful operation of the business. In so holding, the Court adopted the burden of proof already applicable in cases involving discrimination in education 50 and voting . 51

III. SOME REMAINING QUESTIONS

The tasks lying ahead for the courts involve differentiating between those employment prerequisites that give a "reasonable measure of job performance" 52 and those that are inadequate measures or were implemented for purposes falling short of actual business necessity. The judiciary will also have to determine what constitutes a successful

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48. 401 U.S. at 432.

49. Id. at 436.

50. In education, a system of testing was ordered to be discontinued in Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967), where the tests given were not relevant measures of the children's abilities and the results generally led to blacks being placed in lower "tracks" which in turn gave them preparation only for lower positions in life.

51. The downfall of the literacy test had been speeded up by a decision in Gaston County v. United States, 395 U.S. 285 (1965), that to sustain such tests, the court must find a valid relation between the test and the results desired by using it. In Gaston County, the Supreme Court found that unequal educational opportunities for Negroes in North Carolina would alone be sufficient to cause suspension under the 1965 Voting Rights Act. 42 U.S.C. §§ 1971-74 (1970). In passing that Act, Congress had concluded that the relationship of testing to state interest in determining voter qualifications was at best tenuous; likewise, the Court has found that historically literacy tests do not accurately predict who would be the better voter. See also South Carolina v. Katzenbach, 383 U.S. 301 (1966).

52. 401 U.S. at 436.
defense to a complaint. It is already clear that future cases, in light of Griggs, will be replete with studies, statistics, and expert opinions on both sides in an effort to prove or disprove the ability of a company’s devices to predict job performance accurately. The decision in Griggs is of little help in defining its own limits since the facts there did not show that either the high school completion requirement or the general intelligence test bore any demonstrable relationship to successful performance of the jobs for which it was used, and did show that both were adopted without meaningful study of such a relationship.

A. The Quantum of Proof of Job-Relatedness

In United States v. Georgia Power Company, decided after Griggs, the District Court for the Northern District of Georgia, confronted with a similar fact situation but with detailed and extensive efforts to attack and defend the validity of the requirements in dispute, held that the testing procedures were lawful and the high school education requirement unlawful. The tests were found to satisfy the interpretation of section 703(h) in Griggs in that they were adopted after a meaningful study of their relationship to job performance which disclosed that they were correlated with the important elements of relevant work behavior and fairly measured the knowledge or skills required by the particular job or class of jobs. Other cases decided since Griggs have found insufficient validation of the tests used.

While it is clear that evidence of professional validation of employment tests is necessary in an attempt to comply with the EEOC's

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54. 401 U.S. at 431.
55. 3 BNA FEP Cas. 767 (N.D. Ga. 1971). In the early 1960's Georgia Power Company imposed requirements of a high school education and a predetermined score on certain aptitude tests upon all new employees and upon all incumbent employees assigned to the job classifications of laborer, janitor, porter, and maid seeking to transfer to jobs in a new line of progression. Id. at 773.
56. Concerning the degree, the court in Georgia Power noted that countless employees without diplomas mastered high school-type skills through self-study, adult education courses, and perseverance, and advanced to the highest technical levels in the company. Id. at 787.
minimum standards, the type or quantum of evidence needed is far from settled. The most accurate way to learn whether a person can do a job is to let him attempt it for a number of years and then assess his performance, but this can be a costly procedure to both the company and the unsuccessful individual. This test has not been required by any court. A three-fold test of validity was adopted in Chance v. Board of Examiners, where the court sought proof of content validity, predictive validity, and objective administration of the tests. The EEOC Guidelines require discussion of differential validity; that is, separate validity statistics for minority and non-minority groups. The question of how much and what type of validation of a test is required is not likely to be resolved until the Supreme Court speaks again.

B. The Limited Role of General Intelligence

A defense unsuccessfully asserted by Duke Power and by Georgia Power in the later case was the company's goal of upgrading the overall quality of its work force. On this ground, both companies sought to justify their requirements as indicative of general intelligence and trainability, even where such requirements were not actually necessary for the job being filled. The Supreme Court's response was that, in

58. 29 C.F.R. § 1607.4–5 (1971). “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 job or jobs for which candidates are being evaluated.” Id. § 1607.4(c).

59. Studies have shown that some tests have a negative value in predicting job success, and even the commonly used Wonderlic Intelligence Test was found to have no relation to job performance. See E. Ghiselli, supra note 4, at 46; Cooper & Sobel, supra note 4, at 1644; Legal Implications, supra note 4, at 696–706. The first definite analysis of how job testing might be accomplished after Griggs, a book entitled The Law and Personnel Testing, will soon be published by the American Management Association. See N.Y. Times, Sept. 19, 1971, § F, at 5, col. 2.

60. E. Ghiselli, supra note 4, at 7. Some other proposed improvements over the tests currently being employed are described by Stanley Klein in Job Testing Comes Under Fire, N.Y. Times, Sept. 19, 1971, § F, at 5, col. 1. Examples are “work-sampling,” performance tests, orally administered tests and “cultural-laden” tests, which test reactions to life experiences rather than schooling. Id. at cols. 4, 5.

61. 3 BNA FEP CAS. 672 (S.D.N.Y. 1971).

62. Content validity insures that as to subject matter the examination will elicit from the candidate information that is relevant to the job for which he is applying. The validity of an examination as a means of selecting candidates best suited for a position may also be verified empirically by comparing the examination scores of successful candidates with their later performance on the job. If there is a significant correlation between test scores and later performance, the examination has predictive validity. Id. at 682–83. For a detailed explanation of validation see L. Cronbach, supra note 53, at 123, 125–28, 429–34.

63. Such delays are not uncommon in the final interpretation of Supreme Court decisions. In the recent decision of Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971), the Court, seventeen years after its landmark decision in Brown v. Board of Educ., 347 U.S. 483 (1954), recognized the need to define Brown in more functional terms to aid lower courts in applying it: district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in Brown I, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error" .... 402 U.S. at 6.
the absence of evidence that the high school diploma and test score requirements were needed to maintain the company's standards in higher level jobs than those sought by the plaintiffs, such standards were not business necessities.  

The absence of a business necessity for general intelligence tests and educational requirements is shown more easily in the essentially manual jobs involved in *Griggs* and *Georgia Power* than in jobs demanding certain mental attainments as well. At the opposite end of the employment spectrum — doctors, lawyers, engineers, for example — common sense dictates that a high degree of knowledge is necessary for the job. More difficult decisions will arise with the large middle ground of office, sales, and technical jobs, for which general intelligence tests can measure a person's ability to think abstractly, facility with the English language, ability to perform mathematical calculations, willingness to assume responsibility, and acuity of insight. Whereas a typing test would clearly be related to the job of a typist, an employer might contend that intelligence above a certain level is equally important. There is presently no guide for a court attempting to decide what is a reasonable relationship between an arbitrary cutoff point on an intelligence test and performance of such a job. Moreover, it may also be reasonable for an employer to presume that clerical jobs will generally be performed best by those who have been exposed to certain experiences through high school or college education.

The sweep of *Griggs* is likely to affect tests other than those of "general intelligence." An example is seen in the standards for hiring teachers, where the essential qualities are not necessarily susceptible to written testing. One federal case has already rejected the use of certain test scores in hiring elementary and secondary school teachers, finding that a low ranking on the test does not mean that a teacher lacks the knowledge or skill requisite for effective classroom performance.

64. 401 U.S. at 432.

65. The more specific requirements for such professional jobs have also come under fire recently. See, e.g., Adkins, *What Doth the Board Require of Thee?* 28 Md. L. Rev. 103, 117 (1968), in which the author, then a member of the Maryland State Board of Bar Examiners, discusses the deficiencies of bar examinations in determining bar admissions. However, because bar examiners won't list the names of those who fail the bar examination, it is "virtually impossible to check the accuracy of charges that minority group applicants are having trouble" with the tests in various states or to ascertain whether any difficulties minority applicants may be having are related to factors cited in *Griggs*. Stevens, *Bar Examinations and Minority Group Applications*, 56 A.B.A.J. 969, 970 (1970).

66. See Colbert v. H-R Corp., 3 BNA FEP CAs. 602 (5th Cir. 1971).

67. The use of tests in this difficult middle ground of vocations has caused a controversy between the EEOC and the Civil Rights Division of the United States Department of Justice on the one hand, and the federal Civil Service Commission on the other. The rights agencies assert that the Federal Service Entrance Examination, required of all applicants for federal jobs paying $6,928 to $10,470 a year, could not be used by a private employer under Title VII. A study by the Urban Institute introduced in a federal district court suit seeking to enjoin the use of the tests, concludes that the test rejects a disproportionate number of blacks. N.Y. Times, Sept. 26, 1971, § 1, at 67, cols. 2-5.

67. Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971), in which the school district had established a policy under which teachers and applicants for teaching positions had either to meet certain cutoff points on the Graduate Record Examination or to possess a master's degree, the effect of
Another case has questioned whether there are examinations which validly predict the ability of candidates for supervisory positions since success in such jobs depends not only on one's specific knowledge of his field, but also on such intangible factors as leadership skill, sensitivity to others, and ability to organize, to articulate, to induce subordinates to follow directions, to initiate new programs, and to analyze administrative problems.68

Another important motive for a company's utilization of higher standards than are needed for the jobs being filled is to determine the promotability of the applicants. Although the Supreme Court in Griggs did not answer directly the question of whether an employer may take into account capability for future promotions, the same standard of business necessity can be said to apply,69 that is, promotability must be an essential trait in candidates for a certain job. According to the EEOC Guidelines, promotability may be considered only when the applicant's advancement to the next job is "nearly automatic" and not too far in the future.70 While this principle is also more easily applied in the case of the low level employees in Griggs71 than to applicants for office jobs, courts will have to distinguish between those situations in which eventual managerial or other abilities are merely business conveniences and those in which they are indispensable traits from the outset. One obvious reason for such a distinction is that the very qualities usually needed for promotions are often those learned and developed while on the job.72 The burden of presenting the determinative facts in each case will again be on the employer, who must include such information within his analysis of the jobs in question.

C. Criteria Other Than Tests

Another question is the extent to which the Griggs requirement that a test provide a "reasonable measure of job performance" can be applied to criteria other than testing. On this point the Supreme Court stated clearly that any requirement must have a manifest relationship to the employment in question.73 Traditionally, courts have been re-

which was to reduce the percentage of black teachers in the school system. The court found that the GRE was neither designed nor validated for use in the selection of elementary or secondary school teachers. 68. Chance v. Board of Examiners, 3 BNA FEP Cas. 672 (S.D.N.Y. 1971).

In this case, the evidence revealed that the examinations prepared and administered by the Board for the licensing of supervisory personnel, such as principals and assistant principals, discriminated substantially against black and Puerto Rican applicants. The court ruled that the Board failed to meet its burden of proving that the examinations were necessary to select supervisors possessing the skills and qualifications needed for the successful performance of their duties. The court noted that although the Board had sought to secure valid tests, and in fact its tests had been improved, it had not yet achieved truly job-related examination procedures.

69. Other writers have decided that because there was no direct answer to this question in Griggs, it is still an open question. See Policy Guide, CCH Fair Employment Practs. Manual 452 (1971).

70. See Affeldt, supra note 35, at 21-23.

71. See Cooper & Sobel, supra note 4, at 1648: "It is unnecessary and, indeed, wasteful to require the potential for promotion to the top in each low level employee."

72. See note 56 supra.

73. 401 U.S. at 432.
luctant to interfere with minimum educational requirements, since public policy is to encourage students to remain in school. Awareness of the increasing disparity between the percentages of white and non-white graduates at every level and the effect of this on equal employment opportunity led the Supreme Court to the conclusion that such obstacles to employment could no longer be used without thought of their value as predictors of job performance. Requirements of work experience, usually job-related on their face, have also generally been held to be legitimate selection devices. But both the education and work experience requirements must be rejected where they merely perpetuate the effect of a company's or a society's past discrimination by locking minorities into the lower jobs. Another criterion that has been accepted in the past is that an employer may refuse to hire frequently arrested persons. This practice was forbidden in *Gregory v. Litton Systems, Inc.*, because a greater proportion of blacks are arrested than whites, frequently as the result of discrimination.

While all three of these standards represent typical tools of business convenience, *Griggs* seems to require from an employer the best feasible showing that such standards are born of business needs and will reasonably predict job performance. An employer's preference will apparently have no legal weight if it can be shown that he prefers non-essential characteristics that appear more frequently in whites than in blacks. The type of proof will vary with the kinds of jobs at issue, but the burden of coming forth with extensive and complex evidence will clearly be on the employer. He must provide a detailed functional analysis of the background and abilities essential to the specific job or jobs in question before demonstrating the ability of his testing or other procedures to measure those abilities. At the same time, the complainant will be allowed to suggest equally workable alternatives which would reduce the discriminatory effect on employment of blacks.


76. See 84 *Harv. L. Rev.* 1109, 1145–50.


79. A majority of male ghetto residents, ninety percent in some areas, have arrest records of some sort. See *President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 75 (1967).

In a similar vein, another federal court in California has ruled illegal under Title VII and *Griggs* a company rule authorizing discretionary dismissal of an employee suffering more than one wage garnishment. The court cited authorities indicating that garnishments affect minority group members more often than others, and rejected as not constituting business necessity the company's complaint of time and expense involved in responding to employees' creditors. *Johnson v. Pike Corp. of America*, 40 U.S.L.W. 2207 (C.D. Cal. Sept. 29, 1971). It is noteworthy that the *Johnson* case concerned dismissal of a present employee rather than screening of a prospective one.

80. Dr. Cronbach explains that a job analysis should establish the characteristics that determine job success or failure. *L. Cronbach, supra* note 53, at 407–10.
IV. The Sounder Approach: Administrative or Judicial?

The final problem involved in determining "reasonable measures of job performance," which could very well become the center of the controversy, is whether the EEOC Guidelines are now to be adopted in their entirety by the courts. At one point in Griggs, the Supreme Court seemed to indicate that they are, stating: "Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."\(^81\) Further on, the Court narrowed this implication to include only the specific Guidelines under discussion when, in overruling the Fourth Circuit's decision that the Guidelines are not binding on the courts,\(^82\) it held that since the EEOC's specific requirement of job-relatedness comported with congressional intent, that Guideline was binding.\(^83\) Referring to federal agency or commission determinations in general, the Court reconfirmed several earlier cases in which it had held such rulings to be entitled to great deference.\(^84\) Although this would not necessarily negate a specific finding that all of the EEOC Guidelines are binding, it shows an intention that the courts not be bound blindly by those rulings in all cases.

The advantage to be gained by adhering to the Guidelines lies in the expertise that has been developed by the EEOC, especially in technical matters. The danger, however, lies in their inflexibility. Under the Guidelines, tests with a detrimental effect on minority groups are presumptively illegal unless: "(a) the test has been validated and evidences a high degree of utility . . . and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."\(^85\) The Guidelines then set out the minimum evidentiary requirements to establish proper validation.\(^86\) In addition, they call for proof of validity specific to each unit of a multi-unit organization wherever differences exist between units,\(^87\) of controlled and standardized testing conditions,\(^88\) of an absence of bias in the use of supervisors' ratings,\(^89\) and of separate validation for the different racial groups involved.\(^90\) As already mentioned, "automatic" promotion is the only justification for testing at a higher level than that at which the applicant seeks entry into the company.\(^91\)

\(^{81}\) 401 U.S. at 434.
\(^{83}\) 401 U.S. at 436.
\(^{85}\) 29 C.F.R. § 1607.3 (1971).
\(^{86}\) Id. at § 1607.4-.5. See note 58 supra.
\(^{87}\) Id. at §§ 1607.4(c) (2).
\(^{88}\) Id. at §§ 1607.5(b) (2).
\(^{89}\) Id. at § 1607.5(b) (4).
\(^{90}\) Id. at § 1607.5(b) (5).
\(^{91}\) Id. at § 1607.4(c) (1). See text accompanying note 70 supra.
One fear is that strict application of the EEOC Guidelines could force employers to create new techniques that would not trigger the operation of Title VII. Numerical quotas and first come, first served employment could be used to preclude a plaintiff from proving discrimination. Such practices would require an employer to ignore his own business needs, which is precisely what Congress sought to avoid in passing section 703(h).

If the only goal of efforts to reform job entry standards is to right an existing pattern of racial injustice, the EEOC Guidelines would be an effective tool for the courts to apply. The actual goal, however, is to provide reasonable as well as nondiscriminatory bases for hiring and promotion of all personnel. Precise and detailed proof of validation will not always be available and may impose an unfair burden on employers. In any case it is not easy for the respondent to show the absence of any alternative policies. Stringent provisions against using promotability as a hiring criterion could discriminate against better qualified applicants. Furthermore, depending on the test applied, requiring a differential validation by races could make reliance on the Guidelines damaging to culturally deprived white workers who would be judged by the higher standards applied to better-trained members of their race.

In Georgia Power Co., an employer's testing practices were found to be validated adequately in light of Griggs even though they failed to satisfy the Guidelines of the EEOC. As explained in that case the rather startling evidence offered by the government was to the effect that there was no test known to exist or yet devised which could meet [the EEOC] standards. The court concludes that Section 703(h) was not intended by the Congress nor interpreted by the Supreme Court in such meaningless fashion. Psychological testing is itself a new inexact science. Reputable people . . . readily disagree over the ultimate validity of almost any test when related to a particular job or employer. In Griggs, validity is a reasonable, not absolute, requirement. It is inescapable that the Equal Employment Opportunity Commission regulations, while on the whole helpful, are not binding in this respect.

92. Many companies have dropped aptitude testing altogether, especially where validation would be difficult to prove. See N.Y. Times, Sept. 19, 1971, § F, at 5, col. 1.
93. See Blumrosen, supra note 27. Professor Blumrosen's assumption is that once a substantial number of blacks gain employment, the recruiting system will become self-operating due to the word-of-mouth referral mechanism. But there are discriminatory aspects of a quota system also — e.g., where a job opening is available and the company has "enough" blacks already employed.

Another recent strategem of the courts has been to take into account any new practices or policy changes instituted by the company subsequent to the filing of a complaint. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).
94. The Guidelines require compilation of separate statistics on test performance for different racial groups. "A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid." Tests which produce higher scores for one group than another must be scored using separate passing scores for each group. 29 C.F.R. § 1607.5(b) (5) (1971).
95. 3 BNA FEP Cas. 767 (N.D. Ga. 1971).
96. Id. at 787 n.8.
As recognized in *Georgia Power*, perfect employment tests have not yet been developed. Perhaps, if future studies produce tests which are more meaningful to both black and white employees, proving validation will become a simple matter. For now, the complexity of this burden has forced even the EEOC at times to settle for less than convincing arguments.\(^{97}\)

A more flexible alternative to the present administrative approach would vary the employer's burden according to the substantiality of the racial impact of the company's standards; in other words, the greater the discrimination, the closer the nexus required between the standards employed and the job in question. Such other factors as the size of the company and the feasibility of a thorough validation study would also be essential. Courts should demand a more sophisticated and exhaustive analysis where either a large company or a sizable detriment to blacks is involved. A lesser showing would suffice for smaller companies or less substantial injustices.\(^{98}\) The same factors would help determine the extent to which an employer must prove that promotability, trainability or background are traits demanded by his business needs. Companies would have the option of spending large sums of money on validation studies of tests whose value is questionable, or expending similar amounts in efforts to develop new, effective evaluative techniques. Similarly, companies may continue to employ the techniques condemned by *Griggs* until they are faced with complaints, or they may change their practices now to avoid the expenses of validation and litigation. Such treatment would not rule out the use of the EEOC Guidelines as an invaluable starting point and reference for employers and courts. This approach simply contemplates a better balanced adjudication of the requirement in *Griggs* that a standard provide a "reasonable measure of job performance" — balanced in that it would respond both to the purpose and goal of Title VII and to the right of employers to use legitimate employment criteria that might have discriminatory effects.

V. Conclusion

The complaint of employers who have instituted what they felt were objective employment criteria within section 703(h) of Title VII is that it is inequitable to punish them because those criteria reflect certain inherent educational and societal biases. Until more efficient tests are developed, the time and expense that must be expended to comply with the law is a heavy burden. Employers claim a legitimate business purpose in seeking the most qualified candidates available, suggesting that those elements that decrease the ability of blacks to test well may similarly affect their ability to perform on the job.

After *Griggs*, to satisfy section 703(h) an employer must show that his standards measure traits that are so appropriately related to

97. See 84 Harv. L. Rev. 1109, 1131–32.
98. One obvious reason for this distinction is convenience. A small company lacking the time or personnel to devote to recruiting cannot be required to do as thorough a job as a larger firm. At the same time, it is not as crucial that it do so, since it employs far fewer employees than do the larger companies.
the jobs available that they are necessary for the successful operation of his business. The Supreme Court has said that under Title VII employers have a responsibility for the alleviation of social evils which cannot be avoided on the grounds of mere business convenience. The role of the courts now is to determine whether the adverse effect of testing and other requirements on minorities is justified by some business necessity. Such intervention by the courts, though apparently in conflict with the traditional concept of the free enterprise system, is a response to the congressionally-mandated effort to ensure equality of employment opportunity for all races. This end could not be reached without restricting the freedom that employers have had in the past in their personnel decisions. It is a costly but necessary means of ensuring the vitality of Title VII.