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Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII

Elaine W. Shoben*

Last term the Supreme Court handed down three decisions in which it defined with some precision the proper use of statistics in Title VII cases. Those decisions filled a void that had existed since Griggs v. Duke Power Co., but they left some questions unanswered. In this article Professor Shoben discusses those decisions and addresses the issues still unresolved. She proposes a structured framework for the systematic analysis of disparate impact cases that is consistent with, yet builds upon, the three recent decisions. In addition, Professor Shoben considers whether allowing a plaintiff to establish a prima facie case with statistics alone violates the Act's guarantee that it does not require preferential hiring.

All employers use some method for screening potential employees and excluding certain groups of applicants from consideration for employment. A variety of objective or subjective criteria serve as selection aids, such as tests, interviews, education requirements, physical requirements, or any other measure that the employer believes will predict the quality of an applicant as a future employee. The use of criteria that have not been demonstrated to be good predictors of employee performance, however, creates the risk that otherwise qualified applicants will be unfairly excluded by the hiring process. Moreover, if a selection requirement has the effect of

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excluding disproportionately a group on the basis of race, sex, or ethnicity, then its use by the employer constitutes an unlawful employment practice under Title VII of the Civil Rights Act of 1964, unless the employer can demonstrate the business necessity of the requirement. In Title VII litigation the term "disparate impact analysis" refers to plaintiff's statistical proof of the discriminatory effect of defendant employer's hiring practices. Plaintiff's statistics may show, for example, that a height requirement disproportionately excludes women from a job or that the percentage of blacks in defendant's work force is substantially lower than the percentage of blacks in the surrounding community.

Disparate impact analysis has assumed an increasingly significant role in Title VII litigation in the seven years since the Supreme Court first accepted it in the landmark decision *Griggs v. Duke Power Co.*⁴ *Griggs* established that discrimination under Title VII is not limited to overt acts of unequal treatment; the Act also prohibits neutral employment practices "fair in form, but discriminatory in operation" unless the employer can show

1. 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1970 & Supp. V 1975) (enacted as Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (1964)). Title VII provides, in part, that it is an unlawful employment practice for an employer "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." 42 U.S.C. § 2000e-2(a)(i) (1970). In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court held that an employer can violate Title VII in the absence of discriminatory purpose if his employment practices have a discriminatory effect.

For convenience, this article will use the phrase "race, sex, or ethnicity" to refer to the groups protected by Title VII.

2. Griggs v. Duke Power Co., 401 U.S. 424 (1971), which held that a Title VII violation can be established by proof that defendant's employment practices have a discriminatory effect, allowed employers this defense. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. This article will refer interchangeably to the *Griggs* defense as proof of business necessity and proof of job relatedness.

This article analyzes cases of Title VII discrimination premised on a demonstration of discriminatory impact or effect. It does not address instances of overt discrimination based on religion, sex, or national origin, for which the bona fide occupational qualification provision may serve as a statutorily-created justification for discrimination. 42 U.S.C. § 2000e-2(e)(1) (1970) See Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Texas L. Rev. 1025, 1025 n.4, 1034 n.57 (1977).

3. Title VII claims based upon "disparate impact" should be distinguished from claims of "disparate treatment." The similarity in the names of these dissimilar theories of recovery under Title VII is unfortunate because neither of these terms is defined by, nor even appears in, the Act itself. In a disparate treatment case plaintiff alleges and must prove purposeful discrimination in defendant employer's hiring practices, although sometimes discriminatory motive can be inferred from facts showing inequality in treatment. On the other hand, a disparate impact claim alleges only the discriminatory effect of facially neutral employment practices, and plaintiff need not prove that defendant intended to discriminate. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 15-25 (1976).

4. 401 U.S. 424 (1971).

their business necessity.⁵ This operational definition of discrimination in employment has caused the development of a complex body of disparate impact law. In *Griggs* the discriminatory effect of the employment practices was easily seen because the facts disclosed virtually complete exclusion of blacks from the better jobs. 6 Diploma and testing requirements adopted by Duke Power Co. had kept blacks in the laborer jobs they had held historically under an overt system of discrimination. Employment discrimination cases since Griggs still reveal instances of the total exclusion of a group from certain jobs, but now the more typical case concerns a partial exclusion, or underrepresentation, of certain groups.⁷

An example will illustrate the complexities of disparate impact analysis in a case of partial exclusion.8 Assume that a black plaintiff brings a Title VII action alleging that defendant employer engages in hiring practices that have the effect of discriminating against his racial group. The job in question is guard work in defendant's private guard service company, and there are three employment requirements: (1) a passing score on a written test; (2) previous military or guard work experience; and (3) approval from the personnel manager following a subjective and standardless interview. Plaintiff proves that blacks constitute twenty percent of the population in the city where defendant is located and hires, but that the company's work force is only five percent black. Plaintiff also produces statistics showing that whites pass the written test at a rate significantly greater than blacks.

Defendant employer attempts to rebut plaintiff's case in three ways. First, defendant produces data concerning his recent hiring that show that twenty percent of his newest employees are black. This proportion compares favorably with the twenty percent representation of blacks in the general population, even though defendant's total work force remains only five percent black. Second, the company argues that although the written test is passed by whites at a greater rate than blacks, the military or guard work

- 5. Id. at 431. A plaintiff may also base a claim of Title VII discrimination on facts showing that an employer treated him or her unequally as an individual. In a 1972 opinion, McDonnell Douglas Corp. v. Green, 411 U.S. 792, the Supreme Court established the requirements for a prima facie case of individual discrimination:
 - (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 plaintiff has established these elements the burden shifts "to the employer to
- articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id.

 6. See Griggs v. Duke Power Co., 420 F.2d 1225, 1229 (4th Cir. 1970) (only three blacks promoted from Labor Department), aff'd, 401 U.S. 424 (1971).

 7. See generally Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the
- Concept of Employment Discrimination, 71 MICH. L. REV. 59 (1972).
- 8. This example is based on parts of the following three cases: Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); Smith v. City

experience requirement operates in favor of blacks because a disproportionate number of the veterans among the applicants are black. Last, defendant urges that if an overall work force comparison is made, the relevant labor market is not the general population, but only those people who work as private guards. If only five percent of the people who are private guards are black, the company argues, then its hiring practices do not disproportionately exclude black guards.

The litigants in such a case might introduce a variety of other statistical data, limited only by the requirement of relevance and the imagination of counsel. Trial courts have had the task of choosing which figures are most probative to assess whether defendant's practices act as a barrier to a racial, sexual, or ethnic group. The *Griggs* prototype of total exclusion does not provide an easy answer to the question whether the facts of the example are sufficient to show disproportionate exclusion. A judgment whether the evidence shows disproportionate exclusion of a group requires, as the term suggests, a comparison of proportions. The problems arise in deciding which proportions to compare and how to assess whether a difference between the chosen proportions shows discriminatory effect.

Partial exclusion cases such as this hypothetical one have caused the development of varied approaches to disparate impact analysis. 9 An elaboration on the meaning of the Griggs disparate impact standard has been needed from the Supreme Court, and last term that need was fulfilled in part. In a trio of employment discrimination cases decided in the summer of 1977, 10 the Court addressed several disparate impact issues. The developments in the interpretation and implementation of disparate impact analysis, and particularly the recent refinements made by the Supreme Court, are the subjects of this article. Part I discusses the issues recently resolved by the Court and addresses the competing considerations underlying several issues yet unresolved. Parts II and III make two proposals concerning the future of disparate impact analysis. The first is a step-by-step analytical structure for approaching disparate impact cases that avoids the doctrinal pitfalls into which some courts and administrative bodies have fallen. The second is a proposed resolution of an issue left open by the Court, whether the use of disparate impact analysis conflicts with the statutory guarantee

of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), aff'd in part and rev'd in part sub nom. Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976).

^{9.} See Green v. Missouri Pac. R.R., 523 F.2d 1290, 1293-94 (5th Cir. 1974); Thompson v. McDonnell Douglas Corp., 416 F. Supp. 972, 980-81 (E.D. Mo. 1976), aff'd, 552 F.2d 220 (8th Cir. 1977); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976).

^{10.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

that preferential hiring is not required. This article argues that disparate impact analysis is merely a tool for discerning the effects of employment practices and is fully compatible with the Act's goal of placement based solely on merit.

I. The Development of Disparate Impact Analysis

The Supreme Court has twice noted that Congress enacted Title VII to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." In Griggs v. Duke Power Co. 12 the Court held that facially neutral qualification standards may fall within this proscription if they operate in practice to exclude disproportionately members of a particular racial, sexual, or ethnic group. Thus, plaintiff need not produce evidence of an employer's discriminatory motive or intent to prove a violation of Title VII; he can establish a prima facie case with a showing that the employment standard in question selects applicants in a discriminatory pattern. Defendant employer can respond to plaintiff's statistical showing in two ways. He may attempt to rebut the inference of discriminatory effect by introducing his own statistical evidence or, even if he does not contest the discriminatory effect of the challenged standards, he can defend by showing that those standards are related to job performance. 13 Because the requirements for a showing of job relatedness are rigorous, however, the second method of defense has generally not been successful, 14 and thus Title

The Court has noted for the record and so finds that there is no pre-employment test, given and acted upon by any employer in the United States, or known to exist or yet devised, which has been determined by EEOC to meet the requirements contained in Regulation Paragraph 1607 [test validation].

Validation requirements for tests challenged as violative of the constitutional guarantee of equal protection, however, now appear to be less stringent than Title VII requirements. See Washington v. Davis, 426 U.S. 229, 249-52 (1976) (civil service test for police officers). In the area of Title VII, the Court recently expanded the concept of the "bona fide occupational qualification" exemption from the Act for sex discrimination. Dothard v. Rawlinson, 97 S. Ct. 2720, 2728-30 (1977) (height and weight requirements for prison guards). See Sirota, supra note 2, at 1025, 1039, 1050, 1070-71. Although these cases may indicate the Court's current inclination toward lessening the difficulty of defendant's burden of proof, the Court has previously

^{11.} Dothard v. Rawlinson, 97 S. Ct. 2720, 2726 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

^{12. 401} U.S. 424, 430-31 (1971).

^{13.} Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1970). The Supreme Court subsequently added that if the employer proves that the requirements are job related, plaintiff may then show the availability of other selection devices that serve the legitimate business purpose of defendant without the discriminatory impact. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1972).

^{14.} See Johnson, Albemarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing, 27 HASTINGS L.J. 1239, 1257 (1976); Note, Employment Discrimination: Statistics and Preferences Under Title VII, 59 VA. L. REV. 463, 466 (1973). In Henderson v. First Nat'l Bank, 360 F. Supp. 531, 545 (M.D. Ala. 1973), the court well expressed the difficulty of validation:

VII cases often turn on the employer's statistical rebuttal of plaintiff's prima facie case of disproportionate exclusion. ¹⁵

Despite this practical emphasis on proof of disparate impact, until the summer of 1977 the Supreme Court had not provided substantial guidance on the mechanics of disparate impact analysis, but instead left the task to the lower courts and the Equal Employment Opportunity Commission (EEOC). 16 In the cornerstone decision, *Griggs*, the challenged qualification standards were completion of high school and satisfactory scores on two professionally prepared aptitude tests. 17 The Court concluded that the two standards disproportionately excluded blacks, but it relegated to a brief footnote the specific evidence that supported that finding. 18 Because the guidelines promulgated by the EEOC discussed proof of disparate impact with no more detail than did the Supreme Court in Griggs, 19 the lower courts had the burden of developing the evidentiary standards that would control plaintiff's statistical proof of disparate impact. They have allowed plaintiffs to prove disparate impact and thus establish a prima facie case of discrimination by three distinct methods. The courts derived two of these methods from the footnote in Griggs that set forth the evidence on which the finding of disproportionate exclusion was based. They developed independently the third method, which was only recently approved by the Supreme Court.

The first method of proof calls for an examination of the effect of the requirement on the general population group from which defendant employer hires. It entails a comparison of the percentage of blacks or women in the general population excluded by a particular employment requirement with the percentage of whites or males in the general population that would be

endorsed the guidelines on testing promulgated by the Equal Employment Opportunity Commission (EEOC). Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). But see General Elec. Co. v. Gilbert, 429 U.S. 125, 140-43 (1976) (deference not given to the EEOC guidelines on disability benefits for pregnancy). See generally Lopatka, A 1977 Primer on the Federal Regulation of Employment Discrimination, 1977 U. Ill. L.F. 69, 89-94.

- 15. See B. Schlei & P. Grossman, supra note 3, at 1161.
- 16. See generally Lopatka, supra note 14.
- 17. Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).
- 18. In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so.
- Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks.
- Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (citations omitted).
- 19. See 29 C.F.R. § 1607.3 (1976) (discrimination defined as use of unvalidated test that "adversely affects" employment opportunities of protected groups; "adverse effect" not defined). The Department of Justice, Department of Labor, and Civil Service Commission have promulgated a set of their own guidelines, the Federal Executive Agency Guidelines on Employee Selection Procedures (Agency Guidelines), 41 Fed. Reg. 51,744 (1976) (effective

excluded by the requirement.20 This approach to proof of disparate impact was inspired by the Supreme Court's discussion in Griggs of the high school diploma requirement. In a footnote the Court cited United States census statistics which showed that thirty-four percent of the white males in North Carolina (the state in which defendant Duke Power Co. hired) were high school graduates while only twelve percent of the black males in the state had completed high school.²¹ Because the effect of the diploma requirement on the general population was to exclude blacks disproportionately, the Court held the requirement to be a barrier to the employment of blacks that could be justified only by a showing of job relatedness. ²² The Court recently reaffirmed the validity of this method of proof in Dothard v. Rawlinson.²³ In that case the Court upheld a finding that minimum height and weight requirements for Alabama prison guards discriminated against women.²⁴ National statistics showed that the height and weight requirements in combination excluded forty-one percent of the female population but less than one percent of the male population.²⁵

The second method of proof of disparate impact consists of an examination of the pass-fail rates of actual applicants. The failure rate of black or female applicants on a particular test or other scored requirement is compared with the failure rate of white or male applicants. If plaintiff establishes that members of his racial, sexual, or ethnic group are disqualified by the requirement more frequently than are other groups, an inference of discrimination arises. ²⁶ This method is also derived from the footnote in

Dec. 23, 1976, as 41 C.F.R. §§ 60-3.1 to .14). The Agency Guidelines define disparate impact, see notes 133-38 infra & accompanying text, but the EEOC refused to subscribe to the Agency Guidelines and republished its own, 41 Fed. Reg. 51,984 (1976).

- 20. See, e.g., Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975) (disqualification of applicants with conviction records); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (high school diploma requirement); Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972) (disqualification of applicants with arrest records).
 - 21. Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971).
- 22. The Court further held that defendant had not shown either requirement to be job related. *Id.* at 431-32.
 - 23. 97 S. Ct. 2720 (1977).
 - 24. Id. at 2727-28.

25. Id. at 2727. The Court justified use of national statistics on the ground that there was no reason to believe that the physical characteristics of Alabama men and women differed markedly from those of the national population.

26. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Coopersmith v. Roudebush, 517 F.2d 818 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Harless v. Duck, 14 Fair Empl. Prac. Cas. 1616 (N.D. Ohio 1977); United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975).

This approach is sometimes confused with an applicant flow approach, which compares the rate of applicant acceptance after the entire hiring process is completed. See text accompanying notes 98-105 infra. An examination of the pass-fail rates of applicants on individual

Griggs that set forth the evidence supporting plaintiff's case. There the Court observed that the aptitude tests used by defendant disqualified more blacks than whites.²⁷

The second method of proving disparate impact is the same in principle as the first method except that only a sample of the population is used, the sample being those who have applied for the job in question. Because only the effect of the requirement on actual applicants is examined, the second method is a less accurate measure than the first method of the exclusionary effect of a particular requirement on all potential applicants. Nevertheless, when lack of information precludes an assessment of the effect of a particular requirement on the general population, the second method of proof is a workable alternative to the first. National statistics furnish information on certain physical characteristics and educational qualifications of groups defined by race, sex, or ethnicity, but a company-developed test cannot be administered to everyone in the state in order to measure its effect on such groups. In the latter situation, proof of disparate impact among actual applicants may create an inference of discrimination and shift the burden to defendant. Thus, the second method of proving disparate impact is essentially a less accurate variant of the first method, which is necessary when the employment requirement at issue is a test or other scored or pass-fail device and when information about the effect of the requirement on the general population is unavailable.²⁸

The third method of proof compares the racial composition of defendant employer's work force with the racial composition of the community in which defendant hires.²⁹ Plaintiff can create an inference of discrimination by showing, for example, that blacks constitute forty percent of the relevant labor market but that defendant's work force is only two-percent black. Unlike the first two methods of proving disparate impact, this method finds

requirements, however, allows consideration of the effect of separate components of the selection process, such as a written test.

^{27.} Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971). The Court handled this point rather cavalierly. Lacking evidence on the pass-fail rates of the blacks and whites taking the tests at Duke Power Co., the Court referred to an EEOC decision that gave the comparative pass-fail rates of blacks and whites on a battery of tests including, but not limited to, the two tests used by Duke Power Co. Id.

^{28.} See Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof

Under Title VII, 91 HARV. L. REV. 793 (1978).

29. See, e.g., Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976). But see Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974).

The term "employer's work force" is used in this context to mean either the entire force or a single job category.

no support in *Griggs*, but was devised independently by the lower courts. Only recently, in International Brotherhood of Teamsters v. United States³⁰ and Hazelwood School District v. United States, 31 did the Supreme Court approve this method of proof. The Court's discussion of the community composition comparison approach in Teamsters and Hazelwood demonstrates that that method of proof contains additional complexities. In Hazelwood the Court noted that a definition of the relevant labor market is a preliminary step to a comparison of the racial composition of defendant's work force with the racial composition of the community.³² In both Teamsters and Hazelwood the Court intimated that defendant could rebut the inference of discrimination arising from an unfavorable comparison of his work force with the community by showing that since passage of the Civil Rights Act he had hired new employees in a nondiscriminatory fashion.³³ The community composition comparison approach merits fuller discussion because of these refinements and because its proper application was only recently defined by the Supreme Court.

A. The Community Composition Comparison Approach

International Brotherhood of Teamsters v. United States, ³⁴ Hazelwood School District v. United States, ³⁵ and Dothard v. Rawlinson, ³⁶ all decided during the summer of 1977, collectively affirm the usefulness of disparate impact analysis in Title VII litigation. Perhaps the most significant aspect of these cases is that the Supreme Court in Teamsters and Hazelwood endorsed the community composition comparison approach and clarified the proper application of that method of proving a Title VII violation. Justice Stewart, writing for the inajority in Teamsters and Hazelwood, explained the rationale underlying the community composition comparison approach: "[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic compositions of the population in the community from which employees are hired." The theory is that discriminatory practices are revealed in their results; over time, nondiscriminatory hiring

^{30. 431} U.S. 324 (1977).

^{31. 97} S. Ct. 2736 (1977).

^{32.} Id. at 2742 n.13.

^{33.} Id. at 2742-44; International Bhd. of Teamsters v. United States, 431 U.S. 324, 340-42 (1977).

^{34. 431} U.S. 324 (1977).

^{35. 97} S. Ct. 2736 (1977),

^{36. 97} S. Ct. 2720 (1977).

^{37.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2741 (1977) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)).

practices should result in a work force with a composition roughly identical to that of the labor market in the surrounding community.

The Court first discussed the community composition comparison approach in a footnote in *Teamsters*. ³⁸ In that case the United States brought Title VII pattern or practice suits ³⁹ against a nationwide common carrier of motor freight and the union that represented a large group of the truck drivers employed by the common carrier. ⁴⁰ The Government alleged that defendants had purposefully discriminated against racial minorities in the hiring of "line drivers," who do long distance hauling between company terminals. ⁴¹ The employment statistics revealed that almost all the black and Spanish-surnamed employees were local city drivers or servicemen, while whites held virtually all the higher paying and more desirable line driver positions. ⁴² Moreover, a comparison of the racial composition of defendant's line driver work force with the racial composition of the communities in which defendant hired supported dramatically the inference of purposeful discrimination; in many metropolitan areas of substantial black population defendant employed not a single black line driver. ⁴³

38. 431 U.S. at 339 n.20.

39. 42 U.S.C. § 2000e-6(a) (1970) provides in pertinent part:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States. . . .

The *Teamsters* Court observed that the Government's burden in a pattern or practice action is to prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It [has] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure" 431 U.S. at 336.

- 40. The two cases against the union and the trucking company were, respectively, International Bhd. of Teamsters v. United States and T.I.M.E.-D.C., Inc. v. United States. The cases were decided together on certiorari. 431 U.S. at 334.
 - 41. Id. at 335.
- 42. With a single exception, defendant did not employ a black as a line driver until 1969. *Id.* at 337. In 1971 defendant's total work force was 5% black and 4% Spanish-surnamed American, but its line driver work force was only 0.4% black and 0.3% Spanish-surnamed American. *Id.*
- 43. Id. Teamsters, unlike Griggs, was a disparate treatment case; the Government alleged and had to prove a pattern or practice of intentional or purposeful discrimination. Id. at 335 & n.15; see note 3 supra. The Government presented testimony from individuals who related over forty specific instances of overt discrimination. For example, one black who wanted to transfer to a line driver job was told by the terminal manager that the company was not "ready for this right now" and that there would be "problems on the road . . . with different people, Caucasian, et cetera." 431 U.S. at 338 n.19. A Chicano who applied for a line driver job was told he had a strike against him because, according to the personnel officer, "[y]ou're a Chicano, and as far as we know, there isn't a Chicano driver in the system." Id.

The function of the statistical evidence was to complement this testimony of intentional discrimination. Disparity between the racial composition of defendant's line driver work force and the racial composition of the communities in which defendant hired was probative because "such imbalance is often a telltale sign of purposeful discrimination," id. at 339 n.20, and the

A few weeks after *Teamsters* was decided, Justice Stewart again wrote for the Court an opinion in which he discussed more fully the community composition comparison approach. Hazelwood School District v. United States, 44 like Teamsters, was a pattern or practice suit in which the Government alleged purposeful discrimination. Defendant was a Missouri suburban school district, and the issue was whether it discriminated against blacks in its hiring of school teachers. It was undisputed that less than two percent of defendant's teacher work force was black, 45 and the controversy concerned the appropriate comparative figure necessary to assess whether two percent was a disproportionately low representation of blacks. The district court had compared the percentage of black teachers to the percentage of black students in the Hazelwood School District, and because there were few black students in Hazelwood it found the two percent figure nonprobative of discrimination. 46 The Eighth Circuit reversed on the ground that the proper comparative figure to defendant's two-percent black representation was the percentage of blacks in the relevant labor market, which the court defined as teachers in the area composed of St. Louis County and St. Louis City. 47 The Supreme Court agreed with the court of appeals' adoption of the community comparison approach and with the relevant labor market refinement to that approach:

There can be no doubt, in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. . . . [A] proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.⁴⁸

In *Hazelwood* the Court thus reaffirmed the validity of the community composition comparison approach to proof of Title VII violations. The

testimony of specific instances of discrimination then "brought the cold numbers convincingly to life," id. at 339. Logically, community composition comparison statistics should be equally relevant in a disparate impact case. Indeed, such statistics are more probative of the proposition that an employment practice or selection requirement has a disparate impact than they are of disparate treatment because the statistics do not address the issue whether an employment practice or selection requirement was used with intent to discriminate. Nevertheless, because Teamsters was a disparate treatment case in which the Government produced evidence of purposeful discrimination, the Court approved the community composition comparison approach without holding that a plaintiff may establish a prima facie case of either disparate impact or disparate treatment with statistics alone. Part II.B. of this article addresses that issue.

^{44. 97} S. Ct. 2736 (1977).

^{45.} Id. at 2740.

^{46.} Id.

^{47.} Id.

^{48.} Id. at 2742.

Hazelwood Court, however, defined more carefully than did the Court in Teamsters the proper application of that approach and expanded upon Teamsters in at least two significant respects. First, the Court accepted the usefulness of the community composition comparison approach even when the comparison demonstrated only partial exclusion of blacks from defendant's work force. In Teamsters racial minorities were almost totally excluded from the more desirable line driver jobs, 49 and the Court's approval of the community composition comparison approach was arguably an overbroad statement that was unnecessary to its decision. In Hazelwood, however, the Court reaffirmed the validity of that method of proof when blacks were only partially excluded from the job in question. 50 The Hazelwood Court stated that "gross statistical disparities" could in a proper case be sufficiently probative of a pattern or practice of discrimination to shift the burden of proof to defendant.⁵¹ In a footnote the Court said that disparate impact could be shown by an underrepresentation unlikely to occur by chance alone, as calculated by statistical probability.⁵²

Second, the Court in *Hazelwood* refined the community composition comparison approach by its adoption of the relevant labor market concept. In *Teamsters* Justice Stewart wrote that the racial composition of defendant's work force should be compared with the racial composition of the "population in the community from which employees are hired." In *Hazelwood* he clarified that language and stated that in some circumstances

- 49. In a footnote the Court listed several major metropolitan areas where blacks constituted a substantial portion of the population, but where defendant's line driver work force remained 100% white. International Bhd. of Teamsters v. United States, 431 U.S. 324, 337 n.17 (1977). Moreover, the Court referred with approval to the characterization of the circuit court that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.'" Id. at 342 n.23.
- of statistics but from 'the inexorable zero.' '' Id. at 342 n.23.

 50. By the end of the 1973 school year, 22 (1.8%) of defendant's 1,231 school teachers were black. Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2739 (1977).
- 51. Id. at 2741. Despite the breadth of this statement, Hazelwood, like Teamsters, did not decide the issue whether a plaintiff can establish a prima facie case of disparate impact with statistics alone. See note 43 supra. Hazelwood was a disparate treatment, rather than a disparate impact, case, id. at 2741 n.12, and the Government produced evidence of "specific instances of alleged discrimination against 55 unsuccessful Negro applicants," id. at 2739. Part III.B. of this article addresses this issue left open in Teamsters and Hazelwood.
- 52. Id. at 2742 n.14, 2743 n.17. Citing a jury discrimination case decided earlier in the term, Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977), the Court discussed the use of probability theory for a precise statistical calculation of the probability that employment decisions were made randomly with respect to race. 97 S. Ct. at 2742 n.14, 2743 n.17 Justice Stevens, dissenting, also referred to probability calculation. Id. at 2747 n.5.

For an excellent explanation of probability theory, see Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 HARV. L. REV. 338 (1966); Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 HARV. L. REV. 387 (1975).

53. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

defendant's work force should be compared with the racial composition of a relevant labor market rather than with the racial composition of an entire demographic community. Stewart explained that if the job in question requires skills commonly held or easily acquired by members of the general community, then a general population comparison is probative, but if the job requires special qualifications, the proper comparison is with that portion of the labor market whose members are qualified for the job.⁵⁴

The logic of this distinction is well illustrated by its application to the facts of Teamsters and Hazelwood. In Hazelwood Justice Stewart explained that the ability to drive a truck, the sole qualification for the line driver job at issue in Teamsters, was a skill possessed or easily acquired by many people. Because many members of the general population were qualified or easily trained for employment by defendant, a comparison between the racial composition of defendant's line driver work force and the racial composition of the general population in the surrounding geographic area was probative of whether defendant discriminated in hiring. 55 Hazelwood. however, concerned the job of teaching public school, which required special qualifications neither possessed nor easily acquired by most members of the general population.⁵⁶ Because only a segment of the population was qualified for employment by defendant and the racial composition of the qualified group may vary from the racial composition of the general population, a comparison of defendant's work force with the general population would not be probative of discrimination. Accordingly, Justice Stewart explained that the proper comparison was with the relevant labor market for the hiring of public school teachers-that is, the group of qualified public school teachers in the geographic area where the school district hires.⁵⁷

Relevant labor market analysis based on this dichotomy entails a twopart inquiry. A court must first isolate the essential character of the job in question and define the skills necessary to perform the job. It must then ascertain whether those skills are acquired only after extensive education or training or whether the skills are commonly held or easily learned. Teachers.⁵⁸ medical doctors,⁵⁹ and lawyers⁶⁰ must have skills requiring

^{54.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2742 n.13 (1977).

^{55.} Id.

^{56.} The Court did not describe the special qualifications required for teaching school, see id., but a teaching certificate would be one that most members of the population neither possessed nor could easily acquire.

^{57.} Id. at 2742.
58. E.g., Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977).

^{59.} E.g., Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

^{60.} E.g., Coopersmith v. Roudebush, 517 F.2d 818 (D.C. Cir. 1975).

sufficient education and training that only those possessing the necessary skills compose the relevant labor market. On the other hand, general-skills office workers, 61 truck drivers, 62 police officers, 63 fire fighters, 64 and laborers⁶⁵ can easily acquire the skills necessary to perform their jobs. For these types of positions, a comparison of defendant's work force with the racial, sexual, or ethnic composition of the general population in the surrounding community is appropriate. For certain other types of jobs an analysis of the relevant labor market will be more difficult. For example, jobs that require an intermediate length of time for training will be hard to fit into the dichotomy between general skills and special skills. Many machinery jobs. which require only a few weeks training, are properly considered general skills jobs, while a medical doctor, whose skills are the product of years of training, clearly has a special skills job. Relevant labor market analysis is less easily applied, however, to a job that takes a few months of instruction. such as a technician in a health-care field.⁶⁶ Similarly, jobs that can be filled either by people with experience within a company or by specially trained people outside the company will be difficult to categorize according to the dichotomy between general skills and special skills. For example, upperlevel clerking jobs, junior executive jobs, and stockbroker jobs will not easily be classified at the entry level even though employees ultimately attain professional or semiprofessional skills.67

The initial inquiry under an analysis of the relevant labor market calls

- 61. General office skills presumably would include reception duties, filing, mail sorting, switchboard operating, and basic typing. *But see* Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974) (typing skill of 60 words per minute considered specialized).
- 62. E.g., International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Maldonado v. Yellow Freight Sys., Inc., 10 Fair Empl. Prac. Cas. 1290 (C.D. Cal. 1975).
- 63. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), aff'g 385 F. Supp. 543 (N.D. Ill. 1974); Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975).
- 64. E.g., League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976).
 - 65. E.g., United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).
- 66. Compare Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (airline flight officers; comparison not limited to minorities possessing defendant's qualifications), with Thompson v. McDonnell Douglas Corp., 416 F. Supp. 972 (E.D. Mo. 1976) (computer programmer; comparison limited to minorities with relevant minimal qualifications), aff'd, 552 F.2d 220 (8th Cir. 1977).
- 67. Compare, e.g., Rogers v. International Paper Co., 510 F.2d 1340, 1344, vac'd and remanded on other grounds, 423 U.S. 809, on remand, 566 F.2d 722 (8th Cir. 1975) (defendant had burden of proving job relatedness once plaintiff showed underrepresentation of blacks in supervisory positions), with United States v. National Lead, 315 F. Supp. 912, 919 (D.C. Mo. 1970) (plaintiff failed to show that minorities excluded from supervisory positions were qualified), aff'd, 438 F.2d 935 (8th Cir. 1971). See generally Gates v. Georgia-Pac. Corp., 492 F.2d 292 (9th Cir. 1974) (defendant had burden of justifying promotion-from-within policy for accountants).

for an examination of the character of the job in question and a definition of the skills necessary to perform the job. This inquiry should be controlled by the nature of the job rather than the employer's actual requirements for the position; an employer should not be able to limit the relevant Jabor market to people with a college education simply by creating a diploma requirement. In Hazelwood, the Court accepted that the relevant labor market was limited to persons with a college diploma because historically, and by state licensing requirements, a college education is considered a requirement for teaching public school. An overreliance on historical assumptions to answer the inquiry whether a job requires general or special skills, however, could become a means of allowing employers indirectly to define the relevant labor markets with which their work force will be compared. Similarly, although the presence of state licensing requirements will usually provide a convenient, and presumably objective, way to determine whether special skills are necessary for a job, they should not be conclusive of the issue. For example, in some areas employers typically hire prospective real estate agents "off the street" to train them for meeting the state licensing requirements. In such a case, the relevant labor market should not be limited to those people possessing a license or the training necessary to obtain one. Instead, the racial composition of defendant's work force should be compared with the racial composition of the general population in the area where he hires.68

Either inquiry under a relevant labor market analysis may present a close question. A court may be unsure whether a particular skill is required for performance of a job or it may be unsure whether a necessary skill is easily learned or is acquired only after extensive training. When defendant argues for a relevant labor market approach and a court is uncertain which comparison is more appropriate, it should favor the general population comparison. The reason the general population approach is preferable in close cases is that if disparate impact is found, the effect is not to hold defendant guilty of illegal discrimination but to shift the burden to defendant to prove the job relatedness of the type of requirement that he claims makes the job a special skills one.⁶⁹ For example, defendant might argue that a

^{68.} In Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972), the court rejected defendant's argument that the composition of its flight officer work force must be compared with the composition of the group of qualified black applicants. The court held plaintiff established a prima facie case with a showing that blacks were underrepresented in defendant's work force when defendant trained its employees and had at times waived at least one of its selection requirements. *Id.* at 218-19. The court subsequently held, however, that defendant successfully showed its selection requirements to be job related. *Id.* at 219-20.

^{69.} Griggs v. Duke Power Co., 401 U.S. 424 (1971).

college degree in business is a necessary requirement for an entry level supervisory position, and that the relevant labor market therefore consists of those persons who possess business degrees. The typical underrepresentation of blacks and women among persons with a business education would be favorable to a defendant with a similar underrepresentation in his work force. A court applying a community composition comparison approach might be unsure whether the essential nature of the job is such that a business degree is necessary and might also be unsure whether the skills required for the job might not be obtained with minimal training by the employer. In the face of this uncertainty the court should classify the job as a general skills one so that the defendant's work force is compared with the general population. If the statistics show disparate impact, defendant is not found to have discriminated, but rather is required to show the job relatedness of the qualification standard, a business education, which he argues was an essential requirement for the supervisory position.

Even if a court finds that a relevant labor market comparison is appropriate, practical considerations will limit the information available to the court and may cause it to compare defendant's work force with the group of persons already employed in the type job at issue rather than with the group of all persons who possess the requisite skills regardless of their present employment. In *Hazelwood*, for example, the Court used census data that reflected the racial composition of employed public school teachers, presumably because information on the group of all persons qualified to teach school was unavailable or too costly to obtain. To Information on the racial, sexual, or ethnic characteristics of persons employed in a particular type job can easily be gleaned from census data, union member-

In Kaplan v. International Alliance of Theatrical & Stage Employees, 525 F,2d 1354 (9th Cir. 1975), the court allowed a general population comparison for the claim of sex discrimination in excluding a female still photographer from union membership. In Thompson v. McDonnell Douglas Corp., 416 F. Supp. 972 (E.D. Mo. 1976), aff'd, 552 F.2d 220 (8th Cir. 1977), however, the district court restricted the comparison group for computer programmers to those with minimal qualifications for the job.

The position in question here is not an entry-level job requiring no formal education, but a highly skilled and technical job. Although plaintiff challenges the requirement of a collegiate degree for the position, he does not challenge the common sense observation that an applicant for a programming trainee position must have some familiarity with computer operations

Id. at 980.

70. The Court's use of census figures reflecting the racial composition of the group of actually employed teachers is arguably inconsistent with its statement that the "proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2742 (1977) (emphasis added). Although the Court did not discuss the matter, it apparently accepted the census figures as a sufficiently reliable estimate of the racial composition of the pool of qualified teachers.

ship rolls, records of professional organizations, and the like.⁷¹ This information is potentially inaccurate because it does not reflect the racial composition of the larger group of all persons qualified for a particular type job who are seeking employment. In addition, census data may be unreliable because it provides outdated information. Nevertheless, *Hazelwood* demonstrates that information on the currently employed, provided it is not grossly distorted, is an acceptable alternative to information on the group of qualified persons and may be relied upon to establish a prima facie case of disparate impact.

Hazelwood provides an example of the complexity that imperfect information introduces into relevant market analysis. Defendant school district argued that the court of appeals erred by defining the relevant labor market as both St. Louis County and the City of St. Louis, which is surrounded by the county but not a part of it.72 The 1970 Census showed only 5.7 percent black representation among public school teachers in the county, but 15.4 percent black representation in the combined city and county area. Defendant argued that use of the 15.4 percent figure for comparison with its less than 2 percent black teacher work force was misleading because the City of St. Louis made special attempts to maintain a 50 percent black teacher staff. 73 The effect of the city's policy arguably was to inflate black representation among employed teachers in the city, which was reflected in the census data, beyond their actual representation in the unmeasured employment pool of qualified teachers. The Supreme Court found this argument plausible and remanded the case with instructions that the lower court consider this possibility when choosing the appropriate comparative figure.74

The Court instructed the district court on remand to consider factors that might affect the reliability of the county-plus-city figure. The proper comparison, according to the Court, was "between the racial composition of Hazelwood's teaching staff and the racial composition of the *qualified* public school teacher population in the relevant labor market." The true composition of the qualified public school teacher population from which Hazelwood hires is unknown, and the problem lies in selecting the measure that most closely approximates that population. The Court apparently ac-

^{71.} See Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1089-90 (7th Cir. 1977) (union membership rolls for composition of bricklayer group).

^{72.} Mo. Ann. STAT. § 46.145 (Vernon 1966); see Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2740 n.8 (1977).

^{73. 97} S. Ct. at 2742-44.

^{74.} Id. at 2743-44.

^{75.} Id. at 2742 (emphasis added).

cepted the use of census data reflecting actually employed teachers as an estimate of the racial composition of the pool of qualified teachers, but it directed the lower court to assess and to compensate for possible distortions in that estimate. The Court instructed consideration of whether the St. Louis City policy favoring fifty-percent black representation was in effect at the time the 1970 census was taken and what change, if any, that policy might have made in the racial composition of teachers in the city schools. ⁷⁶ These factors would be relevant to an assessment of the effect the city policy might have had in inflating the percentage of black teachers employed by the city and county systems beyond the real percentage of blacks in the qualified public school teacher population. Because the relevant labor market question addresses only the group of qualified teachers available for employment by defendant Hazelwood school district, the Court also ordered consideration of whether the St. Louis recruitment policy had attracted black teachers to the city and diverted them from the pool of qualified persons from which Hazelwood could hire. 77 Conversely, the Court instructed the district court to consider any evidence concerning the extent to which black teachers in the city would prefer employment in Hazelwood or other suburban districts. 78 Finally, the Court said that the experience of other school districts in St. Louis County would be relevant to assess the validity of excluding the city from the relevant labor market.⁷⁹

Justice Stevens in dissent took issue with this fine tuning of the statistics, maintaining that "[a]bsolute precision in the analysis of market

^{76.} Id. at 2744. The census figures showing the racial composition of teachers actually employed in the St. Louis area would be a poor estimate of the true composition of qualified teachers if St. Louis City had deliberately chosen blacks from the pool as part of an affirmative action plan. Use of the census figures as an estimate of the composition of the pool of qualified teachers is valid only on the assumption that no factor influenced the employment of teachers from the pool in a racial proportion that varied from that of the pool. An affirmative action plan, or any form of racial preference, contradicts that assumption. See generally H. Blalock, Social Statistics 509-30 (2d ed. 1972).

^{77. 97} S. Ct. at 2744.

^{18 14}

^{79.} Id. Although the Court did not expressly so state, these considerations were necessary for an evaluation of whether the sample of employed teachers, about which the census figures provided information, accurately reflected the larger group of all qualified teachers. If after weighing these considerations the lower court found the census figures to be biased, it might look to other figures such as county census data or derive some intermediate figure as a better estimate of the racial composition of the unknown pool of all qualified teachers. See id. at 2743-44.

Justice White, concurring, took the position that data concerning the applicant pool would provide the best estimate of the racial composition of the group of teachers from which Hazelwood could hire. "At least [the Government] might have been required to present some defensible ground for believing that the racial composition of Hazelwood's applicant pool was roughly the same as that for the school districts in the general area, before relying on comparative work force data to establish its prima facie case." Id. at 2748.

data is too much to expect." He asserted that the relevant labor market should certainly include the City of St. Louis because one-third of Hazelwood's current faculty came from the city. Moreover, because the evidence showed no absence of qualified black applicants in Hazelwood, Stevens argued that the city's hiring policies should not affect the definition of Hazelwood's relevant labor market. 82

Many district court judges will concur in Justice Stevens' impatience with the complexities of relevant labor market analysis. *Hazelwood* destroys the apparent simplicity of the *Teamsters* standard, which was a comparison of the composition of defendant's work force with that of the community in which defendant hires. Although *Hazelwood* will require district courts to use a sophisticated, almost scientific, ⁸³ approach to disparate impact analysis, plaintiffs should not have the burden of defining the relevant labor market. Plaintiff's prima facie case is established by the basic comparison of defendant's work force with the general population. It should then be defendant's task to rebut the inference of discrimination by showing that the proper comparison is with a particular segment of the population.

B. Rebuttal of Plaintiff's Showing of Disparate Impact

Hazelwood underscored the idea that no method of demonstrating the disparate impact of an employer's hiring practices is irrefutable. A court must allow defendant to rebut plaintiff's prima facie case with statistical evidence that tends to show that defendant's employment practices have had no discriminatory impact.⁸⁴ Defendant can, of course, attempt to rebut a showing of disparate impact based on a general population comparison by

82. Id. These comments suggest that Justice Stevens perceived the issue to be the limits of the relevant geographic community rather than the accuracy of census figures as an estimate of

the racial composition of the group of qualified teachers in that community.

As Justice Stevens' statements suggest, the geographic limits of the relevant labor market are generally considered to be defined by the area from which employees are drawn. See Green v. Missouri Pac. R.R., 523 F.2d 1290, 1294-95 (8th Cir. 1975); United States v. Ironworkers Local 86, 443 F.2d 544, 551 n.19 (9th Cir. 1971). But see League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 896-97 (despite employer's active recruitment policy outside City of Santa Ana, city remained relevant geographic area for a work-force comparison), modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976). See generally Note, supra note 14, at 467-74.

83. See Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2743 n.17 (1977) (discussion of usefulness of statistical probability to assess the prima facie case). The Court concludes its discussion of statistical probability with the following comment, however: "These observations are not intended to suggest that precise calculations of statistical significance are necessary in employing statistical proof, but merely to highlight the importance of the choice of the

relevant labor market area." Id.

84. "[T]he employer must be given an opportunity to show 'that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination.'" Id. at

^{80.} Id. at 2747.

^{81.} Id. at 2746.

arguing that a relevant labor market comparison is the proper one. There are, however, other possible methods of rebutting the inference of discriminatory effect that arises upon plaintiff's showing of a disparity between the racial composition of defendant's work force and the racial composition of the appropriate comparative group.

Post-Act Hiring Statistics. - One method that defendant may use to rebut the inference of discriminatory effect is to show more favorable statistics concerning defendant's hiring after the effective date of the Civil Rights Act. In the guard service example introduced earlier, 85 for example, plaintiff established disparate impact by showing that there was five-percent black representation among the guards in defendant's company, but that the general population in the areas where the company hired was twenty-percent black. To rebut this prima facie case the company produced statistics concerning recent hiring that showed a substantial number of new minority employees. Assume that the company had overtly refused to hire blacks prior to the Civil Rights Act, but that after the Act became effective twenty percent of the new guards it hired were black. If there are 1000 guards in the company and 250 were hired since passage of the Act, the fifty black guards among the newly hired would constitute a five-percent black representation in the company's overall work force. The company's task in this situation would be to convince the court that the overall work force data incorrectly suggest that its present employment practices have a discriminatory impact. It could logically argue that the mere five-percent black presence in the work force reflects past discrimination that has been eradicated, and that the twenty-percent black representation among new employees is more probative of whether defendant's present practices are discriminatory.

In *Teamsters* defendant attempted to rebut plaintiff's prima facie case of disparate impact with post-Act hiring statistics in an argument along these lines. The trucking company maintained that the racial imbalance was caused solely by pre-Act discrimination which, although now abandoned, still had a strong influence on the composition of its line driver work force. ⁸⁶ The company contended that low turnover inhibited minority hiring for the few years immediately following the 1965 effective date of the Act, but that in recent years, especially after 1971, minority hiring had been strong. ⁸⁷ The

^{2743.} The *Teamsters* Court expressed similar concern: "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977).

^{85.} See text accompanying note 8 supra.

^{86. 431} U.S. at 341.

^{87.} Id.

Supreme Court agreed with the company's statement of the principle, but not with its analysis of the facts. Justice Stewart wrote for the Court: "The argument would be a forceful one if this were an employer who, at the time of suit, had done virtually no new hiring since the effective date of Title VII. But it is not." Stewart observed that although hiring was depressed in the late sixties, the company had hired hundreds of line drivers nationally and none was black. Moreover, minority hiring by the company after 1971 did not excuse the company's earlier violations of Title VII.

In *Hazelwood* defendant advanced this argument more successfully. The school district had produced data that suggested at least the possibility that post-Act hiring statistics could rebut the Government's prima facie case, ⁹¹ which was based on community composition comparison statistics. The court of appeals had refused to consider this possibility, ⁹² so the Supreme Court instructed that on remand defendant must be allowed the opportunity to rebut the Government's prima facie case with data about its recent hiring. ⁹³ Justice Stevens, dissenting, took exception to the remand on the ground that the post-Act hiring data most favorable to defendant would be insufficient to rebut the inference of discrimination created by plaintiff's statistics. ⁹⁴ His dissent was based on the facts of the case, however; he did not disagree with the general principle that post-Act hiring data could be used to rebut a prima facie case based on the community composition comparison approach.

2. Applicant Flow Statistics.—In Dothard v. Rawlinson, 95 decided the same day as Hazelwood, the Supreme Court clarified the role of applicant flow data in disparate impact analysis. Unlike Teamsters and Hazelwood, Rawlinson was a private Title VII suit. Plaintiff, a female, was

^{88.} Id.

^{89.} Id. at 341 & n.21. The Supreme Court agreed with the court of appeals that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero." Id. at 342 n.23.

^{90.} Id. at 341-42.

^{91.} Although defendant's work force remained less than two-percent black, 97 S. Ct. at 2739, of the new employees that defendant hired between 1972 and 1974, 3.7% were black, id. at 2743.

Title VII became effective on July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 241. The 1972 Amendments to the Act, however, which extended coverage to public employers, became effective March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 14, 86 Stat. 103. Thus, discrimination by defendant Hazelwood School District prior to 1972 did not violate Title VII, and Hazelwood could logically rebut plaintiff's prima facie case based on a work-force comparison with statistics showing only that it had hired in a nondiscriminatory fashion since 1972.

^{92. 97} S. Ct. at 2742.

^{93.} Id. at 2743-44.

^{94.} Id. at 2745-46; see id. at 2744 (Brennan, J., concurring).

^{95. 97} S. Ct. 2720 (1977).

excluded from employment as an Alabama prison guard by statutory height and weight provisions that required all guards to be five-feet-two inches in height and one-hundred-twenty pounds in weight. 96 She sued the State of Alabama, alleging that it unlawfully discriminated against women in the employment and assignment of its prison guards. The Supreme Court, reaffirming the validity of the method of proof that looks to the effect of a requirement on the population, held that plaintiff had established a prima facie case of disparate impact by showing that the height and weight requirements in combination excluded forty-one percent of the female population, but less than one percent of the male population. 97

The Court rejected defendant's argument that in order to establish a prima facie case plaintiff was required to produce applicant flow data,98 which entails a comparison of the sexual or racial composition of the applicant group with the sexual or racial composition of the group of persons among the applicants that defendant elects to hire. The Court found that because of the phenomenon of self-selection, applicant flow data would not in all circumstances be probative of whether a requirement had a discriminatory impact. "The applicant process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." Presumably, women who were aware of the height and weight requirements and who failed to meet them would not bother to apply. Similarly, in a case like Teamsters that was based on intentional discrimination, a general knowledge of the absence of female or minority workers in a job would inhibit applications. 100 Self-selection will cause the racial composition of the group of applicants to reflect inaccurately the racial composition of the true applicant pool, and evidence of the rates at which minority or female applicants are hired will be an unreliable indicator of discrimination. 101

^{96.} Id. at 2724. Although plaintiff apparently failed to meet only the weight requirement, she challenged both the height and weight requirements, and the Court found both illegal. Id. at 2728.

^{97.} Id. at 2727.

^{98.} Id. But see id. at 2748-49 (White, J., dissenting).

^{99 14}

^{100.} See International Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977). See also Robinson v. Union Carbide Corp., 380 F. Supp. 731 (S.D. Ala. 1974).

^{101.} See, e.g., League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, (Chicanos discouraged by advertised height requirement), modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976); Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) (women discouraged by height and weight requirements learned of by telephone), aff'd in part sub nom. Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976); cf. Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) (word-of-mouth solicitation); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974) (word-of-mouth recruitment), rev'd on

Although the *Rawlinson* Court held that plaintiff was not required to produce applicant flow data to establish a prima facie case, it implied that defendant was free to offer such data in rebuttal of plaintiff's case. ¹⁰² In *Hazelwood* the Court clarified this implication by stating that if defendant on remand could adduce applicant flow data, that evidence would be "very relevant." ¹⁰³ The problem of self-selection, however, logically makes applicant flow data a weak source of rebuttal evidence. Proof that the racial, sexual, or ethnic composition of the actual applicants mirrors that of the general population would be helpful, but not conclusive, to show that self-selection was not taking place and would make applicant flow statistics more reliable. ¹⁰⁴ Only after it is shown that self-selection is not taking place is applicant flow data reliable evidence of discrimination. ¹⁰⁵

II. A Structural Analysis of Disparate Impact

The three recent Supreme Court cases discussing disparate impact analysis, *Teamsters*, *Hazelwood*, and *Rawlinson*, have clarified significantly the proper use of statistics to establish and to rebut plaintiff's prima facie case, but those decisions do not provide a coherent scheme for the analysis of disparate impact cases. The decisions establish a set of disjointed precepts. Each precept stands fairly well alone, but they are not exhaustive, nor is the relationship between them clear.

Five of the precepts derived from *Teamsters*, *Hazelwood*, and *Rawlinson* concern plaintiff's prima facie case. First, in a pattern or practice case in which the Government alleges disparate treatment, statistics are probative of purposeful discrimination. ¹⁰⁶ Second, in a case in which plaintiff alleges the

other grounds, 424 U.S. 747 (1976); Local 53, Int'l Assoc. of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (union nepotism); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967) (black physicians knew futility of applying for hospital staff membership); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969) (priority to applicants with relatives and unannounced policy that application must be renewed every two weeks known only if learned from friend or relative already employed), aff'd in part, 438 F.2d 86 (4th Cir. 1971). See generally B. SCHLEI & P. GROSSMAN, supra note 3, at 445-54.

- 102. After explaining why plaintiff was not required to produce applicant flow data, the Court stated that "[i]f the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." Dothard v. Rawlinson, 97 S. Ct. 2720, 2727 (1977).
 - 103. Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2742 n.13 (1977).
- 104. The *Hazelwood* Court was concerned that applicant flow data be "competent" and "sufficiently reliable." *Id.* at 2742 n.13, 2744 n.21.
- 105. But cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (selection of applicants along a "racial pattern significantly different from that of the pool of applicants" makes out a prima facie case of discrimination); Hester v. Southern Ry., 497 F.2d 1374, 1379 (5th Cir. 1974) (applicant flow for blacks the "most direct route to proof").
- 106. Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2741-42 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

disparate impact of an employer's hiring requirements or practices, intent to discriminate need not be shown. ¹⁰⁷ Third, plaintiff can create an inference of discrimination and thus establish a prima facie case by comparing the racial, sexual, or ethnic composition of the employer's work force (or a single job category) with that of the local population where defendant hires. ¹⁰⁸ Fourth, plaintiff is not required to produce applicant flow data; a prima facie case can be established with general population statistics alone. ¹⁰⁹ Last, plaintiff may establish a prima facie case by showing the disparate impact of a single employment requirement, such as a minimum height standard. ¹¹⁰

Three of the precepts concern defendant's rebuttal of plaintiff's prima facie case. First, defendant may rebut plaintiff's case based on a general population comparison by showing that a relevant labor market comparison is appropriate. If the nature of the job is such that it demands skills not easily acquired, *Hazelwood* instructs that the proper comparison for defendant's work force is with the relevant labor market, which consists of the group of persons who possess the requisite skills.¹¹¹ Second, defendant can rebut the prima facie case with post-Act hiring statistics that show he is not currently discriminating.¹¹² Last, in at least some circumstances defendant can introduce applicant flow data, which will be "very relevant" to the issue whether he is discriminating.¹¹³

These principles were sufficient to resolve the issues before the Court in *Teamsters*, *Hazelwood*, and *Rawlinson*, and they serve as an important reaffirmation of the *Griggs* concept of operationally defined discrimination. They are, however, insufficient to resolve the analytical problems of more complex cases such as the guard service example posed earlier. In that example plaintiff established a prima facie case by comparing the five-percent black representation in the company's work force with the twenty-percent representation of blacks in the surrounding community. Defendant

^{107.} Dothard v. Rawlinson, 97 S. Ct. 2720, 2726 (1977) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

^{108.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2741 (1977) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)). In using the term "local population," lower courts have generally meant the demographic population and not the labor force. See League of United Latin Am. Citizens v. United States, 410 F. Supp. 873, 898, modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976).

^{109.} Dothard v. Rawlinson, 97 S. Ct. 2720, 2727 (1977). But see id. at 2748-49 (White, J., dissenting).

^{110.} See id. at 2726; Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

^{111.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2742 n.13 (1977). A corollary is that defendant may rebut plaintiff's relevant labor market comparison by showing that plaintiff's statistics do not accurately reflect the racial, sexual, or ethnic composition of the true pool of qualified potential applicants. *Id.* at 2742-44.

^{112.} Id. at 2742-43.

^{113.} Id. at 2742 n.13.

introduced in rebuttal of plaintiff's case evidence that twenty percent of its recently hired employees were black, which compared favorably with the racial composition of the general population. Assume that defendant's post-Act hiring statistics succeed in dispelling the inference of discrimination created by plaintiff's general population comparison. Can plaintiff still establish a case by showing that an individual requirement, such as the written test, is failed by blacks at a disproportionately higher rate? The facts of this hypothetical as originally presented were that defendant guard service company had three employment requirements: military or guard work experience, a written test, and a subjective and standardless interview. Blacks failed the written test much more frequently than did whites, but the experience requirement favored blacks because of their disproportionately high representation among veterans. As a result, the overall employment process in recent years selected blacks at a rate close to their representation in the general population. The eight precepts derived from Teamsters, Hazelwood, and Rawlinson leave unanswered whether defendant must prove the job relatedness of the test even though he rebutted the inference of discrimination based on the general population comparison.

In the absence of an ordered framework for disparate impact analysis, trial courts will continue to be troubled by the difficult issues that inhere in complex cases. The next part of this article discusses the particular issue whether plaintiff can establish a prima facie case by showing the disparate impact of a single requirement even though the overall employment process selects members of a protected group at a rate consistent with their representation in the population. The lack of consensus on this issue underscores the need for a clear analytical framework for disparate impact questions. The following part of the article proposes such a framework.

A. Single Requirement Impact Versus Overall Hiring Impact

A 1975 police employment case, Smith v. Troyan, 114 presented to the Sixth Circuit the problem of single requirement impact in the absence of overall hiring impact. The facts were very similar to those of the guard service example discussed earlier. Plaintiffs brought a private class action in which they alleged racial discrimination in the hiring of police officers for the City of East Cleveland, Ohio. The employment selection process contained several steps. One was the Army General Classification Test

^{114.} Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), aff'd in part and rev'd in part sub nom. Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976).

(AGCT), which whites passed at a rate significantly greater than blacks. ¹¹⁵ Another aspect of the selection process, however, was a statutory provision for a veterans preference, which favored blacks because of their disproportionately high representation among veterans. ¹¹⁶ These requirements taken together cancelled out the impact of either requirement taken alone. ¹¹⁷ As a result, although plaintiffs could show the discriminatory effect of the AGCT, they could not prove that the overall employment selection process had a disparate impact.

The district court in *Smith* held that the evidence showing the disproportionately high failing rate among blacks on the AGCT sufficed to establish plaintiff's prima facie case. ¹¹⁸ Moreover, the lack of any disparate impact in the overall hiring process did not dispel the inference of discrimination created by the effect of the AGCT. ¹¹⁹ The district court reasoned that the cancelling effect of the veterans preference did not rebut plaintiff's case because military experience was admittedly job related to the position of police officer. Because of the job-related experience factor, which favored blacks, black applicants were better qualified on the whole than white applicants. The job validity of the AGCT, however, was still at issue. The district court explained: "The fact that some blacks were better qualified in one aspect does not justify defendants in unfairly penalizing blacks on the examination if it is not also job related." ¹²⁰

The Sixth Circuit, on the other hand, favored a "bottom line" approach, which would look only to the disparate impact of the whole employment selection process. 121 The court conceived of the problem as one of "tests" and "subtests" and expressed concern that an examination of

115. The district court noted the following "pass" rates (scores over 100) on the AGCT the previous three times it was given:

| | blacks (%) | whites (%) |
|------|------------|------------|
| 1969 | 15 | 41 |
| 1970 | 9 | 63 |
| 1973 | 22 | 71 |

Id. at 1145.

116. Seventy-five percent of the black applicants were veterans, but only thirty-six percent of the white applicants were. *Id.* at 1146.

- 118. Id. at 1145-47.
- 119. Id. at 1146.
- 120. Id.

^{117.} Although in 1973 defendant's police officer work force was only 12% black and the local population was 60% black, defendant relied on applicant flow data to show that, since 1968, 33% of its new employees had been black, which compared favorably with the 33%-43% representation of blacks in defendant's applicant pool. *Id*.

^{121.} Smith v. Troyan, 520 F.2d 492, 497-98 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976). The Sixth Circuit did not dispute the disparate impact of the AGCT, but it held plaintiff could not establish a prima facie case with proof of the disparate impact of the examination in the absence of proof that the overall hiring process had a disparate impact. Id.

individual requirements would subject minute parts of an employment procedure to judicial scrutiny. ¹²² The court's reasoning contrasts starkly with that of the district court:

That blacks fare less well than whites on the AGCT, a "subtest" in the process of hiring East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a "subtest" of the "subtest." 123

The Supreme Court has not yet had to decide the issue posed by Smith. 124 although Justice White's separate opinion in Hazelwood and Rawlinson might be interpreted as an adoption of the Sixth Circuit's bottom line approach. Concurring in Hazelwood and dissenting in Rawlinson, White emphasized the importance of applicant flow data to establish a prima facie case of discriminatory effect. He approved the Hazelwood remand, which ordered the lower court to allow defendant to present post-Act hiring statistics in rebuttal of plaintiff's case, but he expressed reservations that the Court had not properly emphasized the importance of applicant flow data. 125 Similarly, he rejected in *Rawlinson* the majority's approach to proof that the height and weight requirements had a discriminatory effect against women. 126 Noting that plaintiff did not offer applicant flow data, White stated that he was "unwilling to believe that the percentage of women applying or interested in applying for jobs as prison guards in Alabama approximates the percentage of women either in the national or state population." Accordingly, his position was that a prima facie case could not be established with a simple showing of the effect of the height and weight requirements on the general population.

Justice White's position, however, is not identical to the Sixth Circuit's bottom line approach. In *Smith*, the circuit court was concerned about

^{122.} Id.

^{123.} Id

^{124.} Dothard v. Rawlinson, 97 S. Ct. 2720 (1977), Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and Griggs v. Duke Power Co., 401 U.S. 424 (1977), establish that plaintiff can make out a prima facie case with a showing that a single selection requirement has a disparate impact, but those cases do not decide the issue presented by *Smith* because in each it appeared that the overall hiring process had a disparate impact.

^{125.} The Court's opinion of course permits Hazelwood to introduce applicant pool data on remand in order to rebut the prima facie case of a discriminatory pattern or practice. This may be the only fair and realistic allocation of the evidence burden, but arguably the United States should have been required to adduce evidence as to the applicant pool before it was entitled to its prima facie presumption.

Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2748 (1977).

^{126.} Dothard v. Rawlinson, 97 S. Ct. 2720, 2748-49 (1977) (White, J., dissenting). 127. Id. at 2749.

judicial preoccupation with subtests that were mere components of the total hiring process. Justice White's concern in *Rawlinson* was with the validity of the assumption that the height and weight requirements excluded women who would want to be prison guards when there was no showing that short women would apply for the job in proportion to their representation in the population. His focus on applicant flow data thus reflected his uncertainty that the relevant group of women were included in the comparison group and not that bottom line analysis is necessarily preferable.

The lack of guidance from the Supreme Court on the issue of single requirement impact in the absence of overall hiring impact has been exacerbated by the absence, until recently, of any administrative standards on the issue. Indeed, the EEOC Guidelines have contained neither a general definition of discrimination nor a methodology for disparate impact analysis. ¹²⁸ Following the 1972 amendments to the Civil Rights Act, however, Congress created a council of federal agencies with the mandate to draft new guidelines for use in the uniform enforcement of all federal acts and orders concerning employment discrimination. ¹²⁹ The resulting guidelines, now the Federal Executive Agency Guidelines on Employee Selection (Agency Guidelines), ¹³⁰ have been endorsed by the Department of Labor, the Civil Service Commission, and the Department of Justice. ¹³¹ The EEOC, which was represented on the drafting committee, has declined to accept the new guidelines and maintains a preference for its own EEOC Guidelines. ¹³²

The new Agency Guidelines contain a section on disparate impact analysis¹³³ that is lacking in their EEOC counterpart. That section incorpo-

- 128. The guidelines consider disparate impact only in the context of testing. They provide that the use of an unvalidated test that "adversely affects" the equal employment opportunities of groups protected by Title VII constitutes discrimination, but the term "adversely affects" is undefined. 29 C.F.R. § 1607.3 (1976).
- 129. The council, called the Equal Employment Opportunity Coordinating Council, was created to promote efficiency and to "eliminate conflict, competition, duplication and inconsistency" among the various parts of the federal government responsible for enforcing equal employment opportunity laws and orders. Civil Rights Act of 1964, § 715, 42 U.S.C. § 2000e-14 (Supp. V 1975).
- (Supp. V 1975).

 130. Federal Executive Agency Guidelines on Employee Selection Procedures, 41 C.F.R. §§ 60-3.1 to .14 (1977).
 - 131. 41 Fed. Reg. 51,744 (1976).
- 132. Shortly before the Agency Guidelines were published in December 1976, the EEOC republished its own guidelines with an introductory note that the EEOC Guidelines remained applicable to all parties subject to the jurisdiction of the EEOC under Title VII. 41 Fed. Reg. 51,984 (1976).

Most recently, however, another set of proposed uniform guidelines has been drafted and published for comment. These newest guidelines, the Proposed Uniform Employee Selection Guidelines, have been agreed upon tenatatively by all four of the agencies, including the EEOC. 42 Fed. Reg. 65,542, — (1977) (corrected in 43 Fed. Reg. 1506 (1978)). If these proposed guidelines are adopted, they will supersede all previous guidelines issued by the agencies. *Id.* at

^{133. 41} C.F.R. § 60-3.4 (1977). This section has been incorporated into the Proposed

rates a bottom line approach similar to that of the Sixth Circuit and tests disparate impact by a comparison of applicant acceptance rates. The guidelines advise employers to maintain information showing the effect of the employer's selection procedures on groups defined by race, sex, and ethnicity. The from that information applicant flow figures are extracted for each group. To test for disparate impact the acceptance rate of a particular group is compared with the acceptance rate of the group whose members are hired most frequently (typically white males). If this comparison reveals disparate impact in the overall hiring process, the employer must examine each selection requirement for disparate impact and validate every requirement that disproportionately excludes members of a particular group. The however, the overall selection process does not have disparate impact, the exclusionary effect of individual requirements need not be examined.

An initial problem with the Agency Guidelines is that Rawlinson casts doubt on the reliability of the method that the guidelines adopt for proving disparate impact. The guidelines require a comparison of selection rates of groups of applicants. A finding of disparate impact results when the selection rate of a particular group is less than four-fifths of the selection rate of the group hired most frequently. Rawlinson, however, expressly held that a finding of disparate impact need not be based on data concerning actual applicants. Ustice Stewart explained that recognition by members of the population of their inability to meet announced standards would inhibit applications and distort the representative character of the applicant pool. 141

Uniform Employee Selection Guidelines, 42 Fed. Reg. 65,542 (1977) (corrected in 43 Fed. Reg. 1506 (1978)). All comments in this article concerning the adverse impact provisions of the Agency Guidelines are equally applicable to the adverse impact provisions of the proposed uniform guidelines.

- 134. Id. § 60-3.4(a).
- 135. Id. § 60-3.4(b).

^{136.} The guidelines define disparate impact, called "adverse impact," as a selection rate for any racial, sexual, or ethnic group that is less than four-fifths the rate for the group with the highest selection rate. *Id.* This rule, which inadvisably fails to distinguish between large and small groups, is softened somewhat by an exception for differences based on small numbers if the differences are not statistically significant. *Id.* A rule based entirely on statistical significance would be as workable as this four-fifths rule and would not require exception. *See* Hazelwood School Dist. v. United States, n.17 (1977) (approving Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977)) (use of statistically significant differences based upon the binomial distribution).

^{137. 41} C.F.R. § 60-3.4(b) (1977). The four-fifths rule for evaluating overall disparate impact, see note 136 supra, applies also to the testing of individual requirements for disparate impact. Id.

^{138.} Id.

^{139.} Id. See note 136 supra.

^{140.} Dothard v. Rawlinson, 97 S. Ct. 2720, 2727 (1977). But see id. at 2748-49 (White, J., dissenting).

^{141.} Id. at 2727.

Although *Rawlinson* does not invalidate the Agency Guidelines,¹⁴² the observation by the Supreme Court that applicant flow data is an inherently unreliable measure of disparate impact suggests the need to reconsider whether the guidelines should contain alternative methods for proof of disparate impact.

A second problem is that under the Agency Guidelines disparate impact is determined on the basis of the results of the overall selection process without regard to the effect of particular selection requirements. This is the bottom line approach of the Sixth Circuit in Smith v. Troyan. 143 The justification offered for this approach by the Department of Justice is the limitation on federal enforcement resources. According to the Deputy Attorney General, when an overall selection process results in "equal employment opportunity" for all applicants, expenditure of limited federal resources to examine the component parts of the hiring process is inappropriate. 144 Despite this practical justification, basing the disparate impact inquiry only on the results of the overall selection process will in some circumstances deprive qualified women and minorities of equal employment opportunity. The district court's analysis in Smith¹⁴⁵ is persuasive. In that case, the admittedly valid military experience preference favored blacks, and thus a disproportionately high number of blacks were qualified for the job. The unvalidated written test, which blacks failed disporportionately, penalized many otherwise qualified black applicants. Defendant's work force compared favorably with black representation in the general population but as long as the written test was not shown to be job related, blacks were underrepresented in the work force as compared with their representation in the group of qualified persons. Equal opportunity, according to the district court, meant more than hiring an acceptable number of minority applicants overall. 146

^{142.} Rawlinson did not find applicant flow data inadmissable. On the contrary, the Court held only that plaintiff was not required to produce applicant flow data for a prima facie case, and elsewhere it stated that if defendant could adduce such evidence in rebuttal it would be "very relevant," Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2742 n.13 (1977). Moreover, Rawlinson was a private suit, and the Court did not consider factors such as limited federal resources that might affect administrative enforcement of the federal equal employment opportunity laws.

^{143. 520} F.2d 492, 497-98 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976).

^{144.} Department of Justice, Questions and Answers on the Federal Executive Agency Guidelines on Employee Selection Procedures, 42 Fed. Reg. 3821 (1977).
145. Smith v. City of East Cleveland, 363 F. Supp. 1131, 1145-47 (N.D. Ohio 1973), aff'd in

^{145.} Smith v. City of East Cleveland, 363 F. Supp. 1131, 1145-47 (N.D. Ohio 1973), aff'd in part and rev'd in part sub nom. Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976).

^{146.} But see Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974). In Butts the court held that an Iowa statute forbidding employment of felons in civil service jobs did not violate the equal protection clause. To show the discriminatory impact of the statute on blacks, plaintiff introduced evidence that a disporportionate number of inmates in Iowa prisons are black. The

The Department of Justice cautions that the focus of the guidelines on the overall selection process rather than on its component parts does not mean that discrimination in one selection requirement can be balanced by another discriminatory requirement. Presumably, the Department's assertion that the guidelines "do not permit any kind of discrimination" heans that it will not tolerate overt discrimination to achieve quotas. Despite this disclaimer, the guidelines do encourage employers to create an employment process that makes the numbers "work out right" because an acceptable overall selection rate, even in the presence of requirements that favor different groups, will foreclose under the guidelines an inquiry into the validity of individual requirements. The limitation on the selection of counterbalancing requirements is that the employer not intentionally or overtly discriminate either for or against any group, but in practice this limitation can probably be overcome by selection of requirements that appear plausibly job related.

The Agency Guidelines thus create an incentive for employers to devise surreptitious quota systems composed of counterbalancing selection requirements that have sufficient appearance of job relatedness to prevent a charge of intentional discrimination. ¹⁴⁹ For example, subjective interviews by a personnel manager might have the necessary impact for or against a particular group to make the overall selection rates come out right, yet provide no evidence of overt discrimination. A minimum or maximum height requirement, if plausibly job related, might survive the guidelines despite *Rawlinson* and despite the lack of a validity study, as long as the requirement was buried among the other requirements making up the total

district court found this evidence inconclusive, especially in light of evidence that blacks held 7.1% of the civil service jobs in Des Moines while blacks constitute 5.6% of the city population and 1.2% of the state population.

147. Department of Justice, Questions and Answers on the Federal Executive Agency Guidelines on Employee Selection Procedures, 42 Fed. Reg. 3821 (1977).

^{148.} Id

^{149.} The Fifth Circuit has recognized the dangers of an approach that looks only to overall hiring impact. In Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), the court addressed the issue of counterbalancing requirements as follows:

Goodyear directs our attention to many statistics which it asserts establish that it has transferred black employees from the labor department and hired blacks from the Houston area in a ratio equivalent to the total black population in the area. However, reliance on such data misinterprets the significance of Johnson's proof. Such evidence does not disprove the essential finding that the tests have a detrimental impact on black applicants. It merely discloses that Goodyear has attempted by other practices to remove the taint of the tests' consequences. The fact still remains that for those potential black hirees and black labor department transferors, these unvalidated testing devices have a substantial invidious effect.

Id. at 1372-73.

In his concurring opinion in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Justice Blackmun expressed concern that strict adherence to the test validation requirements of the EEOC Guidelines would encourage quota systems: "I fear that a too-rigid application of the

selection process. A stringent eyesight test without corrective lenses might pass as a reasonable measure without a validation study even though it disproportionately excluded white applicants. 150 An education requirement consisting of minimum or maximum 151 years of schooling might similarly be used to eliminate otherwise qualified black applicants, despite Griggs, as long as the bottom line acceptance rate worked out right. The key under the guidelines is the achievement of an acceptable overall result based upon a conglomeration of plausible, but unvalidated, requirements. The unofficial quota approach to hiring encouraged by the guidelines may relieve personnel managers of some of the burdens of complying with equal employment opportunity requirements, but it flies in the face of the concept of removing artificial barriers to equal opportunity. Greater certainty for employers with respect to their duty to provide equal employment opportunity can be achieved without the perils created by the overall selection approach of the Agency Guidelines. The following part of this article builds upon the principles of Teamsters, Hazelwood, and Rawlinson to suggest a coherent, ordered framework for disparate impact analysis that dispenses with the bottom line approach.

B. A Structural Proposal for Disparate Impact Analysis

The following scheme is proposed as a means of formalizing a structure of disparate impact principles. The purpose of this proposed method of uniform analysis is not only to clarify the contributions of the recent Supreme Court decisions but also to suggest the logical extension of the principles of those decisions to situations not yet presented to the Court. This structure is designed to avoid the pitfalls present in the approach of the Agency Guidelines to disparate impact analysis.

At the outset, disparate impact analysis requires distinctions concerning the type of selection process used by the employer and the nature of the

EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." Id. at 449. Ironically, although the Agency Guidelines have lessened the difficulty of test validation, they also encourage the subjective quota system that Justice Blackmun feared because of their bottom line approach to disparate impact analysis.

150. Differences in visual acuity attributable to race may cause an eyesight requirement to have a disparate impact. One study has concluded that such differences exist:

Negro adults, both men and women, were found to have better uncorrected visual acuity at both distance and near than white adults—that is, relatively more reached the equivalent of 20/30 or better and fewer did not exceed the equivalent of 20/100. Racial differences at the level of 20/20 or better... however, were negligible.

NATIONAL CENTER FOR HEALTH STATISTICS, BINOCULAR VISUAL ACUITY OF ADULTS 1960-62, at 15 (1967).

151. An employer might require a maximum number of years of education, the reverse of the *Griggs* diploma requirement, on the ground that morale is poor among employees who are

job in question. First, the selection process is classified as one of three types: (1) a collection of specific requirements; (2) a subjective, nonspecific hiring process; or (3) a process composed of specific and nonspecific parts, such as a test plus a subjective interview. The second distinction turns on the nature of the job in question. Jobs requiring skills that can be attained by most people after minimal instruction or experience are distinguished from jobs that can be performed only by persons with special qualifications. Application of these two distinctions to the particular job and employment process in question allows a court to characterize a disparate impact case as one of six analytically distinct types.

1. Case I: Specific Requirements Employment Process and Readily Acquired Skills.—In this type of disparate impact case the nature of the job is such that it requires skills commonly possessed or easily attained by many people. Police officers, fire fighters, many factory workers, and bank tellers have jobs of this type. The employer's selection process consists of one or more specific requirements such as height or weight standards, a physical agility test, a written test, a diploma requirement, or lack of an arrest record.

Plaintiff should be able to establish a prima facie case with evidence that one or more of these requirements has the effect of excluding a disproportionate number of potential applicants from the general population on the basis of race, sex, or ethnicity. The effect of each selection requirement should be considered without regard to the effect of any other requirement. The kind of evidence that plaintiff needs to show the disparate impact of a particular requirement is statistical proof probative of the following question: If this test or standard were to be given to every person who might ever apply for this job, would it have the effect of disqualifying disproportionately members of a given racial, sexual, or ethnic group? Evidence probative of this question includes statistics concerning the effect of the requirement on the general population or, if this is unavailable, statistics showing a significant difference in the pass-fail rates of groups of actual applicants. 152 If defendant fails to refute the validity of plaintiff's statistics showing disparate impact, defendant has the burden of proving the requirement is job related.

Rawlinson was a disparate impact case of this type. The selection requirements at issue, height and weight standards, were specific, and the

152. See Shoben, supra note 28.

over-educated for a particular job. Normally, an employer would need to validate such a requirement if it had a racial impact. Under the bottom line analysis of the Agency Guidelines, however, an employer could counterbalance another requirement to avoid the burden of validation. See 41 C.F.R. § 60-3.4 (1977).

job of prison guard did not require specialized skills. Plaintiff's statistics showed that both selection requirements would exclude more adult women than adult men. ¹⁵³ The Court did not ignore the geographic issue concerning who might apply to be an Alabama prison guard. It justified the use of national height and weight figures on the ground that there was no reason to believe that the height and weight of Alabama men and women differed markedly from that of the national population. ¹⁵⁴

2. Case II: Specific Requirements Employment Process and Special Qualifications.—The second type of disparate impact case concerns jobs that require specialized skills like those held by school teachers, accountants, lawyers, and medical doctors. The selection process is composed of specific job requirements such as tests, recent graduation requirements, intracompany experience, and grade point average cut-offs.

The analysis for disparate impact is similar to that for the first type case except that a particular requirement must be examined for its effect on racial, sexual, or ethnic groups among only those people who possess the necessary special qualifications. If, for example, an employer uses a test to select teachers, then the effect of that test on groups defined by race, sex, or ethnicity is relevant only among the group of persons who are qualified by education to be teachers.

3. Case III: Subjective Employment Process and Readily Acquired Skills.—In the third type case there is a subjective hiring process, such as an unstructured and standardless interview, for a position that requires skills commonly held or easily acquired by many people. For example, an employer might conduct simple interviews to select an assembly line worker, a filing clerk, or a truck driver.

Plaintiff should establish a prima facie case by comparing the racial, sexual, or ethnic composition of defendant's work force with that of the general population in the geographic area where defendant hires. If plaintiff is challenging only one job category among many in defendant's work force, he should compare the composition of employees in that category with the general population. *Teamsters* is an example of the latter type case. Although defendant's work force included many categories of truck drivers, plaintiff alleged discrimination only in the employment of long-haul drivers. ¹⁵⁵ The Supreme Court thus compared the racial composition of the

^{153.} Dothard v. Rawlinson, 97 S. Ct. 2720, 2727 (1977). See text accompanying notes 24-25 supra.

^{154.} Id.

^{155.} International Bhd. of Teamsters v. United States, 431 U.S. 324, 329 & n.3 (1977).

group of long haul drivers with the composition of the general population in the communities where those drivers were hired. 156

The question to be answered by the community composition comparison approach should be presented in terms of probability theory: Given the racial, sexual, or ethnic composition of the community in which defendant hires, what is the probability that his work force would attain its particular composition in the absence of a discriminatory effect in defendant's selection process? If the probability is low that a work force with the composition of defendant's would result without a discriminatory influence, then an inference of disproportionate exclusion arises. Defendant employer may then attempt to rebut this inference with evidence of nondiscriminatory post-Act hiring or perhaps with applicant flow data.

- Case IV: Subjective Employment Process and Special Qualifications.—The fourth problem is the same as the third except that the job requires specialized skills. *Hazelwood* is an example of this type of case. The job of teaching historically and by state licensing standards requires a college education, and defendant Hazelwood School District had no clear standards for selecting among the group of qualified applicants. 157 The analysis for this type case is similar to that for the third with the exception that the relevant labor market is composed only of those persons in the community where defendant hires who possess the requisite qualifications. As applied to the facts of *Hazelwood*, the key analytical question is as follows: If the group of persons qualified to be school teachers in the area where defendant hires is ten-percent black, what is the probability that the school district would have hired less than two-percent black teachers absent a discriminatory effect in its selection process? If the probability is low, then plaintiff has created an inference of discrimination and defendant has the burden to dispel that inference. Again, defendant may rebut the prima facie case with favorable post-Act hiring data and perhaps with application flow data.
- 5. Cases V and VI: Combination of Specific and Subjective Employment Process and Skills Either Readily Acquired or Specialized.—In the final two types of cases, the employment process combines specific and subjective requirements for either a readily acquired skills job or a specialized skills job. The private guard service example posited earlier fits the first of these two categories because the guard job was probably easily

^{156.} Id. at 339 n.20.

^{157.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2739 (1977) ("each school principal possessed virtually unlimited discretion in hiring teachers for his school").

learned, and the employment process included two specific requirements, a test and an experience requirement, as well as a subjective and standardless interview. Cases that fall within these two categories should be analyzed imitially the same as the first two types of cases, which concern only specific requirements. Plaintiff should be able to establish a prima facie case that a particular requirement has a discriminatory effect either by showing the effect of the requirement on the general population or relevant labor market or by showing the pass-fail rates of actual applicants. Because of the subjective interview component, however, these two types of cases can also be analyzed the same way that the third and fourth types of cases are analyzed. Plaintiff should have the alternative of establishing a prima facie case by showing that the racial, sexual, or ethnic composition of the employer's work force compares unfavorably with the composition of the relevant labor market or general population in the communities where the employer hires.

If plaintiff shows that a specific requirement has a disparate impact, defendant will have the burden of validating the use of that requirement just as he would under the first and second types of cases. If, however, the comparison of the racial, sexual, or ethnic composition of defendant's work force with that of the relevant labor market creates a statistically significant probability of discriminatory effect, defendant's opportunity to rebut should be limited to applicant flow data derived only from the steps in the employment process immediately before and after the subjective component; the data should reflect only the effect of that component. 159 To allow an employer to rebut with general applicant flow data or post-Act hiring data that would show the effect of the overall employment process, as he would be able to do in the third and fourth type cases, would be to encourage the use of this subjective component as a balancing factor to maintain a quota hiring system. The use of requirements for the preferential hiring of any group is antithetical to the concept of equal employment opportunity based on merit. As the Supreme Court asserted in Griggs, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."160

^{158.} In Harless v. Duck, 14 Fair Empl. Prac. Cas. 1616 (N.D. Ohio 1977), the employment process for the hiring of police officers comprised a written examination, an agility test, and a subjective oral interview. The court examined each component separately for disparate impact.

^{159.} If, for example, the employment process consisted of a validated education requirement plus an interview, the disparate impact of the interview should not be subject to rebuttal by proof of favorable applicant flow data for the overall hiring process. The relevant question would be the effect of the interview on those individuals who have already satisfied the validated education requirement. But see Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976) (validated veterans preference that favored blacks and unvalidated test that disfavored blacks).

^{160.} Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

III. Disparate Impact Analysis and Preferential Hiring Questions

The validation by the Court in Teamsters and Hazelwood of the community composition comparison approach to proof of Title VII violations was based on the rationale that nondiscriminatory employment practices will produce over time a work force that reflects the composition of the community or other relevant labor market. 161 Does this approach indirectly require preferential hiring to achieve quotas, which is incompatible with the principle of employment on merit?

This question of the compatibility of disparate impact analysis with nonpreferential hiring was presented to the Court in Teamsters, but not resolved. Defendants argued that a court should not give disparate impact analysis decisive weight in a Title VII case because to do so would conflict with section 703(i) of the Act concerning preferential treatment. That section provides that an employer shall not be required to grant preferential treatment to any group on account of imbalance in his work force among racial, sexual, or ethnic groups. 162 In Teamsters defendants maintained that this statutory guarantee was violated by the use of disparate impact analysis, at least when that analysis entailed a comparison of the proportion of minorities in the employer's work force with their representation in the population. 163 The Court did not decide whether the use of disparate impact analysis conflicted with section 703(i) because the Government had alleged and proved purposeful discrimination. The Government compared the employer's work force with that of the community to bolster its evidence of intentional discrimination and not to support what Justice Stewart called "an erroneous theory that Title VII requires an employer's work force to be racially balanced."164

Because the Government in Teamsters proved purposeful discrimination the Court also did not decide the related issue whether plaintiff can establish a prima facie case under Title VII with statistics alone. Individual witnesses in Teamsters testified to forty specific instances of discrimina-

^{161.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2741 (1977) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)).

tional Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)).

162. Nothing contained in this subchapter shall be interpreted to require any employer
... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer
... in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Civil Rights Act of 1964, § 703(j), 42 U.S.C. § 2000e-2(j) (1970).

163. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n/20 (1977).

^{164.} Id. The Hazelwood Court did not address this issue.

tion, and the district court judge used this testimony as the basis for his finding that defendant had ignored numerous qualified minority applicants for the line driver jobs in favor of white applicants. ¹⁶⁵ Justice Stewart explained that the evidence of individual discrimination "bolstered" the statistical evidence of disparate impact and "brought the cold numbers convincingly to life." ¹⁶⁶ Proof of intentional discrimination is always a desirable litigation strategy, ¹⁶⁷ but Justice Stewart's ambiguous language in *Teamsters* leaves open the possibility that the Court will *require* future plaintiffs to complement their disparate impact statistics with evidence of specific instances of discrimination. ¹⁶⁸ Thus, because *Teamsters* concerned purposeful discrimination two significant questions remain unresolved. First, can plaintiff establish a prima facie case under *Griggs* with evidence only of disparate impact? If so, is this approach contrary to section 703(j), which guarantees that the Act does not require preferential hiring?

A. Preferential Hiring: Disparate Impact and Section 703(j)

The nature of disparate impact analysis as originally set forth in *Griggs*, and as developed in *Teamsters*, *Hazelwood*, and *Rawlinson*, is consistent with the idea of employment based only on merit and thus should not be considered in conflict with section 703(j). The reason for this is that the effect of disparate impact analysis is only to create an inference of disproportionate exclusion that the employer must rebut and is not to require that the employer's work force mirror the community.

The community composition comparison approach approved in *Team-sters* and *Hazelwood* addresses the following statistical question: Given the racial, sexual, or ethnic composition of the community labor pool from which defendant hires, what is the probability that his work force would have its particular composition if no factor other than chance had affected

^{165.} Id. at 338.

^{166.} Id. at 338, 339.

^{167.} See generally A. Ruzicho, Civil Rights Litigation, An Investigation, Preparation & Trial Manual (1976).

^{168.} In Hazelwood defendants challenged "the judgment of the Court of Appeals for its reliance on 'undifferentiated work force statistics to find an unrebutted prima facie case of employment discrimination." Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2741 (1977). The Court characterized the issue as whether the statistics were sufficiently probative to support a finding of a pattern or practice of discrimination. Id. It concluded that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Id. Despite this broad statement, Hazelwood, like Teamsters, did not decide the question whether a plaintiff can establish a prima facie case of discriminatory effect with statistics alone. First, Hazelwood was a disparate treatment rather than a disparate impact case. Id. at 2741 n.12. Second, because the Government produced evidence of 55 instances of overt discrimination, id. at 2739, the statistical work force comparison was only one component of its prima facie case of disparate treatment.

the hiring process?¹⁶⁹ This approach to proof of disparate impact is based on the assumption that among people in the relevant labor market merit is equally distributed across groups, so that the race, sex, or ethnicity of each employee hired on the basis of merit will depend only on chance. If the probability of defendant's labor force having its composition by chance alone is very small, there arises an inference that some other factor, such as discrimination, has affected the selection. The burden then shifts to defendant to validate his employment practices. By showing that his selection requirements are job related, defendant demonstrates that differences in merit among groups is the factor that is influencing the composition of his work force. Because defendant refutes the original assumption behind the work force comparison—equal distribution of merit across groups—he also dispels the inference of unlawful discrimination. On the other hand, if defendant cannot disprove the validity of the inference of discrimination by showing that his selection requirements are job related, then, under Griggs, he is in violation of the Act.

Nothing in this process should be construed to require or even to encourage preferential hiring. An employer's work force is not expected to mirror the composition of the local population or relevant labor market. On the contrary, one would not expect a nondiscriminating employer's work force to mirror constantly and exactly the composition of the community, ¹⁷⁰ just as one does not expect when playing cards that a fairly dealt bridge hand will always result in a balanced distribution of the honors. The issue is the fairness of the procedure that produces the result. The method of probing the fairness of an employment process is disparate impact analysis, which concerns the probability of obtaining a particular result if the selection procedure has been nondiscriminatory. The process is similar to the way one would investigate the fairness of the card dealing if one team consistently received very few honor cards. After many deals the team without the honors would want to know the probability of this consistently low-honor result. If the probability is low, such as one chance in a hundred, ¹⁷¹ that the

^{169.} See id. at 2743 n.17; Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977).

^{170.} See F. MOSTELLER, R. ROURKE & G. THOMAS, PROBABILITY WITH STATISTICAL APPLICATIONS 7-16 (2d ed. 1970) [hereinafter cited as MOSTELLER et al.].

This principle was observed in Carter v. West Feliciana Parish School Bd., 432 F.2d 875 (5th Cir. 1970). Carter concerned the racial distribution of teacher assignments after the implementation of a school desegregation order. The court observed: "[O]nce a unitary system has been established the system-wide racial ratio may thereafter change from time to time as a result of non-discriminatory application of objective merit standards in the selection and composition of faculty and staff." Id. at 878-79.

^{171.} See MOSTELLER et al., supra note 170, at 305-11.

The EEOC Guidelines discuss statistical significance in the context of test validation, but not in the context of the required showing of disparate impact for plaintiff's prima facie case.

evening's bad hands were only the result of bad luck, then an observer might infer unfair dealing. The dealers should then be required to show the deck and to demonstrate the fairness of the dealing procedure. It would be contrary to the principles of the game, however, to suggest that the method of probing the fairness of the dealing is a requirement that the honors must be equally distributed to the teams, because fair and blind dealing will result in some variations in the luck of the teams from evening to evening. In the same manner, it is contrary to the principles of equal employment opportunity to suggest that the method of probing the fairness of a hiring process is a requirement that the selection must be done in a preferential manner. Disparate impact analysis is therefore only a method of proof based on statistical probability that places the burden on defendant to validate his selection requirements. Its use should not be considered a violation of the Act's guarantee that it does not require preferential hiring. ¹⁷²

B. The Prima Facie Case with Statistics Alone

This argument that the use of disparate impact analysis is consistent with nonpreferential hiring does not determine the related question whether plaintiff can establish a prima facie case in a class action under Title VII using only statistics. Although the Supreme Court has not yet expressly answered that question, it follows from *Griggs* that the presentation of statistics showing disparate impact should be sufficient by itself to create an inference of discrimination and to establish a prima facie case. *Griggs* compels this conclusion for two reasons. First, the Supreme Court stated in *Griggs* the principle that discrimination goes to the consequences of em-

For test validation, the guidelines use a level of significance p < .05 (one chance in 20 that the result occurred by chance alone). 29 C.F.R. § 1607.5(c) (1976). At least one district court case has adopted this level of significance for disparate impact analysis, Harless v. Duck, 14 Fair Empl. Prac. Cas. 1616, 1620 (N.D. Ohio 1977), but the Supreme Court's discussion of statistical analysis for the prima facie case does not specify a particular level of significance as required. Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2743 n.17 (1977).

The Agency Guidelines generally rely upon a four-fifths rule. See note 136 supra. In cases of small numbers the guidelines create an exception to the four-fifths rule for statistical significance, but they do not indicate what level of probability is significant. 41 C.F.R. \S 60-3.4(b) (1977). In Ensley Branch, NAACP v. Seibels, 14 Fair Empl. Prac. Cas. 670 (N.D. Ala. 1977), the court applied the FEA Guidelines, but the probabilities were so low (p < .001) that the requisite significance level was not an issue. Id. at 673-74.

172. But see Harper v. Mayor & City Council of Baltimore, 359 F. Supp. 1187 (D.C. Md. 1973).

[A]cceptance of the idea that discrepancies between racial composition of the community and the plant or department alone make out a prima facie case of discrimination leads inevitably toward a narrowing of the Court's options in fashioning a remedy. If the problem is to be demonstrated by the mere fact of a discrepancy, then the solution must amount to an order to bring employment statistics into line with the population statistics, lest the Court mandate a continuing prima facie violation. Hiring in that manner in the first instance is not required by law.

Id. at 1193 n.5.

ployment practices, not just to the motivation for them, ¹⁷³ and the Court recently reaffirmed this principle in Rawlinson, which, unlike Teamsters and Hazelwood, did not concern purposeful discrimination. 174 Thus, plaintiff need not plead and prove intentional discrimination under Title VII. Defendant violates the Act when members of a group covered by the Act are disproportionately excluded by employment procedures that defendant cannot show to be job related. Second, as discussed in the preceding part of this article, the function of disparate impact analysis is to create an inference of an exclusionary effect in defendant's employment process. Because the Supreme Court has defined discrimination under the Act as an exclusionary result caused by an unvalidated employment practice, statistical evidence that creates an inference of the exclusionary effect of a particular practice should establish plaintiff's prima facie case and shift the burden to defendant to validate the practice. A court following Griggs should not require evidence of intentional discrimination to establish a prima facie case when plaintiff alleges only the discriminatory effect of defendant employer's hiring practices.

Evidence of intentional discrimination is, of course, relevant in any discrimination case, and testimony concerning individual encounters with overt discrimination is desirable as a matter of litigation strategy to put life into an otherwise numerical case. ¹⁷⁵ Evidence of a personnel manager telling an applicant that being a Chicano is a "strike against him" or evidence of an employer telling a woman that the job she seeks is a "man's job" provides a smoking gun that complements plaintiff's statistical proof. Such evidence may furnish the basis for claims of individual discrimination, ¹⁷⁸ or it may enhance plaintiff's disparate impact evidence in a

^{173. &}quot;[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." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

^{174. &}quot;The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive." Dothard v. Rawlinson, 97 S. Ct. 2720, 2726 (1977). "[The] cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly different pattern." *Id. But see* Washington v. Davis, 426 U.S. 229 (1976) (intent must be shown to establish a prima facie case of discrimination under a claimed constitutional violation of equal protection).

^{175. &}quot;The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977). See generally Phillips, Discovery, Evidence, and Trial Techniques—The Plaintiff Position, in Handling the Employment Discrimination Case 81 (G. Holmes & Q. Story eds. 1975).

^{176.} See International Bhd. of Teamsters v. United States, 431 U.S. 324, 338 n.19 (1977). 177. See Saracini v. Missouri Pac. R.R., 14 Fair Empl. Prac. Cas. 1604, 1606, 1609 (E.D. Ark. 1977).

^{178.} See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972). See generally B. SCHLEI & P. GROSSMAN, supra note 3, at 15-25 (1976).

class action, but testimony concerning purposeful discrimination should not be a necessary ingredient of a class action alleging only discriminatory effect under *Griggs* and based upon disparate impact analysis.

Arguably, statistical evidence of disparate impact without testimony of overt discrimination should be sufficient for a prima facie case even in a class action in which plaintiffs allege purposeful discrimination. Teamsters left unanswered the question whether statistics alone can establish a plaintiff's Title VII claim of intentional discrimination against a class because the question was not properly raised by the facts of that case. The Government had alleged purposeful discrimination, but it had not relied exclusively upon proof of disparate impact. At trial individuals testified to some forty specific instances of overt discrimination. 179 Although the question thus remains for the Court's consideration, 180 Justice Stewart's majority opinion in Teamsters indirectly provides some guidance. In the footnote in which he rejects the argument that use of disparate impact analysis conflicts with the guarantee against preferential hiring. Stewart also discusses generally the use of statistics to prove purposeful discrimination. 181 The function of disparate impact analysis, he argues, is not to require an employer to maintain quotas, but rather "[s]tatistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination." Stewart proceeds to state the rationale underlying the community composition comparison approach, ¹⁸³ which was later highlighted in *Hazelwood*, and concludes by citing with apparent approval the following observation by the Ninth Circuit: "In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."184

There is no compelling reason why plaintiff should be able to establish a prima facie case with statistics alone when he alleges discriminatory effect but not when he alleges purposeful discrimination. In either case the absence of provable instances of overt and intentional discrimination should not

^{179.} International Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977).

^{180.} Several courts of appeals have similarly rejected defendants' arguments that statistics cannot form the basis of a prima facie case, but none has addressed the issue in the absence of other evidence of discrimination produced by plaintiff. See, e.g., Kaplan v. International Alliance of Theatrical & Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975); United States v. Masonry Contractors Assoc., Inc., 497 F.2d 871, 875 (6th Cir. 1974); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972).

^{181.} International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

^{182.} *Id*

^{183. &}quot;[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Id*.

^{184.} Id. (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971)).

preclude plaintiff from attempting to create an inference of discrimination, intentional or otherwise, with disparate impact analysis. The difference between the two types of cases should lie in the evidence with which defendant can properly rebut the inference. In a case in which plaintiff alleges purposeful discrimination, defendant should be able to rebut plaintiff's disparate impact case with proof of good faith. Affirmative action plans, active recruitment of under-represented groups, and applicant flow statistics should all be more persuasive to rebut the inference of purposeful discrimination than they are to rebut the inference of discriminatory effect under Griggs. 185 These avenues of defense would be in addition to the possibility of showing favorable recent hiring statistics, which may be persuasive rebuttal even in the Griggs-type case. The availability of statistics alone to establish a prima facie case of intentional discrimination under Title VII remains open after *Teamsters*, but the Court already has addressed the issue in the context of a constitutional claim of employment discrimination. In Washington v. Davis 186 the court held that plaintiff must show purposeful discrimination in a racial employment discrimination case based on the equal protection component of the due process clause of the fifth amendment; proof of discriminatory effect is insufficient. 187 The Davis Court spoke specifically to the question of the sufficiency of disparate impact statistics to establish purpose in an equal protection case: "Disporportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule... that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." The Court conceded that in some racial discrimination jury cases it had held that the "total or seriously disproportionate" exclu-

^{185.} Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups'); see Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) ("If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries."). Thus, in a Title VII effects case, district courts disregard evidence of good faith recruitment offered by defendants to rebut plaintiff's prima facie case. See, e.g., Ensley Branch, NAACP v. Seibels, 14 Fair Empl. Prac. Cas. 670, 673 (N.D. Ala. 1977); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 909, modified in part, 13 Fair Empl. Prac. Cas. 1019 (C.D. Cal. 1976).

^{186. 426} U.S. 229 (1976). Plaintiffs in *Davis* challenged the employment practices used in the selection of police officers in Washington, D.C. The action originated before the amendments to the Civil Rights Act that allowed governmental defendants, *see* note 91 *supra*, so the claim was made under the equal protection component of the due process clause of the fifth amendment.

^{187.} Id. at 238-48. See generally Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540 (1977).

^{188.} Washington v. Davis, 426 U.S. 229, 242 (1976).

sion of blacks "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds," but it cautioned that it had not held invalid under the equal protection clause a law neutral on its face simply because it disproportionately affected one race. If thus appears unlikely that disparate impact statistics alone can establish the purposeful discrimination necessary to trigger strict scrutiny under the equal protection clause.

IV. Conclusion

The use of disparate impact analysis to establish plaintiff's prima facie case under Title VII has acquired such a level of complexity that uniform guidelines, judicially or administratively fashioned, are urgently needed. In the seven years since *Griggs* accepted an operational definition of discrimination, lower courts have developed a variety of methods for probing whether a particular selection requirement or an overall employment process has the effect of excluding disproportionately any group recognized under Title VII. The most controversial of these methods entails a comparison of the racial, sexual, or ethnic composition of the community with the composition of the employer's work force. If the disparity revealed by this comparison is statistically significant, there arises an inference of discriminatory effect in the employment process.

The Supreme Court heard objections to the community composition comparison approach in *Hazelwood School District v. United States* and *International Brotherhood of Teamsters v. United States*, Title VII pattern or practice cases in which the government alleged purposeful discrimination. In the face of these objections, the Court upheld the validity of the approach, underscoring its logic with the following statement: "[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." The Court added a caveat to its approval, however, by holding that defendants must be given an opportunity to rebut plaintiff's statistics with post-Act hiring data and perhaps applicant flow data.

The new Agency Guidelines have also sparked controversy, partly because they measure disparate impact with applicant flow data and partly

^{189.} Id.

^{190.} Id. at 243-44.

^{191.} Hazelwood School Dist. v. United States, 97 S. Ct. 2736, 2741 (1977) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)).

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because they resolve the issue of single requirement impact in the absence of overall hiring impact in favor of a bottom line approach. As the Supreme Court explained in *Dothard v. Rawlinson*, applicant flow data may be an unreliable measure of discriminatory effect because the phenomenon of self selection may distort the applicant pool. Moreover, the bottom line approach of the guidelines permits the use of unvalidated discriminatory requirements as long as there are counterbalancing requirements producing an overall acceptance rate that compares favorably with the composition of the applicant pool. This encourages employers to avoid charges of discrimination by adopting a disguised quota system under which hiring practices include subjective interviews or other unvalidated requirements known to produce an acceptable representation of each group.

The goal of the new Agency Guidelines, greater simplicity and certainty in disparate impact analysis, can be achieved without a bottom lineapplicant flow approach. The model suggested in this article is based on two simple dichotomies: general skills jobs versus specialized skills jobs, and specific employment requirements versus a subjective employment process. Application of these dichotomies to a given set of facts allows classification into one of six distinct categories, each of which can be properly analyzed by procedures as easily understood as those in the guidelines. The model proposed by the article facilitates analysis and preserves the distinctions made by the three recent Supreme Court cases, yet avoids the pitfalls of the Agency Guidelines.

