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Elaine W. Shoben

University of Nevada, Las Vegas -- William S. Boyd School of Law

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COMPOUND DISCRIMINATION:
THE INTERACTION OF RACE AND SEX
IN EMPLOYMENT DISCRIMINATION

ELAINE W. SHOBEN*

The courts have not yet clearly resolved whether Title VII of the Civil Rights Act of 1964 prohibits compound discrimination, that is, discrimination based on a combination of protected characteristics—such as race and sex—rather than single protected characteristics—such as race alone or sex alone. Professor Shoben argues that both the logic and the legislative history of Title VII support the view that compound discrimination is separately protected. She then offers a systematic method for statistically determining whether an employer is discriminating on the basis of a combination of characteristics. Finally, Professor Shoben considers whether single plaintiffs can, consistently with rule 23 of the Federal Rules of Civil Procedure, adequately represent the claims of all class members when both compound and double discrimination are alleged. She concludes that courts should certify such classes and reserve subclassing until actual conflicts of interest arise between class representatives and other class members.

INTRODUCTION

In the sixteen years since Title VII\(^1\) became effective, the courts have answered the most fundamental questions concerning the statute's coverage, and current litigation in this maturing body of law has begun to address more complex problems. We now know that Title VII prohibits not only intentional forms of employment discrimination but also practices that disproportionately exclude groups protected by the Act unless business necessity can be demonstrated.\(^2\) Further, the Supreme Court has said that such “impact analysis” applies to sex discrimination as well as to race discrimination.\(^3\) One of the prob-

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* Associate Professor of Law, University of Illinois at Urbana-Champaign. A.B., 1970, Barnard College; J.D., 1974, University of California, Hastings College of Law. The author would like to thank Susan Bryant Drake, J.D., 1978, University of Illinois, for her invaluable contributions to the concepts in this Article.


lems surfacing as Title VII litigation matures is whether individuals who fall under two of the Act’s protected categories, such as black women, may obtain relief by demonstrating discrimination against their compound category. In other words, must a black woman plaintiff establish race and sex discrimination by separate proof or does the Act recognize that discrimination against black women may be a problem that is distinct from discrimination against blacks or against women alone?  

Some individuals experience “double discrimination” in employment. A victim of double discrimination is one who belongs to two different groups, both of which are adversely affected by an employer’s practices. For example, a police department’s hiring proce-

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4 The Department of Labor regulations concerning equal employment opportunity in apprenticeship programs, for example, recognize that single goals in affirmative action for women and for minorities can result in the underrepresentation of some minority women even if the separate single goals are met. These Regulations on Nondiscrimination in Apprenticeship provide that such an underrepresentation may require the establishment of separate goals if a specific minority group of women is underutilized, even though the sponsor had achieved its standards generally. 29 C.F.R. § 30.4(f) (1980).

Similarly, the Office of Federal Contract Compliance Programs (OFCCP) Revised Order No. 4, Affirmative Action Guidelines, provide that separate goals by sex for minority groups may be required if there is a substantial disparity in the utilization of men or women of a particular minority group. 41 C.F.R. § 60-2.12(1) (1980).

Conversely, the effect of affirmative action plans at many companies may be to improve the relative position of minority women, but to leave minority men and women as a whole lagging. One recent study found that the wages of minority women have climbed dramatically during the last 20 years to virtual equivalence with the wages of white women, whereas minority women still lag behind minority men. Similarly, white women still are behind white men, and minority men are behind white males. Smith, The Convergence to Racial Equality in Women’s Wages (Rand Paper Series No. 6026, March 1978).

dure may include both a written test that disproportionately excludes blacks and a minimum height requirement that adversely affects women. In that instance, a black woman has a double disadvantage in her application. If she wishes to challenge both of these practices she may bring two Title VII claims, one for race discrimination and one for sex discrimination, joined in one action.

The effects of exclusionary practices are not always so neatly dichotomized, however. Assume that this hypothetical police department has a third hiring requirement, an oral interview in which applicants are rated subjectively on qualities such as resourcefulness, commanding presence, integrity, and so forth. This third requirement

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6 When an individual fills out a "Charge of Discrimination" form for the Equal Employment Opportunity Commission (EEOC), he or she must indicate the cause of the claimed discrimination; the choices are race, color, sex, religion, and national origin. There are no instructions on this part of the form, but next to each of these terms there is an empty square box, so the individual is presumably expected to check the cause or causes of the claimed discrimination. 2 EEO Compl. Man. (P-H) § 92,401. Filing a charge of discrimination with the EEOC is a jurisdictional requirement for a Title VII claim in a federal district court. 42 U.S.C. § 2000e-5(f)(1) (1976), so not surprisingly, difficulties have arisen when plaintiffs later have attempted to claim different or additional causes of discrimination in court. If a Mexican-American woman indicates "sex" as the basis of the discrimination against her, for example, may she then allege national origin discrimination in her Title VII complaint? This problem was addressed in Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), in which the Fifth Circuit set forth the now widely followed rule that the allegations in the complaint to the district court may encompass any kind of discrimination "like or related" to the allegation in the EEOC charge and growing out of such allegation during the pendency of the EEOC investigation. Id. at 466 (quoting King v. Georgia Power Co., 293 F. Supp. 943, 947 (N.D. Ga. 1968)). See, e.g., Hicks v. ABT Assocs., 572 F.2d 960, 964 (3d Cir. 1978); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168-69 (7th Cir. 1976); Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971).


In another factually related case, Collins v. City of Los Angeles, 18 Fair Empl. Prac. Cas. 594 (C.D. Cal. 1978), a black woman unsuccessfully challenged the hiring practices of the Los Angeles Police Department after she was terminated from the training academy. She presented inconclusive statistical proof, the court said, of "a lesser graduation rate for blacks than whites and for females as against males and for black females as against white females." Id. at 593. It is unclear why the comparison of black women would be juxtaposed against white women as opposed to black men, white men, or all three. The court did not have occasion to apply a more rigorous analysis to the statistics because they were apparently being offered only as support for a disparate treatment claim, and the court found no intentional discrimination under the McDonnell Douglas v. Green standard. Id. at 595-96; see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); note 26 infra.
may not have any disparate impact⁸ on any group defined by race or sex, but it is possible that black women as a separate group are disproportionately excluded. This may be so even though black men and white women score exceptionally well in the oral interview.⁹ Subtle or explicit stereotypes about the characteristics of black women may disadvantage that particular group. Such discrimination against black women is premised neither on race nor on sex; it results from an interaction of these two characteristics and can be called "compound discrimination." ¹⁰ It is not double discrimination, as defined previously, because there is no discriminatory effect attributable to race alone or to sex alone.

A black female plaintiff challenging the hiring practices of the hypothetical police department may wish to challenge all three requirements, not only the first two.¹¹ The written test has a disparate

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⁸ Title VII claims based upon "disparate impact" should be distinguished from claims of "unequal treatment," which is also often called "disparate treatment." The similarity in the names of these dissimilar theories of recovery under Title VII is the unfortunate result of haphazard nomenclature since neither of these terms is defined by, nor even appears in, the Act itself. "Disparate treatment" has been used to mean an employer's unequal policy or practice which differentiates between two groups solely on the basis of race, color, religion, sex, or national origin. A disparate treatment claim requires proof of the employer's discriminatory intent, although sometimes intent can be inferred from the facts showing inequality in treatment. On the other hand, "disparate impact" concerns the discriminatory results of neutral practices without regard to the employer's intent. The terms "disparate impact," "adverse impact," and "disproportionate exclusion" are used synonymously. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1977); Wright v. National Archives & Records Serv., 609 F.2d 702, 711-18 (4th Cir. 1979).

⁹ For an interesting recent case on the separate effect of an oral interview, see Harless v. Duck, 619 F.2d 611 (6th Cir. 1980). Harless was a sex discrimination case in which both the employer's oral interview and physical ability test were found to have a disparate impact on women. Id. at 616-17. The interview was found to suffer from "lack of standardized conditions, rater bias, and the lack of criteria on which to judge the degree of correctness of answers." Id. at 617. Two written intelligence tests, however, did not have a disparate impact on women. Id. On the use of subjective hiring standards, see generally B. Schlei & P. Grossman, Employment Discrimination Law 166-81 (1976); id. Supp. at 44-46; Stacy, Subjective Criteria In Employment Decisions Under Title VII, 10 Ga. L. Rev. 737 (1976).

¹⁰ "Compound discrimination" is defined here as the interaction of any two groups covered by Title VII, not just race and sex interactions.

¹¹ The author of one book concerning the implementation of equal opportunity laws describes the "hypothetical applicant most likely to send chills of terror" through a personnel manager. Such an applicant would be "an over-forty female Negro atheist born outside the United States, with limited education and a slight physical handicap." D. Peskin, The Building Blocks of EEO 200 (1971). The chills caused by such an applicant apparently result from the fear that if the applicant is rejected she could allege numerous violations of the nation's employment discrimination law. The unlawful employment practices provision of Title VII (codified at 42 U.S.C. § 2000e-2(a) (1976)) covers three possible dimensions: race/color/national origin, religion, and sex. Other federal acts provide other protected dimensions such as age, physical handicap, and veteran status. See Age Discrimination in Employment Act of 1967. 29 U.S.C. §
impact on blacks, and the height requirement disproportionately excludes women. The third hurdle, the oral interview, presents no exclusionary barrier to blacks or to women as separate groups, but any black woman who gets this far has a very low probability of being hired. If compound discrimination is covered by Title VII, evidence of the disparate impact of the third requirement on black women would shift the burden to the defendant to demonstrate the validity of the interview requirement.\textsuperscript{12}

Compound discrimination can most readily be understood as the result of a specific requirement that adversely affects only the compound class, such as the oral interview requirement in the hypothetical police department. However, compound discrimination may coexist with single-dimension discrimination. For example, an oral interview may discriminate on a single-dimension basis against both blacks and women. It may also discriminate on a compound basis against black women if the proportion of black women excluded by the oral interview is greater than may reasonably be explained by the cumulative effect of race and sex discrimination.\textsuperscript{13}

Few courts thus far have addressed squarely the issue of compound discrimination; those that have considered compound claims by black women have come to opposite conclusions about the scope of the Act's coverage.\textsuperscript{14} The issue requires more careful examination.


\textsuperscript{13} The statistical method of proof described in this Article, see text accompanying notes 99-105 infra, is designed to measure the impact on the compound group as a separate protected category. It is not equivalent to "adding" the impact of discrimination on two or more single-dimension grounds.

\textsuperscript{14} Compare Jefferies v. Harris County Community Action Ass’n, 615 F.2d 1025 (5th Cir. 1980) (district court improperly failed to consider black woman's claim on the basis of both race and sex, not just race or sex alone) with Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Miss. 1976), aff’d in part, rev’d in part, and remanded on other grounds, 558 F.2d 480 (1977) (black women are not a special class protected by Title VII; black women could assert claims for race discrimination or sex discrimination or both, but not for a combination of both).

In Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969), aff’d in relevant part per curiam, 438 F.2d 86, 88 (4th Cir. 1971), the court allowed a class of black women to bring a claim against an employer without discussion of whether theirs was a protected class. The de-
than it has received in the past, especially since it is inherent in the claims of reverse discrimination brought by an increasing number of white men. Courts addressing reverse discrimination claims generally have assumed without discussion that the compound category of white males is protected by the Act. The absence of analysis leaves open the added question whether acts of discrimination against compound categories are prohibited only when they are intentional, or whether practices that disproportionately exclude compound groups also are covered by the Act.

This Article argues that overt discriminatory practices against compound groups have already been recognized as covered by the Act and that absent a showing of business necessity, Title VII also prohibits unintentionally discriminatory practices adversely affecting compound groups. Further, this Article offers specific statistical methods for proving double and compound discrimination. These methods are designed to avoid false findings or disparate impact that may unfairly require employers to defend their practices. Restricting the number of compound permutations would provide an additional safeguard; black men should be covered by the Act, but statistical evidence could be misleading if, for example, old black Catholic men are recognized as a subgroup of black men. Finally, this Article explores problems of class representation in double and compound discrimination cases. In the hypothetical police department case, for example, a court might not permit a black female to represent a combined class of blacks, women, and black women because of problems of commonality, typicality, and conflict. The Article concludes that establishing subclasses may be necessary in some cases, but in many cases subclassing is best deferred until actual conflicts of interest appear at the relief stage of litigation.

See, e.g., IBEW, Local 35 v. City of Hartford, 625 F.2d 416, 417-18, 424-25 (2d Cir. 1980) (affirmative action plan favoring racial and ethnic minorities and women upheld against claim of discrimination against nonminority union members); Jurgens v. Norton, 17 Fair Empl. Prac. Cas. 699, 700 (N.D. Tex. 1978) (certification of a class of white male professional employees granted in Title VII action). See also Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976) (motion by Anglo male employees to intervene denied following entry of consent decree in case brought on behalf of minorities and females, but motion granted to modify the decree to apply to all employees).
I

INTENTIONAL DISCRIMINATION AGAINST
COMPOUND GROUPS

A. Overt and Reverse Discrimination:
Compound Groups

The clearest case of a discriminatory employment practice prohibited by Title VII is one in which an employer defendant has demonstrated an "evil motive" by some overt act. The statement that "blacks need not apply" is a classic example, for it presents direct evidence of intentional discrimination. Comparable discrimination against a compound category would take the form of a statement indicating the deliberate exclusion of, for instance, "black chicks." A claim of reverse discrimination similarly is based on a claim that an employer has purposely given preference to minority groups and women to the exclusion of the compound group of white males.

The relevant portion of the Act provides that it is an unlawful employment practice "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." The last "or" which separates the prohibited bases of distinction presents a problem of interpretation. The conjunction "or" can be used additively, as in "compensation, terms, conditions, or privileges"; it can also create alternatives, as in "to fail or refuse." If the "or" in the list of protected classes is considered additive, then compound groups (e.g., black females) should be covered by the Act. If it is considered alternative, then each category is presumably exclusive of the others (e.g., blacks or females) and compound groups are not covered by the Act.

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17 Cf. Miller v. Bank of Am., 600 F.2d 211, 212 (9th Cir. 1979) (sexual favors sought from "black chick" employee); Vuyanich v. Republic Nat'l Bank, 409 F. Supp. 1053, 1055 (N.D. Tex. 1976) (claim of race and sex discrimination after black female employee allegedly was told by supervisor that she probably did not need a job because her husband was a Caucasian).
18 Such preference is usually given in the implementation of an affirmative action plan. See United Steelworkers v. Weber, 443 U.S. 193, 201 (1979). See also Hunter v. St. Louis-San Francisco Ry., 4 Fair Empl. Prac. Cas. 1601 (8th Cir. 1951) (no violation of Title VII when white female applicant for railroad fireman job was rejected in favor of black males favored on the basis of race under an affirmative action plan); Schwartz v. Florida, 23 Fair Empl. Prac. Cas. 203 (N.D. Fla. 1980) (race and sex discrimination found when white female was rejected for job in favor of black male at formerly all black state university).
20 The categories of race and national origin are grouped together for purposes of this discussion on the assumption that individuals in modern America would classify themselves
One federal court has concluded that the “or” is additive: “The use of the word ‘or’ evidences Congress’ intent to prohibit employment discrimination based on any or all of the listed characteristics.”

The intent of Congress on this issue is not so readily discernible, however. The different functions of “or” within the Act’s key prohibitory provisions prevent any conclusion about the drafters’ use of the word, and the legislative history on the question is equally inconclusive. The defeat of an amendment that would have added “solely” before “because of such individual’s race, color, religion, sex, or national origin” is noteworthy, but probably refers to problems of causation rather than to the specific categories of prohibited discrimination. More importantly, some comments made during debate on the addition of “sex” to the prohibited categories indicate that Congress considered the particular plight of black women. For example, Representative Frances Bolton noted that the prohibition of employment discrimination on the basis of sex “affects very deeply Negro women who, perhaps, are at the small end of the horn in a great many of these areas.” Senator Humphrey pointed out that

along one or the other of these dimensions but not both. Discrimination against Mexican-Americans is generally considered national origin discrimination, for example, although this group might also be described in racial or color terms. Similarly, discrimination against blacks is considered racial discrimination, although historically this racial dimension was clearly related to national origin. The absence of Title VII definitions contributes to the confusion. See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (national origin discrimination under Title VII does not include discrimination on the basis of citizenship).

Similarly, the term “color” under Title VII appears to have no meaning separate from race or national origin. See Powell v. Syracuse Univ., 580 F.2d 1150, 1151 (2d Cir.), cert. denied, 439 U.S. 984 (1978) (complaint alleged discrimination on basis of “race, color, and sex” but only race and sex discussed); Gomez v. Pima County, 426 F. Supp. 816 (D. Ariz. 1976) (discussion of “color” discrimination in employment in a claim brought under 42 U.S.C. § 1981). Until recently the EEOC combined “race and color” as one unit on the Charge of Discrimination form, but a revision of EEOC Form 5 separates race and color as two separate possible causes of discrimination. See 2 EEOC Compl. Man. (P-H) ¶ 92.401. If individuals using the new charge form specify only color as the cause of discrimination against them, there may be future litigation clarifying the difference, if any, between race and color under Title VII.

The Jeffries court was considering a claim brought by a black woman alleging discrimination based on “a combination of race and sex.” Id.


Id. at 2720. Similarly, Representative Martha Griffiths considered situations in which black women or white women might be unable to remedy discrimination against them if only race were covered by the Act. Id. at 2579. A black woman dishwasher from a greasy spoon down the street, she noted, would have difficulty applying for a job dishwashing at a fancy restaurant with only white male dishwashers if the restaurant claimed that it only wanted men as dishwashers. She would have to prove race discrimination, presumably by convincing the trier of fact that she would have been rejected even if she were a black man rather than a black woman. A white woman applying for a job at such a restaurant could not succeed in proving race discrimination because all the dishwashers are white. Id.
"[o]nly two percent of white women who have graduated from high school but not completed college are domestic workers, but fully 20 percent of Negro women with this much education find only domestic work." Again referring to the special problems of black women, the Senator noted that "[o]ne in every three white women workers is employed in a clerical job; for Negro women the figure is one in nine."

These references to problems of discrimination against compound categories suggest that Congress assumed that adding sex to the categories of prohibited discrimination would forbid at least intentional exclusions of compound groups. A few decisions in intentional discrimination cases appear to make the same assumption. It is not critical for a plaintiff to prove that intentional discrimination has occurred because of only one dimension of the person's racial, ethnic, or sexual identity. Indeed, some cases even reach three-dimensional claims by including religion or age. Individual claims have included intentional discrimination against an old female with a

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24 Id. at 6547 (remarks of Sen. Humphrey).
25 Id. at 6548.
26 The order of proof for an individual claim of disparate treatment was explained by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Those requirements are: "(i) that [plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." Id. at 802. Once the plaintiff has established these elements, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. These requirements are not restricted to discrimination claims based on membership in a racial minority. See, e.g., Lujan v. New Mexico Health and Social Servs. Dep't, 624 F.2d 958 (10th Cir. 1950) (national origin discrimination application of McDonnell Douglas criteria); Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598 (7th Cir. 1979) (sex discrimination application of McDonnell Douglas criteria). The Supreme Court has emphasized that the McDonnell Douglas criteria were "never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
foreign accent and against a homosexual Jewish man. Such claims fail frequently for lack of evidence or because the employer demonstrates a legitimate business purpose for the adverse employment decision. Nonetheless, it appears to be taken for granted that the Act covers intentional discrimination against such categories. Similarly, white males are treated as a category protected from intentional exclusion unless exclusion is permitted by a bona fide affirmative action plan. That the category in question is a compound one has never been considered relevant to the discussion in these cases. From the meager legislative history and the assumptions made by the courts, it appears that the Act’s protection extends at least to intentional acts of employment discrimination directed toward compound groups.

**B. The Sex-Plus Analogy**

Another argument supporting the view that Title VII prohibits intentional discrimination against compound groups relies on the principles of “sex-plus” discrimination. Sex-plus discrimination occurs when a hiring practice, while not explicitly directed at a particular sex, operates to exclude only one sex. In *Phillips v. Martin Marietta Corp.*, the Supreme Court held that a rule that could be stated in

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28 In Zell v. United States, 472 F. Supp. 356 (E.D. Pa. 1979), a 57-year-old female who was Czechoslovakia-born alleged that she was denied a promotion because of sex, national origin, and age discrimination. Id. at 357. The court found no intentional discrimination on the basis of sex, age, or national origin, and found that the plaintiff was not qualified for the job. Id. at 360. It further determined that the defendant’s promotion procedures had no “disparate impact on female employees, elderly employees, foreign-born employees, or elderly female employees who are foreign-born or have foreign accents.” Id. This suggests that if the plaintiff had produced convincing statistical evidence of an adverse impact on the compound group of elderly foreign-born females, the court might have found a prima facie case. Age discrimination is prohibited by the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1976 & Supp. II 1978), which is modeled after the proscriptions in Title VII.

29 See Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (Jewish male homosexual alleged that his job was terminated because of his race, religion, and sexual preference).

30 See, e.g., id. (legitimate business reason found for discharge in case alleging race, religion, and sexual preference discrimination against homosexual Jewish man); Zell v. United States, 472 F. Supp. 356 (E.D. Pa. 1979) (older foreign-born female found not qualified for promotion).


32 See cases cited in notes 30-31 supra. See also Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969), aff’d in part, vacated in part on other grounds, 438 F.2d 86 (4th Cir. 1971) (intentional discrimination against black women found without discussion of whether this group by itself was protected by the Act).

33 400 U.S. 542 (1971) (per curiam).
neutral terms violates the Act if the rule is applied to only one sex, unless the employer can demonstrate that the rule is a bona fide occupational qualification (BFOQ). Martin Marietta had a rule against hiring female applicants with preschool-age children, although men with preschool children were considered and hired. The rule applied only to a subset of persons with preschool children, and that subset was entirely women. It is noteworthy that there was no evidence in Phillips that the employer's practices otherwise had an adverse impact on women as a class. In fact, 70-75% of the applicants for the assembly-trainee position in question were women, and 75-80% of those hired were women. The disparate treatment of women with preschool-aged children was the only issue.

The Fifth Circuit was impressed with the analogy between sex-plus discrimination and compound discrimination. In Jefferies v. Harris County Community Action Association, it noted the line of sex-plus cases holding that an employer may not establish unqualified rules excluding women with young children, married women, or women who are single and pregnant. The court found it inconceivable that the subclass of women-plus-black would not similarly be protected. If sex plus a neutral category is covered by the Act, the reasoning goes, then sex plus a protected category must be covered.

This analogy is appealing, but not as helpful as it initially appears to be. Sex-plus analysis merely attempts to determine whether an employer has created a category that unlawfully operates against a group protected by the Act. An employer may not treat differently any group covered by the Act. It is already known that women are protected by the Act, so the sex-plus question is whether a rule against marriage applied only to women discriminates against women. In contrast, it is not already known that compound categories are

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34 Id. at 544. Justice Marshall disagreed with the Court's "indication" that Martin Marietta should have an opportunity to establish that women "with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities." Id. at 544. (Marshall, J., concurring). Justice Marshall would have required gender neutral application of the employment criterion at issue in Phillips. Id. at 544-45, 547.
35 Id. at 543.
36 Id.
37 Id.
38 For a discussion of the difference between disparate treatment and disparate impact analysis under Title VII, see note 6 supra.
39 615 F.2d 1025 (5th Cir. 1980).
40 Id. at 1034.
44 615 F.2d at 1034.
covered by the Act, so the question is not whether a rule against black women amounts to discrimination against a group known to be protected by the Act. To ask a parallel sex-plus question would be to inquire if a rule against blackness applied only to women amounts to discrimination against women. The strangeness in the phrasing of this question reveals the contortion of the analogy.

The confusion caused by the analogy arises from the popular term for this line of cases: “sex-plus.” The term is misleading, however, because a rule that excludes married females does not involve discrimination based on something in addition to sex; the rule singles out a subset of married persons and operates exclusively against women. The category of affected persons is the protected class of women and a single-dimension claim of disparate treatment of women is established. Unless the employer can demonstrate that the rule reflects a BFOQ, the practice unlawfully discriminates against women. The court would not logically try to probe the existence of only sex discrimination when presented with a rule excluding black women. If the sex-plus analogy were used, the court would ask if the employer’s rule singled out only women among black persons. The answer might be yes, but then only a sex discrimination claim has been established.

Discrimination against the compound group of black women is simply not analogous to single-dimension sex discrimination. Typical sex-plus discrimination, such as a no-marriage requirement, affects women who are not part of the sex-plus category; these women are exposed to the threat of dismissal if they change their status. A rule against blackness applied only to women, by contrast, could not even potentially affect all women. Furthermore, a BFOQ defense is available against claims of sex discrimination. For race discrimination, however, there is no BFOQ defense.46 If compound discrimination against black women were treated as sex discrimination, the courts would be in the anomalous position of determining whether a BFOQ defense should be allowed for exclusion based on race for black women.

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44 The BFOQ defense is provided in the Act as a defense to sex discrimination suits, 42 U.S.C. § 2000e-2(e) (1976) (originally enacted as Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703(e), 78 Stat. 255 (1964)). No similar defense is provided for race discrimination claims.
women only. In a sex-plus case, the BFOQ for excluding married women would depend on an occupational necessity for a rule prohibiting marriage for women employees. The comparable BFOQ for excluding black women would have to depend on a necessity for excluding blackness for women employees—a defense not permitted by the Act.\textsuperscript{47}

This discussion demonstrates two points. First, compound discrimination is a problem distinct from sex discrimination and does not lend itself to sex-plus analysis. If the “plus” is race, the Act precludes any BFOQ defense and a sex-plus inquiry adds nothing. Although the Fifth Circuit was persuaded by the analogy,\textsuperscript{48} it does not resolve the question whether compound discrimination is prohibited by Title VII. Instead, a practice that overtly excludes a compound group, such as an employment rule explicitly prohibiting the hiring of black women, should be treated simply as intentional discrimination of the type that Congress intended to cover.\textsuperscript{49} Furthermore, if the Act’s protection extends to compound groups, then practices which disproportionately affect such groups, as well as overtly discriminatory practices, should be examined. Disparate impact analysis is needed to determine the discriminatory effect of a practice.

\section{II}
\textbf{Disparate Impact Analysis for Compound Discrimination}

Even if intentional discrimination against compound groups is prohibited under Title VII, the question remains whether neutral

\textsuperscript{47} Although the Act does not specifically permit the BFOQ defense for discrimination based on marital status, see id., in a sex-plus case the availability of a BFOQ defense is predicated on the essential identity of sex-plus and sex discrimination. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974). In theory, sex-plus analysis of a compound discrimination claim could result in incorporating race in the BFOQ defense to sex discrimination. The EEOC, however, clearly refuses to permit the BFOQ defense for any claim involving racial distinctions: “All discrimination by race or color is forbidden, as is any limitation, classification, or segregation that affects any person adversely; in practice this means always. Race or color can \textit{never} be a bona fide occupational qualification or a reason for differential treatment of any kind.” 1 EEO Compl. Man. (P-H) \textsuperscript{1201} (emphasis in original); see 42 U.S.C. § 2000e-2(a)(2) (1976).

The analysis might more successfully be reversed by using a “race-plus” approach, but race-plus rules have not emerged in the case law. A hypothetical race-plus situation would involve an employer who has a rule prohibiting the hiring of blacks who have a history of drug abuse, but no similar rule excluding whites with a history of drug abuse. The employer might claim that it is a rule against drug abusers, not blacks. A court using the sex-plus analogy would find that this is a race-plus rule that amounts to race discrimination. No such employment rules have been the subject of Title VII litigation.

\textsuperscript{48} See Jefferies v. Harris County Community Action Ass’n, 615 F.2d 1025, 1033-34 (5th Cir. 1980).

\textsuperscript{49} See text accompanying notes 23-26 supra.
employment practices that have a disproportionate impact on compound groups are prohibited unless business necessity can be shown. Griggs v. Duke Power Co. and subsequent Supreme Court decisions established the use of disparate impact analysis to demonstrate discrimination against single-dimension classes. No court at any level, however, has squarely addressed whether these principles properly can be applied to compound groups.

Suppose, for example, that an employer in a community with a substantial percentage of Hispanic workers hires large numbers of Hispanic women, but few Hispanic men. Assume further that this results from an informal hiring process and that no intentional exclusion of Hispanic men can be demonstrated. Unless the class of Hispanic men is permitted to show the disparate impact of the employer's practices on their group, they would be unable to obtain relief. Although the Act might prohibit intentional discrimination against compound groups, it is assumed here that no disparate treatment can be shown. If the evidence demonstrates no adverse impact on Hispanics as a group (men plus women) and no adverse impact on men as a group (all ethnic groups), then the question is whether the employer is insulated from the necessity of showing the job-relatedness of hiring practices that disproportionately exclude Hispanic men.

Disparate impact analysis should be available to establish a prima facie case of discrimination against a compound group. Safeguards

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52 In several cases plaintiffs have imposed a compound restriction on either the certified class or on the proof of disparate impact. These cases do not discuss the restriction of the class or proof to a compound group, but they involve race or national origin discrimination in jobs that are sex-stereotyped. The total exclusion of one sex from any consideration in hiring results in a compound plaintiff group, such as Hispanic males, challenging rates of hiring for white males. See Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (census figures on high school diplomas used to compare white males with black males); Marks v. Pratco, 607 F.2d 1153 (5th Cir. 1979) (comparison limited to black and white female housekeepers at motel); EEOC v. International Union of Operating Engrs, 553 F.2d 251, 254 (2d Cir. 1977) (statistical proof assumed limitation to males in racial and ethnic comparisons); Gay v. Waiters’ Union, Local 30, 22 Fair Empl. Prac. Cas. 280, 280 (N.D. Cal. 1980) (class certified as all black males working or desiring to work as waiters).
53 Whether compound groups are separately protected is unresolved under Title VII, but has been addressed in part in the Department of Labor Regulations on Equal Employment Opportunity in Apprenticeship and Training, 29 C.F.R. § 30.4(f) (1980). See note 4 supra.
54 In reverse discrimination actions, for example, the question is whether white males should have a Title VII claim when disparate impact against them can be shown even though there is no overt affirmative action plan, and, therefore, intentional exclusion cannot be proven.
should be incorporated into the statistical methods of proof, however, in order to avoid the possibility that an employer's work force could be so over-analyzed that a prima facie case could be established by mere chance during the process of repeated analysis. As an additional safeguard, the standing of compound groups should be restricted to two dimensions only, not permitted three or more dimensions to create a separately protected group. The proliferation of categories permitting, for example, young black Catholic women to be treated as separately protected, leads too easily to spurious cases. With these restrictions to protect potential defendants from meritless claims, it is appropriate to use disparate impact analysis for compound groups as for any single class protected by Title VII.

A. The Function of Adverse Impact Analysis for Compound Discrimination

If courts accept the proposition that Title VII protects individuals from intentional discrimination suffered because of membership in a compound group, then compound groups should be afforded the same legal protection as any other group now protected by Title VII. Thus, not only should disparate treatment be prohibited, but unjustified practices that have an adverse impact on compound groups should be prohibited as well. The same considerations that support such a case, for instance, might emerge from the employment practices in what was the Higher Education Division of HEW (now HHS), in which women and blacks are heavily represented among staff members:

Women and especially blacks are overrepresented among the 74 staff members in the Higher Education Division. On June 30, 1973, about one-half (35) were women, almost three-fifths (43) were members of minorities, and approximately one-half (35) were blacks. The 58 regional compliance officers were distributed as follows: 25 women (13 blacks, 10 whites, and 2 members of other minorities) and 33 males (13 blacks, 14 whites, and 6 members of other minorities).

R. Lester, Antibias Regulation of Universities: Faculty Problems and Their Solutions 105 (1974). An imbalance disfavoring white males among professionals in the EEOC is the subject of an ongoing class action suit. This imbalance is alleged to be the result of implementing affirmative action plans, Jurgens v. Norton, 22 Fair Empl. Prac. Cas. 1738 (N.D. Tex. 1980). However, if the alleged exclusion cannot be shown to be intentional and unlawful, should plaintiffs establish a prima facie case with statistics showing a significant exclusion? This Article argues that disparate impact analysis should be available for any compound group, including white males in reverse discrimination suits.

See note 106 infra. The coverage of compound groups should include not only those situations in which sex-stereotyped jobs in race discrimination cases create compound classes, see note 52 supra, but also situations in which a class is compound because that group is disadvantaged by employment practices more than others of all races and sexes. See text accompanying notes 11-13 supra.
the application of adverse impact analysis to Title VII claims for separate race or sex discrimination compel the application of the doctrine to compound discrimination claims.

The principle underlying adverse impact analysis is that an employer should be required to demonstrate a business necessity for any requirement that has the effect of disproportionately excluding a group protected by Title VII. When the Supreme Court adopted this operational definition of discrimination in *Griggs v. Duke Power Co.*, it relied on Congress' intent to remove the "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 58 Chief Justice Burger, writing for a unanimous Court, also noted that Title VII proscribes discriminatory preferences for any group, minority or majority. 59 Striking down Duke Power Company's high school diploma requirement and testing practices, the Court rejected the proposition that intent to discriminate must be shown: "[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." 60

That rationale is equally applicable to discrimination directed toward a compound group. A compound group such as black women should be considered an "impermissible classification" because discrimination against them results in discriminatory preferences for other groups. That the minority groups of black men and white women might benefit from discrimination against black women is irrelevant. Thus, a black female plaintiff's proof of the exclusionary impact of hiring practices on her compound group should, as in *Griggs*, shift the burden to the defendant to show the business justification for the practices. 61 She should not be required to demonstrate the employer's intent to discriminate against her particular group.

**B. Manner of Proof**

If disparate impact analysis is applied to cases of compound discrimination, plaintiffs will be introducing increasing volumes of

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58 401 U.S. at 431.
59 Id.
60 Id. at 432.
61 See id. If the employer meets its burden of demonstrating a business justification for the practice, the plaintiff has an opportunity to prove that the business objective could have been accomplished by other, nondiscriminatory employment practices. Dothard v. Rawlinson, 433
COMPOUND DISCRIMINATION

numerical data into evidence. The potential for abuse is great; when an employer's work force is cross-classified and subdivided countless numbers of times, the possibility of obtaining a misleading statistical result greatly increases. 62 However, guidelines for using statistics to prove compound discrimination can be formulated to minimize the possibility of misuse while allowing courts to probe disparate impact.

The question is how to assess the substantiality of underrepresentation of a compound group in the employer's work force. The Affirmative Action Guidelines of the Office of Federal Contracts Compliance Programs (OFCCP) recognize this issue without providing specific guidance on resolving it. The Guidelines provide that if the compliance agency discovers a "substantial disparity" in the utilization of men or women of a particular minority group, the agency may require the employer to establish separate goals and timetables for those groups. 63 The Guidelines, however, do not establish the method for assessing the substantiality of the disparity.

Assume, for example, that an employer draws its work force from a community of the following composition: 40% white men, 40% white women, 10% black men, and 10% black women. The employer has 100 employees with the following breakdown: 38 white men, 42 white women, 12 black men, and 8 black women. There is no race discrimination here because whites are represented 80% and blacks are represented 20%, exactly as in the population. Similarly, there is no sex discrimination here because women and men constitute 50% of both the work force and the population. There is overrepresentation of white women and black men in this situation, however, and a corresponding underrepresentation of black women and white men. It remains to be demonstrated whether this evidence is sufficient to establish a prima facie case of discrimination against either of the underrepresented compound groups. Examining these figures by a simple inspection of the raw numbers, one might conclude intuitively that the disparity in representation of these groups in the work force compared to the population is very slight. Intuition may serve well in a case such as this one, but it is an inexact approach to the question. 64 The use of intuition to assess the substantiality of differ-

62 See text accompanying notes 108-09 infra.
ences becomes very difficult in close cases and leads to a lack of uniformity in results across cases.

Alternatively, the question of the substantiality of differences in representation can be addressed in terms of probability: how likely is it that chance alone would produce a workforce of this particular composition for a nondiscriminating employer? As a statistical analogy, imagine an infinitely large drum filled with an infinite number of marbles which are 40% blue, 40% yellow, 10% red, and 10% green. Someone sits and blindly draws 100 marbles, sorts them into type and counts each group. The particular composition of this draw is recorded on paper and then the marbles are thrown back into the drum. The drum is rotated to mix up the marbles again and another draw is made. This process continues indefinitely. This monotonous marble-drawing will result occasionally in some very unusual patterns: all of one color will be drawn some time, and there will be other odd results. Most of the time, however, the patterns of the draw will more or less resemble the composition of all of the marbles in the drum.

Now, a second person comes along and draws just once a hundred marbles from the barrel. It is not known if he drew them blindly. In order to probe the likelihood that the second person’s draw was blind, an examiner can compare the composition of the second person’s draw to the number of times that result, or one more unusual, has been found by blindly drawing infinite numbers of times from the drum. If the second person’s result is a fairly common one, then it was probable to appear by chance in this single draw. On the other hand, if the result was a very rare one, it would be highly improbable that such a result would be obtained by chance when drawing once. Appropriate statistical calculation provides this prob-

65 This process is analogous to the employment situation in which an employer hires in one year a specific composition of employees from a pool of available employees of a specific composition. See Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09 (1977).

66 The term “blind” is used here to mean in a manner that does not disfavor any color.

67 Although the choice of the level of rareness is a matter of policy, one chance out of 20 (the 5% or .05 level) is the most common choice for the degree of rareness considered too rare to have happened by chance alone in experimental situations. Hallock, The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation, 23 Vill. L. Rev. 5, 13-14 (1977) [hereinafter The Numbers Game]. The level chosen is called the level of significance. F. Mosteller, R. Rourke & G. Thomas, Probability with Statistical Applications 305-07, 311 (2d ed. 1970). If a result is likely to happen by chance alone less than one time in 20, it is called significant at the .05 level. Id. at 306. On levels of significance in civil rights litigation, see Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977); D. Baldus & J. Cole, Statistical Proof of Discrimination 308 (1980); The Numbers Game, supra, at 11-15.
COMPOUND DISCRIMINATION

The ability to assist the examiner in deciding if the draw was too rare to be considered a blind draw.

The Supreme Court has approved the use of statistical probability analysis to probe race discrimination in Title VII disparate impact situations.\(^8^a\) Statistical analysis has also been employed by courts in disparate impact sex discrimination cases.\(^8^a\) As noted by the Supreme Court, the appropriate statistical tool to compare the racial composition of the population to the racial composition of the work force is the binomial test.\(^7^a\) The binomial test can also be used, of course, to make a similar inquiry concerning sex discrimination.

As its name suggests, however, the binomial test can be used only for situations involving two terms, such as black and white. Compound discrimination requires a slightly different analysis to handle several terms—such as white men, white women, black men, and black women—in one analysis. A statistical test related to the binomial test, the chi-square test, can be used for this situation.\(^7^a\)

\section*{C. Chi-Square Calculation}

The chi-square test is a general test suitable for evaluating the difference between observed and expected frequencies from independent random samples of nominally classified data.\(^7^a\) In the simplest case, there are only two categories into which all observations are classified, such as males and females, and the chi-square test is the functional equivalent of the binomial test referred to previously.\(^7^a\) Either test may be used to analyze the two-category case. Use of the chi-square test as an alternative to the binomial test will be addressed in the next section.\(^7^a\) Use of the chi-square test for several-group analysis is discussed first because it is directly relevant to problems of analyzing compound discrimination.

\(^7^a\) On the use of chi-square generally in employment discrimination litigation, see The Numbers Game, supra note 67, at 28-30.
\(^7^a\) See H. Blalock, supra note 70, at 279-82; L. Horowitz, supra note 70, at 365-66.
\(^7^a\) See text accompanying notes 68-70 supra. More exactly, the chi-square is the functional equivalent of the normal curve approximation of the binomial. See L. Horowitz, supra note 70, at 143-49, 371-75.
\(^7^a\) See text accompanying notes 88-95 infra.
The chi-square test may be used to examine whether two variables interact. For example, a group of people may be classified by height (tall or short) and by weight (heavy or light), and an examiner may wish to evaluate whether height and weight interact in such a manner that a particular height characteristic may be associated with a particular weight classification. If height and weight are uncorrelated, then one would expect to find heavy people proportionately represented among both tall and short people. If height and weight interact, however, one may find a disproportionate number of heavy people among tall people, for example. This same kind of analysis can be applied to examine whether race and sex interact to result in a disproportionate underrepresentation of one group, such as black women. In this way, one can determine whether the proportional representation of such a group is even less than one might expect based on the cumulative effects of race and sex discrimination.

Chi-square analysis begins by checking that the assumptions underlying the test have been met: the variables must be classified into discrete categories, and the data must come from independent random samples. An analysis of the interaction of two discrete variables, such as race and sex, may then begin by establishing a 2 x 2 contingency table, such as the one shown in Figure 1.

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
<th>Women</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whites</td>
<td>a</td>
<td>b</td>
<td>a+b</td>
</tr>
<tr>
<td>Blacks</td>
<td>c</td>
<td>d</td>
<td>c+d</td>
</tr>
<tr>
<td></td>
<td>a+c</td>
<td>b+d</td>
<td>a+b+c+d</td>
</tr>
</tbody>
</table>

Figure 1. Contingency table for 2 x 2 design: race (white and black) and sex (men and women).

Each side of this table represents the two levels of each category, and the marginal totals show the sum of the number of individuals in each category, in this instance, whites, blacks, men, and women. Numbers in the four squares inside the table represent the number of individuals in each compound group, starting with white males in the upper left hand corner. The total shown at the lower right must equal the sum of the numbers in the four squares, which will also be the

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75 See H. Blalock, supra note 70, at 279-80.
76 See id. at 282.
sum of the vertical marginal totals, as well as the sum of the horizontal marginal totals.

The contingency table shown in Figure 2 represents the racial and sexual composition of a hypothetical employer's work force.

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whites</td>
<td>94</td>
<td>76</td>
</tr>
<tr>
<td></td>
<td>(85)</td>
<td>(85)</td>
</tr>
<tr>
<td>Blacks</td>
<td>6</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>(15)</td>
<td>(15)</td>
</tr>
</tbody>
</table>

Figure 2. Contingency table showing distribution by race and sex of employees in hypothetical company. Numbers in parentheses are the "expected values" of each compound group based upon expected proportional representation (given the marginal totals).

There are 170 whites, 30 blacks, 100 men, and 100 women. The numbers in the squares represent the breakdown into the compound groups: 94 white men, 6 black men, 76 white women, and 24 black women. These numbers, the actual count of workers in each category, are called the "observed frequencies" in the four cells. The numbers in parentheses below the observed frequencies are the "expected frequencies" which one would expect to appear in these cells if there is no adverse interaction of race and sex. The next question is whether the expected values differ significantly from the observed ones. The data from the hypothetical employer in this problem intutively suggests that black men may be underrepresented in the work force, but analysis can show whether this underrepresentation would be highly unlikely to occur by chance alone. If so, the employer should justify the selection process that disproportionately excludes black men. This probability is calculated as follows:

1. First, expected frequencies, such as those shown in parentheses in Figure 2, must be ascertained. They represent the expected values if the proportional representation of the four subgroups simply reflected the proportions of the two major groups. In this case, since the men and women are equally divided in this group of 200 persons, proportionate representation would mean that both the black and white groups are composed half of men and half of women. There are 170 whites, so the expected values for men and women are 85 in

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78 It is normal for there to be a certain degree of fluctuation from the expected values. See text accompanying notes 64-67 supra.

each cell; similarly, there are 30 blacks so the expected values for men and women are each 15. The formula for ascertaining expected values for each cell is to multiply the marginal totals corresponding to that cell and then to divide by the total number in all cells.\(^6\) Here, for cell \(a\) (white men) the marginal total for whites (170) is multiplied by the marginal total for men (100) and divided by the total (200) to reach 85. The expected value of the cell of black men is \((30 \times 100)/200 = 15\). The same approach is used for all four cells.

(2) For each cell the following calculation is taken: subtract the expected frequency from the observed frequency, square this difference, and then divide this result by the expected frequency. This calculation is repeated for all four cells, and then the four resulting numbers are added. This number is called the chi-square statistic.\(^8\)

For the hypothetical case shown in Figure 2, the calculation would be as follows:

for white men: \((94 - 85)^2/85 = 81/85 = 0.95\);
for white women: \((76 - 85)^2/85 = 81/85 = 0.95\);
for black men: \((6 - 15)^2/15 = 81/15 = 5.40\);
for black women: \((24 - 15)^2/15 = 81/15 = 5.40\).

These four numbers for the four cells are now summed: \(0.95 + 0.95 + 5.40 + 5.40 = 12.70\). Thus, the chi-square statistic for this problem is 12.70.

(3) The probability of obtaining a particular result can be evaluated by comparing the chi-square statistic obtained from the previous calculation to a table of “critical” values of the chi-square distribution.\(^9\) The portion of that table appropriate for evaluating an interaction of two variables (such as race and sex) can be summarized here: there is a less than .05 probability (one in twenty) of obtaining an observed result by chance alone when the chi-square statistic is 3.84 or larger.\(^8\) In other words, 3.84 is the critical value for the 5% level of probability. Any chi-square statistic from a 2 x 2 contingency table that is greater than 3.84 is statistically “significant” at the 5% level. In the hypothetical case used here, the chi-square statistic was found to be 12.70, well above the critical value at the 5% level.

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\(^6\) See H. Blalock, supra note 70, at 283-85.

\(^7\) Id. at 281-84.

\(^8\) Id. at 288-89. Chi-square tables can be found in any standard statistics text. See, e.g., Id. at 613; L. Horowitz, supra note 70, at 440-41.

\(^9\) On levels of significance, see note 67 supra. This conclusion is based on the use of a two-tailed test, meaning that it is assumed that the outcome of the test could favor or disfavor any group. For a discussion of one- and two-tailed tests, see D. Baldus & J. Cole, supra note 67, at 307-08.
Therefore, the difference between the observed and expected values in the compound group can be considered substantial, and there appears to be an adverse effect resulting from the interaction between race and sex in this work force. A class of black males should have a prima facie case with these statistics, and the burden should shift to the defendant to show a business necessity for the selection procedure resulting in this work force composition.\textsuperscript{64}

\textbf{D. Sequence of Analyses for Race and Sex Factors}

The chi-square test described in the preceding section analyzes only whether the interaction of two variables, such as race and sex, affected the disproportionate representation of a compound group within the employer's work force. It does not consider whether race discrimination, sex discrimination, or both influenced the initial formation of the overall work force. A plaintiff would typically be uncertain at the outset of a lawsuit whether he or she had been a victim of race discrimination, sex discrimination, both race and sex discrimination (double discrimination),\textsuperscript{65} or compound discrimination (the interaction of race and sex discrimination). An orderly progression of data analysis, therefore, is proposed here.

\textbf{1. Single-Dimension Claims.}

Single-dimension claims of race discrimination or sex discrimination may be analyzed by comparing the racial or sexual composition of the employer's work force with the composition of the relevant

\textsuperscript{64} On the nature of the defendant's burden under Title VII to show business necessity once the plaintiff has established a prima facie case, see cases cited in note 51 supra.

A prima facie case may be established by statistical proof, International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977), but the courts will consider whether all the facts and circumstances support the statistical findings. E.g., Hazelwood School Dist. v. United States, 433 U.S. 299, 312 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977). Furthermore, a statistically significant result may not rise to the level of legal significance in all cases. The Supreme Court has generally approved statistical significance as a measure of significant discrimination, e.g., Hazelwood School Dist. v. United States, 433 U.S. at 311 n.17 (standard deviation analysis may be used for both establishing and rebutting prima facie case); Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977) (recognizing significance at "greater than two or three standard deviations"), and the Federal Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3.14 (B)(5) (1950), adopt the 5\% level of probability as the measure of significance for proof of discrimination. See note 67 supra. However, statistical and legal significance may differ. See United States v. Test, 550 F.2d 577, 584 (10th Cir. 1976); The Numbers Came, supra note 67, at 12-18.

\textsuperscript{65} See text accompanying notes 4-5 supra.
population in the surrounding community. As the Court indicated in *Hazelwood School District v. United States*, a statistical test called the binomial test may be used to compare the substantiality of the differences found between those two compositions. Alternatively, a chi-square test may be used because the chi-square test involving only two cells is functionally identical to the binomial test. Furthermore, many people find the chi-square test conceptually easier.

The calculation of a two-celled chi-square test proceeds as follows. First, two cells are designated to represent the two (and only two) categories involved, such as whites and blacks. The actual numbers of whites and blacks in the employer's work force are the "observed values." The "expected values" are the number of whites and blacks that would be expected in a work force of the employer's particular size, based on the proportionate representation of these two groups in the relevant population. The expected number of whites in the employer's work force is calculated by multiplying the percentage of whites in the relevant population by the total number of employees. Similarly, the percentage of blacks in the relevant population is multiplied by the total number of employees. For example, if a hypothetical employer had 1,000 employees (950 whites and 50 blacks) drawn from a community with a relevant population that is 90% white and 10% black, the observed values of whites and blacks would be 950 and 50 respectively, whereas the expected values would be 900 and 100. These values are displayed in Figure 3.

<table>
<thead>
<tr>
<th></th>
<th>Whites</th>
<th>Blacks</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>950</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>(900)</td>
<td>(100)</td>
</tr>
<tr>
<td>total</td>
<td>1000</td>
<td></td>
</tr>
</tbody>
</table>

Figure 3. Two-celled table showing distribution by race only in a hypothetical company's work force. Numbers in parentheses are the "expected values" in each category (based upon representation in the relevant population).

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88 Id. at 308-09 n.14, 311 n.17. Although the Court refers to the statistical test as a "standard deviation analysis," the test is commonly called the binomial test or a test using the binomial distribution. See *Castaneda v. Partida*, 430 U.S. 483, 496 n.17 (1977); M. Finkelstein, supra note 64, at 32-43; L. Horowitz, supra note 70, at 366-70; notes 69-70 supra.

89 See text accompanying notes 72-73 supra.

90 See M. Finkelstein, supra note 64, at 43-78; L. Horowitz, supra note 70, at 366-70.
The actual calculation of the chi-square statistic is now the same as described previously,\(^9\) except that only two cells are involved and one small modification is made for statistical accuracy in the computation. As before, the expected value in each cell is subtracted from the observed value in that cell. Now, however, \(\frac{1}{2}\) is subtracted from the absolute value of this result before it is squared and divided by the expected value.\(^2\)

Thus, the formula is:

\[
\frac{\left(\frac{\text{Actual whites} - \text{Expected whites}}{\text{Expected whites}}\right) - \frac{1}{2}}{2} + \frac{\left(\frac{\text{Actual blacks} - \text{Expected blacks}}{\text{Expected blacks}}\right) - \frac{1}{2}}{2}
\]

If the result obtained from this calculation is greater than 3.84, it would be statistically significant at the .05 level.\(^3\) In other words, the disparity between the observed and expected numbers of blacks and whites in the employer's work force may be considered significant if the chi-square result is greater than 3.84. In the hypothetical situation shown in Figure 3, the chi-square statistic would be 27.2.\(^4\) Since this value exceeds the number required for the .05 level of significance, this statistical evidence should be sufficient to establish a prima facie case of racial discrimination under Title VII.\(^5\)

2. **Double Discrimination Analysis**

Having found prima facie evidence of racial discrimination, a plaintiff who was a black woman might analyze the data to determine whether sex discrimination is present as well. Assume that in this hypothetical employer's work force there are 530 men (of all races) and 470 women. Assume further that men and women are equally

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\(^9\) See text accompanying note 81 supra.

\(^2\) The subtraction of \(\frac{1}{2}\) is a correction for continuity, necessary to make the calculation more precise in the two cell situation. See H. Blalock, supra note 70, at 290-92; L. Horowitz, supra note 70, at 368.

\(^3\) On levels of significance, see note 67 supra. The critical value 3.84 is based on a two-tailed test with one degree of freedom. See note 83 supra. Degrees of freedom are established by determining the minimum number of cells whose value must be known in order to calculate the values of all the other cells. Degrees of freedom must be determined before the critical value can be ascertained. The 1\(\times\)2 or 2\(\times\)2 chi square always has one degree of freedom. See H. Blalock, supra note 70, at 289-90; T. Wonnacott & R. Wonnacott, Introductory Statistics 517 (3d ed. 1977).

\(^4\) The actual calculation is as follows:

\[
\frac{[(950 - 900) - \frac{1}{2}]^2}{900} + \frac{[(1150 - 1001) - \frac{1}{2}]^2}{100} = \frac{49.5^2}{900} + \frac{49.5^2}{100} = 27.225
\]

\(^5\) See text accompanying notes 67-69 supra.
represented in the relevant population. The chi-square analysis would proceed as described above for single-dimensional sex discrimination. The figures for men and women would yield a chi-square statistic of approximately 3.5. This result is less than the critical value of 3.84 that is necessary for significance at the .05 level. Therefore, these data do not support a prima facie finding of sex discrimination. In this hypothetical situation, there is, then, no evidence of double discrimination (sex discrimination as well as race discrimination).

3. Compound Discrimination Analysis

The hypothetical black woman plaintiff may now wish to investigate the possible presence of compound discrimination. In other words, she may wish to determine whether there is significant discrimination against black women, apart from the discrimination against blacks as a whole. Assume that in this employer’s work force, the 50 black workers are 40 men and 10 women and that of the 950 white workers, 490 are men and 460 are women. The four-celled chi-square analysis is represented in Figure 4.

![Figure 4. Contingency table showing distribution by race and sex of hypothetical employer’s work force. Numbers in parentheses represent “expected values” in each category.](image-url)

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96 See text accompanying notes 91-93 supra.
97 The actual calculation is as follows:

\[
\frac{\left((530 - 500) - \frac{25}{2}\right)^2}{500} + \frac{\left((1470 - 500) - \frac{25}{2}\right)^2}{500} = \frac{29.5^2}{500} + \frac{29.5^2}{500} = 3.481
\]

98 On levels of significance, see note 67 supra. The critical value 3.84 is based on a two-tailed test with one degree of freedom. See notes 83 & 93 supra.
99 See text accompanying notes 67-69 supra.
The chi-square calculation produces a figure of 15.4,100 significant at the .05 level.101 Thus, these data could be prima facie evidence of compound discrimination against black women.

The statistical evidence with respect to this hypothetical employer has revealed an adverse impact of the employment practices against both blacks and black women. In other words, blacks are disadvantaged as a whole, and black women even more so than black men.102 The individual components of the employment process should be scrutinized for the sources of these impacts. In the example of the police department at the beginning of the Article,103 for instance, blacks as a whole were disadvantaged by the written test and black women were disadvantaged by the oral interview. In the absence of proof of a business necessity for these practices, both should be enjoined. If compound discrimination were not recognized as separate from race discrimination, however, only the written test would be enjoined. Similarly, if the court grants affirmative relief such as quotas, it should take account of the especially disadvantaged position of black women.104

100 The actual calculation is as follows:

For white men: \[
\frac{(490 - 503.5)^2}{503.5} = 0.36
\]

For white women: \[
\frac{(460 - 446.5)^2}{446.5} = 0.41
\]

For black men: \[
\frac{(40 - 26.5)^2}{26.5} = 6.88
\]

For black women: \[
\frac{(10 - 23.5)^2}{23.5} = 7.76
\]

Total: 15.41

The chi-square statistic is thus 15.41. See text accompanying notes 80-81 supra.

101 See text accompanying notes 82-83 supra.

102 Unlike the single-dimension test, see text accompanying notes 90-91 supra, the marginal totals for each cell, rather than the proportional representation in the population, are used in calculating the expected values. If the proportional representation were used, a significant chi-square statistic would be ambiguous in this instance: it might reflect compound discrimination or it might reflect one-dimensional or double discrimination. Using the marginal totals insures that a significant chi-square statistic unambiguously indicates compound discrimination. Thus, the expected value for any cell can be calculated by multiplying the marginal totals for that cell and then dividing the result by the total number of employees. See text accompanying notes 79-81 supra. For example, the expected number of black women is calculated by multiplying the number of blacks (50) by the number of women (470) and dividing the result by the total number of employees (1000). The expected number of black women equals 23.5.

103 See text accompanying notes 5-10 supra.

This orderly progression of proof does not suggest that a plaintiff must show discrimination along any single dimension (race or sex) prior to proving compound discrimination. To the contrary, if compound discrimination is separately protected under Title VII, proof of compound discrimination alone, by showing an interaction between race and sex, should be deemed to establish a prima facie case under the Act. If both double and compound discrimination are alleged, however, this progression of proof would provide the court with a clear indication of the dimensions along which the plaintiff has proven a prima facie case of disparate impact.  

**E. Avoidance of Indefinite Permutations**

The most serious policy argument against recognizing compound discrimination under Title VII is that plaintiffs could manipulate categories until one appears to show wrongful exclusion. Statistically, every opportunity to show a significant result increases the probability that some statistically significant disparity can be shown, even if, in fact, the demonstration of discriminatory impact results from sampling variation. Such statistical manipulation could lead to unjust

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106 This progression of proof for a double and compound discrimination case would solve the difficulties encountered by one district court in 1975 when presented with a complaint alleging sex discrimination as well as race and national origin discrimination. The court first found that race and national origin discrimination claims could not be brought because the original charge filed with the EEOC and the investigation had been for only sex discrimination. The court went on to say:

Plaintiffs' complaint, by asserting both sex and racial discrimination, also raises the problem of whether male members of the allegedly discriminated against races ought to be included in the suit. There are three possible views of the case given that problem: either the present alleged class is underinclusive, since no male minority race members are included, or the class ought to be expanded to include male minority race members, which undermines the sex discrimination identification, or the discriminatory classifications of sex and race have a synergistic effect, which to some degree implicitly dilutes the singular claim of sex discrimination by non-minority race females. That dilemma posed by the addition of race and national origin discrimination allegations highlights their lack of relationship to sex discrimination. Thus, defendant's motion to strike the allegations of racial and national origin discrimination is granted.  


106 The error of finding a significant result when in fact the result found occurred by chance alone is called a Type I error (rejecting the true null hypothesis that there is no factor adversely affecting the employment of a group protected by the Act). This type of error occurs when a very rare sample happens to be found by chance alone. The likelihood of making a Type I error increases if a sequence of statistical tests is performed on the data because each test contains a probability of error and these probabilities aggregate as the number of tests increases. See H. Blalock, supra note 70, at 109-12; L. Horowitz, supra note 61, at 167-68. The effect of a Type I error in an employment discrimination case is to find that a prima facie case has been made when the evidence does not justify such a finding. See also D. Baldus & J. Cole, supra note 67, at 291-92 n.5.
results. Employers could not withstand endlessly cumulative statistical scrutiny of their hiring methods, especially without establishing illegal quotas to guarantee an artificially balanced work force. This danger is limited under the proposed statistical test because plaintiffs must show that discrimination results from the interaction of protected categories. They may not juxtapose categories such as black women against a single other compound category, with a choice of comparisons to black men, white women, or white men. Thus, the proposed test limits plaintiffs to one opportunity to prove each distinct type of discrimination. To allow a single juxtaposition, such as black women versus white men, would permit a plaintiff three separate chances to establish disparate impact, with each chance increasing the probability of finding impact when none exists.

Courts should further reduce the danger of statistical manipulation by not allowing compounding of more than two protected categories. Groups such as black Catholic women or old Russian Jewish men may be able to make the same arguments for recognition under the Act that this Article has advanced for recognizing the combination of two groups. Nonetheless, the large number of permutations of categories that could be generated by allowing more than two combined categories creates unmanageable problems of proof. Absent a method to handle these numerous permutations, courts should not interpret the Act so broadly. Intentionally disparate treatment of such groups should be considered prohibited by the Act, but the adverse impact type of discrimination should not be included.

III

CLASS REPRESENTATION FOR COMPOUND AND DOUBLE DISCRIMINATION CASES

If a plaintiff pleading double discrimination or double and compound discrimination seeks class certification, the court must examine whether the named plaintiff can represent all groups adequately. Binding adjudication of the claims of all class members comports with due process only if their representation is adequate. Assume, for

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107 The three chances would be: black women versus white women; black women versus black men; and black women versus white men.

108 See text accompanying notes 57-61 supra. Data indicating high levels of unemployment for groups such as young black males provide an additional reason that such groups should be recognized. See Iden, The Labor Force Experience of Black Youth: A Review, 103 Monthly Lab. Rev. 10, 10-15 (Aug. 1980).

109 See text accompanying notes 28-32 supra.

example, that a black woman wishes to represent black and female employees in a Title VII suit and the complaint alleges both double and compound discrimination in pay by the employer. The evidence shows that blacks are paid less than whites for the same work, women are paid less than men, and black women are paid the least. It is immediately apparent that there exists a potential for conflict among blacks, women, and black women. Although conflict may be a practical problem only at the relief stage of litigation, the potential for conflict may be apparent at the liability phase as well.

Reconsider the hypothetical case of a police department’s hiring practices presented at the beginning of this Article. There were three hiring requirements: a height requirement that adversely affects women, a written test that disproportionately excludes blacks, and an oral interview that has a significant disparate impact on black women only. If both double and compound discrimination claims are presented, the court must consider possible antagonism between the claims of blacks and women or between the claims of both of these groups and those of the compound group of black women. In the competition for a limited number of jobs, black men are better off not challenging the height requirement because both black and white men as a group gain an advantage from the requirement. Similarly, white women are advantaged with white men from the disproportionate exclusion of blacks by the written test. Finally, both black men and white women benefit from the oral interview because they receive better ratings than black women. Courts must determine whether such conflicts are sufficient to require the creation of subclasses with separate representatives.

An interesting example of this situation appears in a case which involved only a claim of racial discrimination. The statistics in the opinion show that black women fared the worst in hiring and promotion, worse than blacks overall and worse than women overall. Sledge v. J.P. Stevens & Co., 16 Fair Empl. Prac. Cas. 1652, 1662-63, 1670-72 (E.D.N.C. 1974), aff’d in part, rev’d in part, 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Only race discrimination was at issue in that case, but the evidence suggests that a sex discrimination claim might have been brought by a proper class representative. Moreover, the evidence reveals that there is an interaction between race and sex such that the compound group of black women appear to have fared worse than would be expected from the combined effects of race discrimination and sex discrimination considered separately. Id. at 1662-63.

See text accompanying notes 6-10 supra.

In County of Los Angeles v. Davis, 566 F.2d 1334 (9th Cir. 1977), vacated, 440 U.S. 625 (1979), plaintiffs alleged discrimination against blacks and Mexican-Americans. Judge Wallace noted that there is inherent antagonism between the class representatives and Mexican-American class members in challenging a height requirement for hiring. Each named class representative had fulfilled the 5’7” minimum height requirement and “applicants 5’7” or taller have an interest in limiting the number of their competitors by retaining the height requirement.” Id. at 1345 (Wallace, J., dissenting).
Courts already face a dilemma with respect to conflicts in double discrimination class actions; recognition of compound groups will increase these problems. In order to provide the fairness necessary for finality, a court must ensure that the multiple bases of relief for the named plaintiff do not undermine the named plaintiff's ability to represent adequately the interests of all class members.

Courts also must be mindful, however, that defendants gain a strategic advantage over financially limited class representatives when a court rules that subclasses must be formed and separate counsel retained. An award of attorneys' fees to prevailing plaintiffs is not always sufficient to ensure that plaintiffs can bear the financial burdens of a court's creating several subclasses in a long and complicated case. On the one hand, unnecessary subclassing should be avoided in order to promote the broad purposes of the Act; on the other hand, the fundamental requirements of class actions must be met in order to achieve fairness and due process. Courts should strike this balance by avoiding subclassing until the evidence reveals the presence of actual conflict. Inherent conflict should not be assumed, and potential conflict should not be a sufficient basis for imposing on plaintiffs the difficulties of subclassing.

A. Rule 23 Problems with Double Discrimination Cases

Several courts have recently considered problems of class representation in cases in which the named plaintiff alleges double discrimination, most typically pleading both sex and race discrimination. The question is whether one representative, usually a black woman, can represent both the class of women and the class of blacks. Rule 23(a)

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115 See text accompanying notes 119-67 infra.

116 Title VII grants courts discretion to award attorneys' fees to the prevailing party. 42 U.S.C. § 2000e-5(k) (1976) (originally enacted as Civil Rights Act of 1954, Pub. L. No. 88-352, Title VII, § 706(k), 78 Stat. 253 (1964)). The Supreme Court has held that a similar provision under Title II of the same Act should be interpreted to mean that prevailing plaintiffs should be awarded attorneys' fees as a matter of course, absent reasons making such an award inequitable. Prevailing plaintiffs need not show bad faith by the defendant. Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). The Supreme Court has further held that attorney's fees under Title VII should not be awarded to prevailing defendants as a matter of course: "[A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

117 Under Fed. R. Civ. P. 23(c)(1), a court may issue a conditional class certification order and amend it at any time prior to the decision on the merits.
of the Federal Rules of Civil Procedure specifies four requirements for certification of a class: numerosity, commonality of questions of law or fact, typicality of the named plaintiffs' claims, and adequacy of representation of class interests by the representatives. The last three of these prerequisites may present problems in double discrimination suits.

1. Commonality

The commonality element requires that questions of law or fact be common to the class. Courts generally have been liberal in interpreting rule 23(a)(2) in Title VII actions. In Title VII class actions, complaints frequently allege "across the board" discriminatory employment practices by defendant employers. An across-the-board action alleges discrimination in some combination of employment practices: hiring, work assignment, wages, transfer policies, promotions, discharges, or other terms or conditions of employment. The common questions are said to arise from an overall pattern of discrimination in the employer's practices. In most cases, the lack of identity in the types of practices giving rise to individual claims is not an obstacle. This same reasoning applies to meeting the commonality requirement in double discrimination across-the-board cases. The common thread of pervasive discrimination in an employer's practices is generally sufficient to overcome differences between race and sex discrimination and differences in the particular challenged employment practices. Even the creation of subclasses reflecting those differences cannot destroy the commonality of the claims.
2. Typicality

A double discrimination case presents special problems in meeting the typicality requirement. Rule 23(a)(3) requires that the claims of named plaintiffs be typical of those of the class members. Although many courts have treated the typicality requirement as virtually synonymous with either the commonality requirement or the adequacy of representation requirement, others have attempted to give it a particular meaning. The test is whether the named representative's claim is sufficiently analogous to class members' claims.

One court listed three factors to be considered in Title VII cases: (1) the similarity of the terms and conditions of employment, (2) the similarity of the alleged discrimination, and (3) the compatibility of the requested relief.

In double discrimination cases these factors sometimes point toward a lack of typicality. In Bartelson v. Dean Witter & Co., for example, a white woman wanted to be the class representative for claims of both sex discrimination and race discrimination against minorities. Although the court found the commonality requirement satisfied, the typicality requirement barred certification of the class. The white woman's standing to complain of race discrimination against minorities did not meet the typicality requirement because

131 Id. at 666-67.
her claim of loss of association with minorities was not sufficiently analogous to direct claims of race discrimination. In another case, in which double discrimination was alleged with a black female as class representative, the court required subclasses to be formed to satisfy the typicality requirement and to avoid class conflicts.

The Supreme Court discussed rule 23(a)'s typicality requirement in *East Texas Motor Freight System, Inc. v. Rodriguez.* In that case, Mexican-American plaintiffs brought a class action against their common-carrier employer and their unions. They alleged that job transfer policies and the seniority system adversely affected blacks and Mexican-Americans. The Court found that the named plaintiffs did not "possess the same interest and suffer the same injury" as class members because they had not individually suffered any discrimination. They had not suffered discrimination because they were unqualified for the line-driver jobs they wished to transfer to, and because they stipulated that they had not been discriminated against in initial hiring, leaving them unaffected by alleged discrimination in a seniority system that keeps city-drivers and line-drivers separate.

Since *Rodriguez,* courts have split over how to apply this same interest/same injury test. The Fourth Circuit's decision in *Hill v. Western Electric Co.* interpreted *Rodriguez* as greatly limiting across-the-board actions. The *Hill* court ruled that a named representative cannot represent "a class of people who suffered different injury or those having similar claims but who are employed in other facilities." It applied that principle to mean that the action could not encompass claims of discrimination against women and blacks in hiring, nor against women in promotion in a particular department, because no named plaintiff was a member of these excluded

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132 Id. at 668-69. The *Bartelson* court attributed a "semantic integrity" to rule 23(a)(3) by "focusing on its dictionary or common sense meaning." Id. The court equated this test with tests developed by other courts and commentators. Id; see note 128 supra.


135 Id. at 403 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)). Although the *Rodriguez* Court did not specifically tie the same interest/same injury test to rule 23(a)(3)'s typicality requirement, other courts have done so. See, e.g., Scott v. University of Del., 601 F.2d 76, 86 (3d Cir.), cert. denied, 444 U.S. 931 (1979); Turner v. A.B. Carter, Inc., 85 F.R.D. 360, 364 (E.D. Va. 1980).

136 431 U.S. at 403-04.

137 Id. at 405.


139 Id. at 102.
Similarly, the class could not include workers from facilities other than the one at which the representatives were employed.\textsuperscript{141} It was permissible, however, to consider all persons denied promotions in one facility as members of one class, even though the promotion denials were in different departments. Chief Judge Haynsworth explained: "Rodriguez did not require the fractionization of similar claims by a class of employees in a single facility, nor does it destroy the utility of the class action device by requiring separate suits on an episodic basis."\textsuperscript{142}

Another court has found Rodriguez much less restrictive. District Court Judge Higginbotham in Vuyanich v. Republic National Bank\textsuperscript{143} emphasized the importance of the distinction between the named representative's suffering no injury at all, as in Rodriguez, and the named representative's suffering an injury shared by some but not all members of the class. In the Rodriguez situation the named representative is not a member of the class at all,\textsuperscript{144} but in the other types of cases the representative is a member of a class in which other members have suffered similar but not identical injuries.\textsuperscript{145}

\textsuperscript{140} Id. at 101; accord, Jones v. MacMillan Bloedel Containers, Inc., 84 F.R.D. 640, 643 (E.D. Ark. 1979). Most circuits have not squarely faced the issue whether Rodriguez requires that hiring and promotion claims of discrimination not be brought by the same class representative. A rejected applicant never has a promotion problem, so a single class representative cannot be a member of both groups. Hill held that the Rodriguez same interest/same injury test was not met under those circumstances; class representatives who suffered discrimination in promotion or terms and conditions of employment do not have claims typical of those who were denied any employment. 596 F.2d at 101-02.

In a case decided after Rodriguez, the Third Circuit held that a black professor denied tenure could not represent a class of those not hired. The court found that the typicality requirement was not satisfied because the named representative's interests diverged greatly from the applicant class. Scott v. University of Del., 601 F.2d 76, 85-86 (3d Cir.), cert. denied, 444 U.S. 931 (1979). A concurring opinion by Judge Adams emphasized that the majority opinion was not meant to be too restrictive. "We do not hold ... that in general a person allegedly discriminated against with respect to promotion may not represent a class including individuals who were aggrieved by the employer's hiring practices." Id. at 93 (Adams, J., concurring). See also Patterson v. General Motors Corp., 631 F.2d 476, 480-81 (7th Cir. 1980) (plaintiff's claim very personal; same interest/same injury test not met); DeGrace v. Rumsfeld, 614 F.2d 796, 809 (1st Cir. 1980) (one representative may represent both hiring and promotion class claims when the challenged procedures are "closely akin," but not allowed under special facts or case); Duncan v. Tennessee, 84 F.R.D. 21, 34 (M.D. Tenn. 1979) (former employee may not represent class of applicants without a showing of applicants who have been subject to discrimination); RWDSU, Local 194 v. Standard Brands, 24 Fair Empl. Prac. Cas. 409 (N.D. Ill. 1979). 146

596 F.2d at 102. See also Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980) (not sufficient showing of common practices among facilities to allow statewide class).

146 596 F.2d at 102.


145 82 F.R.D. at 433 n.8; cf. Petty v. People Gas Light & Coke Co., 86 F.R.D. 335, 340 (N.D. Ill. 1979) (typicality requirement met whenever named plaintiff is adversely affected by the same practice; injury need not be precisely the same).
Understood in this way, *Rodriguez* does not limit the application of rule 23 to absolutely identical harm resulting from exactly the same type of practice. The typicality prerequisite for a class action may be satisfied by much less.\textsuperscript{146}

3. Conflict

The adequacy of representation requirement of rule 23(a)(4)\textsuperscript{147} poses the greatest problem in double discrimination cases. Several courts have held that a single class representative may not represent both females and minorities even if the representative has allegedly been a victim of both types of discrimination.\textsuperscript{148} The difficulty with a single class representative for a double discrimination case is the potential for conflict. It is a fundamental requirement in class actions that the interests of the class representative cannot be antagonistic to the interests of members of the class.\textsuperscript{149} If such antagonism exists, the named plaintiffs cannot fairly and adequately protect the interests of the class. For example, in *Rodriguez*, the named plaintiffs' request for relief presented a conflict because they sought a merger of the city-driver and line-driver collective bargaining units, whereas members of the class had voted against exactly such a merger.\textsuperscript{150}

When a Title VII complaint alleges both race and sex discrimination, some courts have held that a single representative is inadequate to protect the interests of both groups because there is "inherent conflict" between the groups.\textsuperscript{151} Representing both groups puts the named plaintiff in an untenable position, one district court explained,\textsuperscript{152} because the plaintiff would be arguing both that the de-

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\textsuperscript{146} See 82 F.R.D. at 432-33. The Fifth Circuit does not find the nexus requirement in *Rodriguez* as restrictive. It held in *Falcon v. General Tel. Co.*, 626 F.2d 369 (5th Cir. 1980), that it is consistent with *Rodriguez* to allow a plaintiff to represent a class of Mexican-Americans on both promotion and hiring claims. The common national origin discrimination complaint can "outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices." Id. at 375.

\textsuperscript{147} *Fed. R. Civ. P. 23(a)(4).*


\textsuperscript{151} See cases cited in note 148 supra.

\textsuperscript{152} *Droughn v. FMC Corp.*, 74 F.R.D. 639 (E.D. Pa. 1977).
fendant’s employment policies discriminate in favor of men, including black men, and that the defendant’s policies discriminate in favor of whites, including white females. The court concluded: “A single litigant should not be asked to juggle these conflicting interests in an adversary system of justice.”

Other courts have not considered the conflict between race and sex groups to be an inherent conflict in a Title VII case, but have found the existence of actual conflict. In one case, for example, a black woman was the named plaintiff for a class of both women and blacks. In her deposition, however, she revealed that she believed favorable treatment was given to white women over black women. In another case the complaint alleged both race and sex discrimination, but it also alleged that there were racist attitudes on the part of white women workers. Since those white women workers would be a part of the class the black woman sought to represent, the court held that she would be an inadequate representative for the double discrimination claim. Revelation of any actual conflict always requires either the formation of subclasses or the disqualification of class representatives on some claims.

Vuyanich contains the most complete analysis of possible conflicts among subgroups in a double discrimination case. Judge Higginbotham was unwilling to find as a matter of law that conflict inherently exists in a double discrimination case, but required that a careful inquiry be made to determine whether ‘fundamental antagonism actually exists or is likely to result from dual representation.’

He found a conflict between black and female applicants for some positions with the bank and required the subclassing of those groups. Since the hiring records showed that a sizeable number of those positions were filled by white women, black applicants might

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158 Id. at 435.
159 Id.
160 Id. at 431 n.6.
easily contend that white females were hired in place of blacks. Judge Higginbotham found no conflict between female and black applicants for a second category of positions with the bank, however, because the available evidence indicated that white males held most of those jobs. Neither black nor female applicants were likely to argue that those jobs were filled by fellow members of the class, making subclassing unnecessary. If evidence indicating a further conflict were to emerge at trial, the court suggested that additional subclassing might then be required.

Judge Higginbotham's approach may strike the best balance between the dangers of dampening employment discrimination class actions and of failing to provide sufficient safeguards to protect the interests of all class members. Inherent conflict should not be found in all double discrimination cases, but subclassing can be required if and when actual conflict is discovered.

A refinement of this basic approach would be helpful. In Vuyanich the court found conflict in the situation in which black applicants could claim that white women received jobs that blacks might have received but for race discrimination. If both race and sex discrimination were present as alleged, however, this conflict might be more imagined than real. Proof of a Title VII claim does not focus on who is favored, but rather on who is disfavored. If the bank's employment practices adversely affected both blacks and women, then it should be irrelevant that on particular occasions exclusion of one applicant resulted in favoring another applicant from a disfavored group. The proof at the liability stage of the trial would be unaffected, and there is no reason to believe that a representative of both groups would have an incentive to push one claim any more vigorously than another. Any potential conflict is more likely to appear at the remedial stage of the trial. The relief sought in such a

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161 Id.
162 Id. at 435.
163 See id. See also Fischer v. Kletz, 41 F.R.D. 377, 384, 386 (S.D.N.Y. 1966) (subclassing may be appropriate if conflict ripens in a securities case).
164 For a related argument, discussing the interaction between the due process concerns of the federal class action rule and the broad purposes of antidiscrimination laws, see Note, Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2), 88 Yale L.J. 868, 878-91 (1979) [hereinafter Class Actions].
165 See text accompanying note 61 supra.
166 See Parker v. Bell Helicopter Co., 78 F.R.D. 507, 512 (N.D. Tex. 1978) (bifurcation of liability and relief phases, and subclassing in the latter, eliminates conflicts of interest); Newberg, supra note 118, §§ 7984d, 7984e (vigorous prosecution assumed absent express showing of dissatisfaction with named representatives).
case might well bring a divergence of interests, so that once liability has been found, subclassing may be desirable.\(^{165}\)

### B. Representation and Conflict with Compound Groups

If compound groups are recognized as protected by the Act, problems of class representation similar to those in double discrimination cases will emerge. If both double and compound discrimination are alleged in a class complaint, one more layer of analysis is required to determine whether the rule 23 requirements are met. The prerequisites of commonality, typicality, and adequacy of representation must be met with respect to the claims of the compound groups as well as double groups. In the hypothetical case posed at the outset of this Article,\(^{166}\) for example, the defendant police department had three hiring practices that disproportionately affected blacks, women, and black women, respectively. As the previous section indicates, the courts have split on whether a single black woman plaintiff could represent both the race and sex discrimination claims.\(^{167}\) The requirements for representation of a compound discrimination claim have not yet received judicial consideration.

If only compound discrimination is alleged, without double discrimination claims, then no special rule 23 problems appear. If the class consists only of black women, for example, and neither black men nor white women are members of the class, then the claim is identical to one based on race or sex alone.\(^{170}\) The compound group is capable of subclassing only to the extent that a strictly racial or sexual class would be.\(^{171}\) There is no opportunity for the type of conflict and subclassing that occurs in the double discrimination setting since compound discrimination claims reflect the impact on one distinct, protected group.\(^{172}\)

\(^{165}\) See text accompanying notes 6-12 supra.

\(^{166}\) See text accompanying notes 148-63 supra.


\(^{168}\) Thus, subclassing may be necessary, for example, to separate types of claims such as hiring discrimination and promotion discrimination. See, e.g., Sullivan v. Winn-Dixie Greenville, Inc., 62 F.R.D. 370, 375-76 (D.S.C. 1974); Ellison v. Rock Hill Printing Co., 8 Fair Empl. Prac. Cas. 383, 385-86 (D.S.C. 1974); see text accompanying notes 139-42 supra.

\(^{171}\) See text accompanying notes 115-17 supra.
The more usual case, however, would involve claims of both double and compound discrimination, as in the hypothetical police hiring case. Jurisdictions applying a strict interpretation of the Rodriguez same interest/same injury test \(^{173}\) may require separate class representatives for the race and sex discrimination claims. A separate class representative may also be required for the compound claim because the injury suffered by black women excluded by the oral interview is distinct from both the injury suffered by the black class because of the written test and the injury suffered by the female class because of the height requirement. A court that finds inherent conflict between black and female classes \(^{174}\) may also find inherent conflict between those classes and the compound group. In the hypothetical police case, a subclass of black women may be necessary because black women might argue that they lost jobs that were gained by black men and white women after the oral interview.

The extensive subclassing that may result in cases alleging both double and compound discrimination could be very detrimental to Title VII class litigation efforts. At the outset of a complex case, finding named plaintiffs for each subgroup may not be easy. Moreover, the addition of counsel for each subclass may be financially prohibitive. The private enforcement provisions of the Act encourage litigation by "private attorneys general" who may be awarded attorneys fees, \(^{175}\) but the prospect of such an award after prevailing in litigation does not solve the problem of bearing the costs of a suit at its outset. Although the court must be mindful of the necessity of protecting adequately the interests of all members of the plaintiff class, the court also needs to be mindful of the broad purpose of Title VII to eradicate discrimination, a purpose that suggests a policy favoring large classes. \(^{176}\)

It has often been said that the rule 23 requirements are construed liberally in Title VII cases precisely because of the broad purposes of the Act. \(^{177}\) Although Rodriguez teaches that a liberal reading

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\(^{173}\) See text accompanying notes 134-46 supra.


\(^{176}\) In Lewis v. Philip Morris, Inc., 419 F. Supp. 345 (E.D. Va. 1976), the district court noted that the federal courts, as a matter of policy, are receptive to large classes in discrimination suits because of the goals of finality of claim adjudication and reduction of trial costs by economies of scale. Id. at 352; see, e.g., Rich v. Martin Marietta Corp., 522 F.2d 333, 340-41 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543, 548 (4th Cir. 1975).

\(^{177}\) See Newberg, supra note 118, § 7984, at 1301; Class Actions, supra note 164, at 884-85.
does not mean that these requirements can be ignored, the prerequisites for class representation were not met in that case because the class representatives had not suffered the injury they were attempting to redress. The Rodriguez decision should not prevent named plaintiffs who have actually been injured from bringing suit on behalf of all others similarly injured. Striking a balance between excessive subclassing and adequate safeguards for the class is difficult. Courts should attempt that task very carefully. Although a conservative approach to protecting interests by extensive subclassing may appear to be a proper judicial strategy in complex cases, leaning too much in that direction may have detrimental consequences for employment discrimination litigation.

One solution to the problem of how much to subclass in double and compound discrimination cases is to reserve the question of conflict until actual conflict appears. Actual conflict may appear in the relief stage of the litigation, when subclassing is least detrimental to the plaintiffs. In the hypothetical police case, no inherent conflict among blacks, women, and black women exists in the liability stage. Although some members of these groups may claim that they should have received jobs that other minorities received, what is at issue is the pattern of exclusion of each group, not a series of individual claims.

Disparate impact analysis focuses on the disproportionate exclusion of each group; the corresponding benefit to the opposing group is collective, not individual. Although a different minority group may possess some theoretical benefit, that group does not fit comfortably into the role of antagonist when, along with another plaintiff subgroup, it, too, demonstrably has been excluded from job opportunities. That white men, white women, and black men collectively benefit from the disproportionate exclusion of black women does not necessarily mean that the claims of black men conflict with those of black women when black men are also underrepresented in the work force.

Nor does the collective benefit necessarily mean that a single class representative of the groups of blacks, women, and black women would fail to oppose vigorously the discriminatory hiring
practices that led to the exclusion of any of these groups, so long as that representative had actually suffered from those discriminatory practices. Since a judgment finding any one of the forms of discrimination would benefit the named plaintiff's subgroup, the representative could be expected to oppose each form of discrimination with vigor.

At the relief stage of litigation, actual conflict among such groups becomes more obvious and likely. Affirmative relief in the form of enjoining the use of particular selection procedures, ordering affirmative action, or setting temporary quotas may produce conflicts, and subclassing may be necessary to protect the interests of each group. Similarly, in a case alleging double and compound discrimination in pay, divergent interests may influence setting a formula for determining individual entitlements. Subclassing at that stage may, therefore, be warranted.

Postponing subclassing until the relief stage protects the interests of all class members at the point at which actual conflict arises, without creating as great a burden on the plaintiffs as does subclassing at the outset of the litigation. Once liability has been established, finding both individuals willing to be named plaintiffs for particular sub-classes and additional counsel is less difficult. In many cases, conflict may never arise at any stage of the litigation, so that subclassing may be unnecessary. If and when subclasses are formed, however, the court should take care to form only as many subclasses as existing evidence suggests are absolutely necessary.

CONCLUSION

Exclusionary employment practices cannot always be classified easily as discrimination based solely on sex, race, or national origin. The simple dichotomies of male/female or black/white are

183 See note 165 supra.

184 Conflicts among groups seeking equal employment opportunities have been noted in recent years by the press. A 1979 article, for example, quotes a representative of the Urban Coalition as saying that blacks believe that most employers would prefer a white woman to a black male if forced to choose one or the other. Moreover, the article notes that a predominantly black group of women who were being trained as electromechanics found considerable resistance when competing for jobs with black men. Roberts, Blacks and Women Clash on Access to Jobs and Aid, N.Y. Times, Feb. 20, 1979, at A10, col. 1. In an earlier article on the same subject, a representative of the Women's Equity Action League noted the existence of tension between minorities and women, and observed that statistics show that as a group, women earn much less than black men earn. A Catholic priest who is a sociologist said that Eastern and Southern European ethnic groups have been underrepresented in positions of responsibility. He added that although these groups have been victims of discrimination, the government neither collects data on their unemployment nor creates special programs such as those made available to racial minorities and women. Reinhold, Government Expands 'Minority' Definition; Some Groups Protest, N.Y. Times, July 30, 1978, § 1 at 1, col. 6.
often insufficient to describe the unique problems faced by compound groups such as black women or Asian-American men. The purpose of Title VII is to eradicate discrimination in employment on the basis of "race, color, religion, sex, or national origin," and it should be interpreted to prohibit the unjustified exclusion of compound groups as well as unjustified exclusion on the basis of a single characteristic.

Title VII cases alleging double discrimination are distinguishable from those involving compound discrimination. Double discrimination occurs when an employer's practices disproportionately exclude two groups, such as blacks and women. Compound discrimination, however, is the disproportionate exclusion of a group formed by the interaction of two groups, such as black women. There may be no discrimination based strictly on either race or sex if an employer hires large numbers of black men and white women, but the effect of that kind of disproportionate hiring may be the exclusion of black women.

This Article has argued that Congress intended the Act to prohibit intentional discrimination against compound groups. Many courts have assumed that intentional discrimination against such groups is covered by Title VII. The more difficult question is whether disparate impact analysis should be applied to compound groups. This Article has maintained that it should be, although some safeguards should be adopted to prevent unfairness to defendants. One of those safeguards is a limitation on the manner of statistical proof so that a plaintiff does not have boundless opportunities to manipulate data to find a significant result. In addition, Title VII should not be interpreted to prohibit disparate impact against groups formed by the interaction of more than two characteristics, such as young black Catholic men. Overt discrimination against such groups should be prohibited, but policy dictates that disparate impact analysis should not be applied: it would subject defendants to numerous suits and virtually unlimited liability while enhancing the possibility of unjustifiable applications of statistical proof.

Finally, this Article has suggested that courts allow class actions alleging double and compound discrimination to proceed through the liability phase of the trial without automatic subclassing. Problems of antagonism and conflict may emerge; when that happens, subclassing is clearly required under rule 23. Courts should not assume that conflict is inherent in such cases, however, and they should not require subclassing until actual conflict is apparent. Actual conflict is likely to occur only at the relief stage of compound discrimination claims that are combined with one or more single-dimension claims. Automatic subclassing fractionalizes claims to the point of discouraging the kind of broad-based employment discrimination actions that specifically were encouraged by the private enforcement provisions of Title VII.
The problems of compound discrimination have not yet been widely litigated. To the contrary, the question whether compound discrimination is prohibited by the Act is just now emerging in the courts. The issues presented by compound discrimination claims are likely to arise more often in the next few years as Title VII litigation poses the new and tougher questions typical of maturing law. These issues should be resolved in a manner that will promote fully the broad purposes of the Act while protecting employers from exposure to unfair employment discrimination suits.