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

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THE USE OF STATISTICS TO PROVE INTENTIONAL EMPLOYMENT DISCRIMINATION

ELAINE W. SHOBEN*

I

INTRODUCTION

Two decades after the once fiery debate about the meaning of "discrimination" in employment under Title VII of the Civil Rights Act of 1964,[1] the issue has recently been rekindled.[2] In simplest form, the question is whether the type of discrimination statutorily prohibited is only purposeful exclusions, or whether it includes unintended exclusions caused by tests or requirements that disproportionately affect a group defined by race, sex, or ethnicity. The Supreme Court's decision in *Griggs v. Duke Power Co.*[3] resolved the question in one major area, thus causing the issue to lie dormant since 1971. *Griggs* held that liability under Title VII does not require a showing that an employer acted purposefully to exclude; instead, liability could be premised upon a showing that an employment screening device, such as a requirement of a high school education or a minimum score on an aptitude test, disproportionately excludes a group protected by the Act without the justification of business necessity.[4]

The difference between "intentional" and "effect" discrimination[5] still poses a

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* Professor of Law, University of Illinois.

1. 42 U.S.C. § 2000e (1976 & Supp. III 1979), *as amended by* General Accounting Office Personnel Act of 1980, § 8(g), 42 U.S.C. § 2000e-16 (Supp. V 1981) (originally enacted as Civil Rights Act of 1964, §§ 1971, 1975a-1975d, 2000a-2000h-6, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253 (1964)). Title VII provides, in part, that it is an unlawful employment practice for an employer having fifteen or more employees who is "engaged in an industry affecting commerce," *id.* § 2000e(b), 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." *Id.* § 2000e-2(a)(1).

2. For an account of the early debate about the meaning of employment discrimination under the Civil Rights Act of 1964, see Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59 (1972).

3. 401 U.S. 424 (1971).

4. *Id.* at 431; *see also* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

5. Title VII claims based upon "disparate impact" should be distinguished from claims of "unequal treatment," which is also often called "disparate treatment." The similarity in the names of these dissimilar theories of recovery under Title VII is the unfortunate result of haphazard nomenclature since neither of these terms is defined by, nor even appears in, the Act itself. "Disparate treatment" has been used to mean an employer's unequal policy or practice which differentiates between two groups solely on the basis of race, color, religion, sex, or national origin. A disparate treatment claim requires proof of the employer's discriminatory intent, although sometimes intent can be inferred from the facts showing inequality in treatment. On the other hand, "disparate impact" concerns the discriminatory results of neutral practices without regard to the employer's intent. The terms "disparate impact," "adverse impact," and "disproportionate exclusion" are used synonymously. *See* International Bhd. of Teamsters v. United States, 431 U.S.

question today in the area of subjective interviews. Objective hiring criteria, such as aptitude tests or education requirements, are distinguishable from formless subjective hiring processes. Is it sufficient to use a *Griggs*-based proof of adverse impact when challenging the disproportionate effect of subjective interviews, or must the claimant show purposeful exclusion in such a case? The courts of appeal are floundering on this issue.[6]

A decision in favor of an intent requirement in such cases does not necessarily foreclose the use of statistical proof. Statistics have been the major focus of disparate impact cases following *Griggs,*[7] as well as being relevant to proof of intentional discrimination.[8] Statistical proof, however, should have a greater role than it currently does in cases alleging intentional discrimination. Specifically, even if hiring is based on subjective interviews, statistics alone in the proper case should be sufficient to establish a prima facie case of purposeful exclusion.[9] Moreover, statistical proof of the impact of a requirement should be relevant under a theory that the continued use of a screening device *known* to exclude on the basis of race, sex, or ethnicity can be evidence of intent to exclude.[10]

The relevance of statistical proof to a claim of intentional exclusion is increasingly important today for two reasons. First, the Supreme Court may resolve the conflict concerning subjective interviews in favor of requiring proof of intent to discriminate. Second, the Supreme Court held just last term that proof of intent is

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324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971); Wright v. National Archives & Records Serv., 609 F.2d 702, 711-18 (4th Cir. 1979).

6. The Fifth Circuit has taken the position that disparate impact analysis may not be used when subjective interview results are challenged; only disparate treatment analysis is allowed. Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 451 (1982). The Fourth Circuit recently took a similar position, finding that disparate impact analysis is appropriate only for identifiable objective criteria. EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983). Other circuits have assumed that subjective interviews could be analyzed with disparate impact analysis without adequate discussion of whether that approach is appropriate under Title VII. *See* Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); Peters v. Lievallen, 693 F.2d 966 (9th Cir. 1982); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982); Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981); Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835 (10th Cir. 1981); Whack v. Peabody & Wind Eng'g Co., 595 F.2d 190 (3d Cir. 1979).

7. *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); W. CONNOLLY & D. PETERSON, USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION (rev. ed. 1982).

8. *See* McDonnell-Douglas v. Green, 411 U.S. 792, 805 (1973); Davis v. Califano, 613 F.2d 957, 962-63 (D.C. Cir. 1980).

9. This use of statistics is related to, but distinguishable from, the use of statistics to show pretext in a disparate treatment case. As explained in McDonnell-Douglas v. Green, 411 U.S. 792 (1973), statistics may help to probe whether a defendant's proffered reason for the disparate treatment of the plaintiff is legitimate or pretextual. The Court explained that "statistics as to the petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to hire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805. In such cases the statistics are not being used to establish the pattern of intentional exclusion itself, but to reflect upon the character of the treatment of an individual employee. The Supreme Court has recently agreed to consider the proper allocation of the burden of proof and the appropriate role of statistics during the pretext stage of disparate treatment cases. Westinghouse Elec. Co. v. Vaughn, 702 F.2d 137, (8th Cir. 1983), *cert. granted,* 104 S. Ct. 272 (1983). The forthcoming decision in this case should shed some light on the role of statistics in disparate treatment cases of individuals, but it will not resolve the problem posed in this article. The question here is: what is the appropriate role of statistics to show intentional discrimination against a group?

10. *See infra* text accompanying notes 43-52 and 137-145.

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necessary in cases brought under the Civil Rights Act of 1866.[11] Justice Rehnquist said in *General Building Contractors Association v. Pennsylvania*[12] that absent proof of intent liability could not be imposed under 42 U.S.C. § 1981 against employers who employed exclusively from a hiring hall discriminatorily run by a local union.[13] This opinion, as well as possible developments with respect to subjective interviews challenged under Title VII, raises important questions of proof that deserve full consideration at this time.

Subjective interviews should be treated like any other requirement and thus analyzed for disparate impact and business necessity under *Griggs*. If intent is required, however, (in this context or in any statutory claim of employment discrimination when intent is required) the concept of intent should be broad. It should be based upon the tort definition of intent or recklessness, rather than the evil-motivated definition of intent that may be required for violations of the equal protection clause.[14]

Statistics should play an important role in two ways. One is to probe whether a discriminatory pattern of hiring through subjective interviews is so unlikely to happen by chance alone that purposeful exclusion can be inferred. The other is to show the impact of a requirement such that the employer must have been aware of the exclusionary effect. The continued use of a selection process with a known exclusionary effect is a reckless disregard of rights which satisfies a statutory intent requirement. The burden then shifts to the defendant to show good faith belief in the validity of the requirement.

II

PROBING THE INTERVIEW PROCESS

Consider a hypothetical employer who operates a fast food hamburger restaurant. Young people are employed to take orders, fill bags with prepackaged food, and ring up sales on the cash register. Hiring for this job is done by interview. Turnover among employees is high in this minimum wage job, so the employer accepts applications more or less constantly and interviews everyone who applies. During the interview the restaurant manager evaluates the general demeanor of the candidate. The manager also asks the prospective employee a simple question about making change: if a customer has a bill of $3.36, how much change should be given for a five dollar bill?

Assume that the employer's work force hired by this process shows a significant under-representation of racial minorities when compared with either the relevant local population or the actual applicant pool. In other words, assume that if the interview process is considered to be a requirement like the *Griggs* educational or testing requirements, then a prima facie case of disparate impact can be estab-

11. 42 U.S.C. § 1981 (Supp. III 1979) (providing in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .").

12. 458 U.S. 375 (1982) (Justice Rehnquist joined the Court after *Griggs*).

13. *Id.* at 389.

14. *See, e.g.,* Washington v. Davis, 426 U.S. 229 (1976).

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lished.[15] Indeed, there is no compelling reason why an interview should not be treated exactly the same as any other screening device under Title VII.[16] Interviews can often contain components that are essentially tests, as in the example where the candidate is asked to make change.[17] Should an employer enjoy different treatment under the Act simply because that quesion is oral rather than written? The demeanor part of the manager's assessment of the applicant should also be considered as a requirement, even though it is an amorphous one. If forced to articulate what personal characteristics are desirable ones, the manager would probably say that appearance, poise, maturity, and honesty are important. The manager's "feel" for who will make a good employee is a kind of pass-fail test. It is analogous to supervisory ratings of employees for promotion.

When an interview process is viewed as a test, there is no reason not to subject it to the same scrutiny that *Griggs* imposes whenever a requirement disproportionately excludes a group defined by race, sex, or ethnicity.[18] If the employer wishes to identify individual components such as the change-making question, then that question should be validated exactly as if it were a written test. The demeanor component, or the entire interview if the employer cannot divide it into parts, should be treated like supervisory ratings.[19] If a "neat appearance" is sought, for example, then the business necessity of that requirement should be demonstrated.[20] Interviewers should be encouraged to make their judgments on some kind of scale so that predictive validity might be possible.[21] Thus even the interviewer who uses "pure instinct" in assessing applicants[22] could be asked to give some kind of rankings of confidence so that predictive validity could be studied.[23]

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15. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* D. BALDUS & S. COLE, *supra* note 7; W. CONNOLLY & D. PETERSON, *supra* note 7; Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII,* 56 TEX. L. REV. 1 (1977).

16. For a general treatment of subjective interviews under Title VII, see Stacy, *Subjective Criteria in Employment Decisions Under Title VII,* 10 GA. L. REV. 737 (1976).

17. *See, e.g.,* Milton v. Weinberger, 696 F.2d 94 (D.C. Cir. 1982) (candidates were asked during interview about their "management concept").

18. The Court explained the nature of the validation burden in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The requirements are detailed in the Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3 (1978) [hereinafter cited as Guidelines]. These Guidelines have been adopted by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice. *See generally* 1 W. CONNOLLY & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY 376-87 (rev. ed. 1982).

19. *Cf.* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 166-81 (1976).

20. *Cf.* Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (sex cannot be a bona fide occupational qualification for an airline that promoted its image as the "Love" airline by hiring only females with high sex appeal as flight attendants and ticket agents). On appearance cases generally, see B. SCHLEI & P. GROSSMAN, *supra* note 19, at 344-60.

21. *See* Guidelines, *supra* note 18, § 60-3.14(B).

22. Consider Casey Stengel, who, as legend has it, could make expert judgments of character on the basis of a half hour's conversation—and Casey did all the talking.

23. For discussions of defenses to subjective hiring cases, see Foster v. MCI Telecommunications Corp., 30 Fair Empl. Prac. Cas. (BNA) 1493 (D. Colo. 1983); Page v. U.S. Indus., Inc., 28 Empl. Prac. Dec. (CCH) 32,464 (S.D. Tex. 1982). Compare requirements for supervisor's ratings for predictive validity studies, as discussed by the Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405, 430 (1975).

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A. Subjective Interviews: Disparate Treatment or Disparate Impact Analysis?

The logic of treating interviews like any other employment requirement has not been universally accepted. The Court of Appeals for the Fifth Circuit recently held in *Payne v. Travenol Laboratories*[24] that a challenge to the exclusionary outcome of subjective interviews requires proof of intentional discrimination rather than a *Griggs*-based impact analysis. Using the terminology that the Supreme Court has inflicted on us, the plaintiff must present a disparate treatment case, not a disparate impact case.[25] The court of appeals reasoned that "interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to *Griggs v. Duke Power Co.* . . . . Hiring processes that rely heavily on subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case."[26]

In *Payne* a class of black women claimed discrimination on the basis of race and sex against a pharmaceutical plant in Mississippi. There were two types of assembly line employees whose positions required no special skills or experience: assemblers and material handlers. Material handlers were considerably better paid than assemblers. Historically, the plant hired no blacks until forced to do so by the Affirmative Action Office of the Navy in 1965. At that time the company altered its hiring requirements, which included a tenth grade education requirement. All candidates were also interviewed and hired upon subjective appraisals of their "alertness, comprehension, and cleanliness."[27] Until 1968, only males were considered for material handlers and only females for assemblers.

The black female class challenged both the tenth grade requirement and the interview process. The issue of the education requirement was removed from the case, however, because no plaintiff had standing to challenge it. This removal "transformed this case dramatically,"[28] according to the court of appeals, because now the case was one of disparate treatment rather than disparate impact. The class was no longer challenging a facially neutral criterion that disproportionately excluded its members. Plaintiffs were now arguing that the subjective interviews provided the company with an opportunity to continue its historical pattern of exclusion.

The general conclusion in *Payne* that subjective interviews cannot be analyzed like neutral criteria was unfortunate, especially because it was unnecessary to reach that conclusion to resolve the case. The class ultimately prevailed with its evidence of intentional exclusion. Purposeful discrimination is always deemed a violation of the Act, regardless of whether a disparate impact case could appropriately be brought.[29] *Payne* could easily have been decided on that ground without

24. 673 F.2d 798 (5th Cir.), *cert. denied,* 103 S. Ct. 451 (1982).
25. *See supra* note 5.
26. *Payne,* 673 F.2d at 817.
27. *Id.* at 805.
28. *Id.* at 816.
29. In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), the Supreme Court held in a per curiam opinion that a rule applied only to one sex violates Title VII even if there is no disparate impact. In that case the employer refused to hire women with preschool children, although men with preschool children were hired. The rule had no exclusionary effect on women as a class. To the contrary, 70-75% of

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requiring the Fifth Circuit to break new ground by differentiating subjective interviews from other types of requirements.[30]

The Supreme Court may ultimately decide where subjective interviews fall in its dichotomous scheme of disparate treatment and disparate impact.[31] If the Fifth Circuit's position prevails, the unfortunate result will be to encourage employers to abandon objective hiring requirements in favor of subjective ones. Proof of intentional exclusion is different in kind, and presumably more difficult,[32] than proof of disproportionate exclusion unintentionally caused. Nonetheless, under both types of proof, statistics should be highly relevant. Statistics probe disparate impact by definition;[33] they are also very useful in establishing intent. The sections that follow concern this latter question—the relevance of statistical analysis to the proof of intent.

B. The Hypothetical Interview's Component Parts

There were two identifiable components in the interview used by the hypothetical fast-food restaurant employer described at the beginning of this section. First was an evaluation of general demeanor, which might include a subjective assessment of the applicant's appearance, poise, maturity, agreeability, or other personal characteristics deemed desirable for employees. Second was an informal test incorporated into the oral interview; the applicant was asked about making change.

1. *The Demeanor Test: Invidious Intent.* If the demeanor component of the interview were used to mask a deliberate exclusion of minority applicants, one would have no difficulty labeling this exclusion intentional. Such exclusion is tantamount to openly saying that no minorities need apply.[34] To belabor the obvious, one cannot distinguish between a refusal to accept a black's application for a job and a position that no black will pass the subjective interview.[35]

The problem is one of evidence. Direct evidence of the employer's purpose is unlikely, but occasionally possible.[36] Intent is evident if the employer says, "Very

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the applicants and 75-80% of hirees were women. The disparate treatment of women with preschool children was the only issue. This intentional exclusion without a defense was a violation of the Act even in the absence of adverse impact. *See also* Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982) (direct evidence of discriminatory motive).

30. Other circuits have tended to analyze subjective interviews by disparate impact analysis without discussion of whether this approach is appropriate under Title VII. *See supra* note 6.

31. The Court recently denied certiorari in a case presenting this issue on appeal. Harrell v. Northern Elec. Co., 672 F.2d 444 (5th Cir.), *modified,* 679 F.2d 31, *cert. denied,* 103 S. Ct. 449 (1982).

32. See Arterian-Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982), for a treatment of the present status and possible future developments of the burdens, orders of proof, and defenses in disparate treatment and disparate impact cases.

33. *See* D. BALDUS & J. COLE, *supra* note 7, § 1.23; W. CONNOLLY & D. PETERSON, *supra* note 7, at 2-3.

34. Categories of types of discriminatory conduct are described in an excellent early article on Title VII. *See* Blumrosen, *supra* note 2.

35. Although Title VII permits sex or ethnicity to be a requirement for a job under some limited circumstances where it is a bona fide occupational qualification, no similar defense is allowed for race. *See* 42 U.S.C. § 2000e-2(e) (1976) (originally enacted as Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703(e), 78 Stat. 255 (1964)). Therefore race can never be made a qualification for employment.

36. *See, e.g.,* Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).

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few black boys have the blue eyes and flirtatious wiggle that customers like."[37] In the absence of such evidence, or in addition to it, the plaintiff should be able to introduce data on the disproportionate effect of the interview. If the pattern of exclusion is compelling, the trier of fact[38] should be allowed to infer intent from statistical evidence alone.[39]

2. *The Change Test: Invidious Intent.* Similarly, if the change question were adopted for the purpose of excluding minorities, one has no difficulty characterizing the effect as intentionally caused. The manager may have assumed, correctly or incorrectly, that minority applicants would have greater difficulty in answering such a quiz. Again the problem is evidence. Direct evidence of the employer's purpose in asking this question is unlikely but possible. The same may be said of any hiring requirement or test. This oral question is merely an informal test. If any requirement or test is adopted for the express purpose of excluding a group defined by the Act, then the employer should be held in violation of the Act. The court should find a violation in such a case even if the employer was incorrect in the assumption that the disfavored group would be excluded, and even if the requirement is job related.[40]

In one case, for example, a police commissioner adopted a minimum height requirement of 5'7" for officers.[41] He stated candidly on deposition that the basis for his final decision on the cutoff was how many women would be eligible at each level. Describing a conversation with a major on the force, the commissioner said:

> [H]ow many women do we have waiting? And he showed me a list, three at this, and four this, so many—no names, as I recall. I said well, if it's five-foot-eight, how many do we get? If it's five-foot-seven, how many would we get, and we looked at the list, five-six, six and a half, and you start to weigh these problems and I said, well, leave it with me.[42]

Such a procedure is surely intentional exclusion, even though the individual women were not named. If the hypothetical fast food restaurant manager was

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37. Problems inherent in cases alleging discrimination against groups defined by both race and sex are discussed in Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination,* 55 N.Y.U. L. REV. 793 (1980).

38. The trier of fact in a Title VII case is the judge sitting without a jury because the claim is considered to be one in equity rather than at law. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). Although the Supreme Court has never decided whether jury trials must be allowed under Title VII, the Court has distinguished Title VII remedies as equitable ones, thus strongly suggesting in dicta that there is no right to a jury trial under Title VII. Lorillard v. Pons, 434 U.S. 575 (1978); Curtis v. Loether, 415 U.S. 189 (1974). A claim under § 1981, however, may entitle the parties to ask for a jury trial. Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981).

39. *See infra* text accompanying notes 103-10.

40. *See infra* text accompanying notes 119-23.

41. Vanguard Justice Soc'y v. Hughes, 471 F. Supp. 670 (D. Md. 1979).

42. *Id.* at 711 n.77. It is rare to find such a "smoking gun" in an intentional discrimination case. Earlier in the deposition the Commissioner further clarified his position with respect to women on the police force:

> Where [the height requirement] really has the application [is] what I refer to as the little balls of fluff, those things we hold near and dear to our hearts, that do—do we want to take this little, luscious ball of fluff, five-feet-two, weighing 92 pounds, or my wife, five-foot-three, that I consider to be a nice, little, soft ball of fluff, and 116 pounds, and make a cop out of her and put her on the street? Now, she's quite capable, very capable, but I am worried about—I am concerned about her personal safety. I am concerned about the safety of her brother officers.

Id.

operating under a similar assumption about the effect of the change question, then intent should be found.

3. *The Change Test: Intentional Choice of Excluding Test.* The more difficult question is whether a similar result should obtain from the adoption of a requirement whose disproportionate effect would be known at the time of its adoption. Is the choice of an education requirement[43] or a height requirement[44] always purposeful exclusion, even without the kind of invidious purpose displayed in the commissioner's statement? The next section argues that the kind of intent required under Title VII or under 42 U.S.C. § 1981[45] should be intent within the meaning of the common law of torts rather than the invidious intent standard that may be required for a violation of the Constitution.[46] The adoption of a requirement or test known disproportionately to exclude is intentional conduct that violates the statutes[47] unless the employer can demonstrate a good faith belief in the validity of the screening device.[48] Because the issue is intent, however, the actual

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43. An education requirement was one of the successfully challenged hiring criteria in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

44. A height requirement was the successfully challenged hiring criterion in Dothard v. Rawlinson, 433 U.S. 321 (1977).

45. The Supreme Court's most recent decision in this area concerned § 1981. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); *see also supra* text accompanying note 13.

46. *See infra* text accompanying notes 67-73.

47. Compare the approach taken by some courts in school desegregation cases that a school board's discriminatory purpose can be reflected in the "natural" or "foreseeable" effect of its school assignments because the racial composition of neighborhoods is generally known. *See, e.g.,* United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976); Hart v. Community School Bd. of Educ., 512 F.2d 37, 51 (2d Cir. 1975). This approach has been criticized by Professor Perry as a "bastardization of the concept of intent." Perry, *The Disproportionate Impact Theory of Racial Discrimination,* 125 U. PA. L. REV. 540, 579 (1977). He argues that the kind of discriminatory purpose or intent that the Supreme Court requires for racial discrimination under a constitutional challenge is the deliberate use of race as a criterion. *Id.* His argument has been bolstered by the Supreme Court's most recent case, Rogers v. Lodge, 458 U.S. 613 (1982). In that case the challenge was to an at-large system for electing members of a county's Board of Commissioners. The system resulted in no black members of the board even though blacks were a substantial majority of the county's population (albeit a minority of registered voters). The question was whether the system violated the fourteenth or fifteenth amendments. The Court said, in the majority opinion by Justice White, that *Washington v. Davis* and *Arlington Heights* established that "for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.' " *Id.* at 617 (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)). Noting that those cases established that effect alone is not enough for a violation of the equal protection clause, the Court added that those cases "recognized that discriminatory intent need not be shown by direct evidence." *Id.* The absence of black board members is important evidence of purposeful exclusion, the Court said, but not conclusive without other evidence, such as proof that blacks have less opportunity to participate in the political process. The facts in this case were sufficient to show that the at-large system had been maintained for the purpose of denying blacks equal political access. *Id.* at 627.

Although Professor Perry's argument may be a correct interpretation of the Supreme Court's position on equal protection, statutory challenges need not be so restrictive. A broader concept of intent, including but not limited to acts motivated by racial animus, is justified outside of the constitutional context. In tort law, it is often said that one intends the natural and foreseeable consequences of an act. This more general concept of intent is appropriate in statutory challenges of employment discrimination. *See infra* text accompanying notes 81-94.

48. This approach is described more fully later in this article. *See infra* text accompanying notes 81-102. It is spiritually related to, but procedurally different from, the approach recently advocated by Professor Kaye. He argues for a model that resolves the apparent conflict between *Griggs v. Duke Power Co.* and *Washington v. Davis* by analyzing a case in the following order: Is there disparate impact? If so, then does the requirement have facial validity? If there is not disparate impact, then the plaintiff has not established

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validity of the device should not control; it is the employer's good faith belief in validity that should dispel the inference of intent.[49]

In a case such as the hypothetical fast food restaurant employer, one would think that a test about making change for a job that requires using the cash register is clearly valid on its face. The obvious relationship between the task in the test and the task on the job would suggest that it has content validity. Indeed it may, although validity can rarely be found so easily. The cash registers at this restaurant may automatically compute the change due once the employee indicates that the customer owing $3.36 has paid with a five dollar bill. The task is then not so obviously content valid. It is entirely possible that someone capable of computing change easily and accurately will be more careful in handling money when counting it out of the cash drawer, but that is a different task. If ability to compute change predicts a general accuracy in handling cash, that should be shown with criterion-related validity, not content validity.[50]

One can rarely say that a test, or an informal quiz such as the one in this hypothetical interview, is so obviously valid on its face that the employer's good faith selection of this screening device can be inferred from the test itself. In contrast to tests, a few requirements such as licensing or some education requirements are clearly valid.[51] Except for such requirements or for the rare test that may be

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a prima facie case. If there is disparate impact and no facial validity, then the plaintiff has established a prima facie case. Kaye, *Statistical Evidence of Discrimination,* 77 J. AM. STATISTICAL A. 773, 782 (1982). His concept of "facial validity" is related to my test of "good faith belief in validity." My approach, however, leaves the burden with the defendant to establish good faith belief. Part of that proof may be the employer's efforts at validation, or the employer's argument that the court's perception of facial validity matches the defendant's good faith belief in the apparent validity of the requirement upon its adoption. In this process the defendant need not prove actual validity, but the burden remains with the defendant to rebut the inference of intent. This approach does not have the virtue of Kaye's proposal in that it does not seek to reconcile disparate impact analysis with intent analysis. That concept is appealing, but this author believes it is unlikely to be accepted as the appropriate interpretation of *Griggs* and *Davis,* especially in light of the *General Contractors* case, which was decided after the Kaye article went to press.

49. The Supreme Court in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), addressed the nature of the plaintiff's and defendant's burdens in a disparate treatment case. Justice Powell's opinion for the Court said that the plaintiff's prima facie case creates a presumption of unlawful discrimination. The defendant then has a burden of production to rebut the presumption by producing evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason. *Id.* at 253. The burden of persuasion remains with the plaintiff, however. The Court explained: "She [the plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. The burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256.

50. The Court of Appeals for the Second Circuit has suggested a new approach to validity. This approach avoids the problem that predictive validity is almost impossible to prove under the Guidelines. *See supra* note 18. The Second Circuit adopted a "functional approach" that expands the opportunity to use content validation. Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79 (2d Cir. 1980). The court's attempt to find a middle ground between content validity and predictive validity is laudatory, but this author finds unworkable the "functional approach" as explained in that opinion: "[A]s long as the abilities that the test attempts to measure are no more abstract than necessary, that is, as long as they are the most observable abilities of significance to the particular job in question, content validation should be available." *Id.* at 93. It appears to be a very result-oriented rule.

51. Some requirements are clearly content valid, such as the requirement that a prospective teacher be certified by the state. Some requirements are recognized as being so obvious that the relevant labor pool is defined as restricted by that requirement when the plaintiff presents the prima facie case. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). As one court noted: "When it is clear that qualification, e.g. as an economist, engineer, lawyer, computer expert, statistician, accountant, business manager,

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clearly content valid, a court should require the employer to demonstrate good faith. Once the plaintiff establishes that the employer has chosen a screening device that would generally be known to exclude a group defined by the Act, the burden should shift to the defendant to dispel the inference of intent by demonstrating a good faith belief in the validity of the requirement.[52]

4. *The Overall Interview: Continued Use With Observed Impact.* The discussion above is premised upon the employer's choice of a test or requirement with a known tendency to exclude. Such knowledge would occur prior to the actual use of the device to screen applicants. The adoption of an education requirement or a height requirement would have an exclusionary effect on the basis of race and sex respectively, and most employers could be expected to know of such an effect. In contrast, the use of a test such as the change quiz hypothesized here does not so obviously exclude on the basis of race, sex, or ethnicity.[53] The mere choice of such a test may not therefore justify an inference of intent sufficient to shift the burden to the employer to demonstrate a good faith belief in the test's validity.

There is, however, another theory for the inference of intent from impact. Even if the test were not adopted with the invidious purpose of excluding, and even if the impact of the requirement is not known at the time of the adoption of the requirement, nonetheless the continued use of a test once the adverse impact of the test has been observed can also be the basis of inferring exclusionary intent from the effect.

When any individual screening device, or the overall hiring process, can be observed to have an adverse impact on a group defined by race, sex, or ethnicity, its continued use suggests an intent to exclude unless the employer believes in good faith that the device or entire selection process is valid. Even when the exclusionary effect may not reasonably be known at the time of initiating the selection process, at some point the employer can be deemed reasonably to have perceived the effect of the process.[54] At that time the continued use of the excluding device without a bona fide attempt at validity reflects an indifference to its effect. If the trier of fact finds such awareness of impact without reasonable efforts to validate, such indifference should suffice for intent. This state of mind is analogous to the reckless indifference that can support an award of punitive damages in tort.[55]

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secretary, is a prime factor in the selection process, a Title VII plaintiff cannot shy away from that factor in developing her prima facie case." Valentino v. United States Postal Serv., 674 F.2d 56, 71 (D.C. Cir. 1982); *see also* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983) (college degree requirement could be justified by evidence other than a validation study).

52. The burden should be the same as in any disparate treatment case, *see supra* note 49, but the proof is different because the claim is discrimination against a group rather than against a single individual.

53. *See supra* text preceeding note 15.

54. *See infra* text accompanying notes 137-45.

55. *See* D. DOBBS, REMEDIES 204-07 (1976). In the Pinto litigation in California, for example, Ford argued that the "malice" required for punitive damages requires an *animus malus*—an intention to injure. No such intention can be possible, Ford continued, with the manufacture of a defectively designed product. The California Appellate Court rejected this argument and noted that the term "malice" includes "not only a malicious intention to injure the specific person harmed, but conduct evincing 'a conscious disregard of the probability that the actor's conduct will result in injury to others.' " Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 806, 174 Cal. Rptr. 348, 381 (1981) (quoting Dawes v. Superior Court, 111 Cal. App.

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Statistics are relevant to this inquiry as well, but they play a very different role. When statistical analysis is used to probe invidious intent, the question is: how unlikely is the pattern of exclusion to happen by chance alone; is the pattern of decisions following subjective interviews so unlikely to happen by chance that the trier of fact can conclude that the employer is using the interview to mask deliberate discrimination? On the other hand, the reckless indifference theory operates very differently. Here the theory is that the employer must have noticed the exclusionary effect of the hiring process.[56] The statistics are relevant to what the employer must have observed. An inquiry into the probability of a pattern of results by chance alone is less probative, except to the extent that the employer made the same inquiry. A much more subjective view of the data is appropriate. Given the exclusionary pattern, would the employer have been alerted to its adverse effect on a group defined by race, sex, or ethnicity? If so, then failure to make a good faith effort to justify the effect with business necessity amounts to a reckless indifference that should suffice for intent to exclude.[57]

III

THE MEANING OF "INTENT" IN EMPLOYMENT DISCRIMINATION

It is commonplace in employment discrimination to distinguish between intentional exclusion and disparate impact. This is the essence of the distinction between disparate treatment analysis under *McDonnell-Douglas v. Green*[58] and disparate impact analysis under *Griggs v. Duke Power Co.*[59] The difference is similar to the distinction in tort law between liability for intentional conduct and strict liability.[60] As in torts, however, the concept of intent is not as simple as it sounds. As every first year law student quickly learns, there has developed a convoluted definition of tortious intent in order to cover the situations when the actor's state of mind was more culpable than negligence, but fell short of being invidious intent. Thus the concept of "substantial certainty" developed, as well as "transferred

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3d 82, 88, 168 Cal. Rptr. 319, 322 (1980)); *see also* Smith v. Wade, 51 U.S.L.W. 4407 (U.S. Apr. 20, 1983) (standard for punitive damages under § 1983 is recklessness rather than actual malicious intent).

56. This theory could be used for the entire hiring process or any component part, including the interviews, where the composition of the applicants would be regularly observed before and after the requirement.

57. *See infra* text accompanying notes 119-24.

58. 411 U.S. 792 (1973).

59. 401 U.S. 424 (1971); *see supra* note 5.

60. Professor Blumrosen made a similar distinction in his article, Blumrosen, *supra* note 2, published shortly after *Griggs* was decided. He equates discriminatory acts motivated by antipathy toward a group with the common law parallel of cases involving malice or wilful or wanton conduct. Similarly, he equates conduct by employers that has an adverse impact on a group with the common law parallel of strict liability. *Id.* at 67. This author agrees with those categories. His middle category needs alteration, however. He equates unequal treatment—treating members of one group in a less favorable manner than similarly situated members of another group—with common law negligence. *Id.* This analogy is weak. If an employer has consciously treated groups unequally, the resulting invasion of rights must be characterized as at least recklessly caused. If the conduct does not prove racial animus, such conscious conduct surely suggests a reckless disregard of the right of individuals to be treated equally without regard to race, sex, or ethnicity. If the unequal treatment were somehow the result of *unconscious* conduct, the negligence analogy would be apt.

intent."[61] Similarly, the state of mind necessary for an assessment of punitive damages is not restricted to malice.[62] That concept was helpful for simply battery cases, but less useful for product liability actions against corporations, for example. Tests such as "reckless disregard" and "reckless indifference" appear in the latter context.[63]

The *McDonnell-Douglas* model for intentional discrimination is based upon an invidious intent concept.[64] It works well as far as it goes, but it should not be the only definition of intentional exclusion in employment. A broader definition of intent, including the concept of reckless indifference, should be adopted, especially in the statutory context.

A. Invidious Purpose: When Is It Required?

A restrictive definition of intent in employment discrimination would require an employer to act against an individual with an evil motive to exclude on the basis of race, sex, or ethnicity. Discrimination with invidious purpose could be directed either against an individual or against a group.[65] It has been previously argued here that the adoption of a requirement such as an education prerequisite or a height requirement can meet this *animus malum* test if the requirement was adopted specifically because of its exclusionary effect.[66]

The Supreme Court has said that the kind of discriminatory acts prohibited by the Constitution are purposeful ones. Although "purposeful" is ambiguous, the opinions strongly suggest that the Court means invidious purpose rather than a broader concept of purpose as synonymous with "intent" in the tort sense.

In *Washington v. Davis,*[67] black applicants for the position of police officer in the District of Columbia challenged the use of a verbal skills test that disqualified a disproportionate number of blacks. The challenge was based on a denial of equal protection under the fifth amendment.[68] The court of appeals applied the *Griggs* disparate impact standard, and the Supreme Court reversed. The Court held that Title VII standards did not apply to constitutional cases. Rather than a disproportionate impact theory, the standard for equal protection analysis is one of discriminatory purpose. The Court occasionally used the phrase "invidious purpose,"

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61. *See, e.g.,* Talmage v. Smith, 101 Mich. 370, 59 N.W. 656 (1894) (transferred intent); Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955) (substantial certainty).

62. *See* D. DOBBS, *supra* note 55, at 204-07.

63. *See generally* 3 FUMER & FRIEDMAN, PRODUCTS LIABILITY § 36A.02 (1982); Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH. L. REV. 1258 (1976).

64. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

65. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). Both of these cases were pattern or practice cases brought by the Attorney General in which the issue was intentional discrimination against racial and ethnic groups.

66. *See supra* text accompanying notes 40-43.

67. 426 U.S. 229 (1976).

68. *Washington v. Davis* was not brought under Title VII because the complaint was filed prior to the 1972 amendments that extended the coverage of the Act to government employees. Even though those amendments were effective prior to the judgment, the procedural requirements of Title VII had not been met. It was thus necessary to address the claim as a constitutional one. 426 U.S. at 238 n.10.

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apparently meaning it to be synonymous with discriminatory intent.[69]

Six months later in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,*[70] the Supreme Court reaffirmed the *Davis* principle. In this case a nonprofit real estate developer wanted local authorities to rezone a tract of land from a single-family to a multifamily classification so that the developer could build racially integrated low and moderate income housing. The town, which had an extremely low minority population, refused to make the reclassification. The suit claimed that the authorities' refusal was discriminatory. The lower court found no evidence of purposeful exclusion of minorities by the town, but the Seventh Circuit found that the refusal to rezone was a violation of the fourteenth amendment because the "ultimate effect" of the denial was exclusionary. The Supreme Court reversed on the ground that this was not the proper constitutional standard.

Citing the Court's recent opinion in *Davis,* Justice Powell repeated that disproportionate impact is not the "sole touchstone of an *invidious* racial discrimination."[71] Further, proof of "racially discriminatory *intent or purpose*"[72] is necessary for a violation of the equal protection clause. The use of these terms in adjacent sentences indicates that the Court meant them to be synonymous. It thus appears that the Court intends a narrow concept of intent to be required for constitutional violations of equal protection; that is, the actor must have an *invidious* purpose.[73]

Most recently, the Court considered the purpose requirement in the context of 42 U.S.C. § 1981. In *General Building Contractors Ass'n. v. Pennsylvania,*[74] the Court held that discriminatory purpose is necessary even under this statutory claim. *Arlington Heights* had concluded by drawing a distinction between constitutional and statutory bases of recovery and remanding for consideration whether disproportionate impact is sufficient under Title VII.[75] In *General Building Contractors,* however, the Court held that the close connection between 42 U.S.C. § 1981 and the fourteenth amendment requires an identical standard for discrimination. Justice Rehnquist's opinion for the majority concluded that 42 U.S.C. § 1981, like the equal protection clause, can be violated only by purposeful discrimination. It would be incongruous, he stated, to construe them in a manner markedly different.[76]

The *General Building Contractors* case concerned a claim against construction industry employers for the discriminatory operation of a union hiring hall. The collective bargaining contracts provided for the exclusive use of the hiring hall for

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69. Compare the language of the Court, 426 U.S. at 238-39, where in one paragraph Justice White uses the phrase "discriminatory purpose" and then two sentences later refers to "invidious racial discrimination." The Court did not appear to be drawing any distinction between the two.

70. 429 U.S. 252 (1977).

71. *Id.* at 265 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

72. *Id.*

73. *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). "[E]ven if a neutral law has a disproportionate impact upon a racial minority, it is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory purpose." *Id.* at 272 (upholding a preference for veterans despite its adverse impact on women).

74. 458 U.S. 375 (1982).

75. *Village of Arlington Heights,* 429 U.S. at 271.

76. *General Bldg. Contractors Ass'n,* 458 U.S. at 390.

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skilled workers. Although the district court found that the employers had not intentionally discriminated, they were nonetheless enjoined from perpetuating the exclusionary practice. The substantive ground of the injunction was the district court's assertion that 42 U.S.C. § 1981 does not require proof of purposeful conduct. The Supreme Court's reversal specifically spoke of the need to show "purposeful" or "intentional conduct" and referred to conduct *motivated* by racial animus.[77]

The Court does not appear to have considered the possibility of making a distinction between invidious discrimination and a broader concept of intent from tort law. Given the apparent willingness of the Court in *Arlington Heights* to make a distinction between constitutional and statutory bases of recovery,[78] future interpretation of *General Building Contractors* will provide an ideal opportunity to differentiate under 42 U.S.C. § 1981 between invidious purpose and intent generally. The Court's earlier decision not to read the equal protection clause so expansively as to include disproportionate impact theory is not as necessary in a statutory context, when Congress has greater latitude to override the Court's position.[79] A more general concept of intent would be appropriate both under 42 U.S.C. § 1981[80] and in those circumstances when intent may be necessary under Title VII.

B. Intent to Act with Reckless Disregard of Consequences

The meaning of intent in the constitutional context has long been the subject of scholarly debate, especially in the area of school desegregation.[81] For statutory employment discrimination law, however, it is helpful to look not only to that debate for inspiration, but also to tort law. Discrimination in employment

77. *Id.* at 389.

78. *Village of Arlington Heights,* 429 U.S. at 271. On remand in *Arlington Heights,* the Court of Appeals for the Seventh Circuit found that racially disparate impact could be sufficient to show a violation of the Fair Housing Act, 42 U.S.C. § 3601-3619 (1976). The Supreme Court declined to review this decision. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).

79. In the *General Building Contractors* case, however, Justice Rehnquist said in a footnote that the Court was not deciding "whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose . . . ." 458 U.S. at 390 n.17. The suggestion is that there may be a constitutional effects test under the thirteenth amendment, even though there is none under the fifth and fourteenth amendments. The distinction between constitutional bases versus some statutory bases may thus be too facile. *See also* Memphis v. Greene, 451 U.S. 100 (1981) (majority opinion by Justice Stevens) (concerning the thirteenth amendment and 42 U.S.C. § 1982). No constitutional or statutory violation was found against a city that closed a street such that a predominately black neighborhood was cut off from a downtown route through a predominately white neighborhood. At the end of the opinion, Justice Stevens notes: "To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the [Thirteenth] Amendment itself." *Id.* at 128. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 527-35 (1978).

80. The Court of Appeals for the Ninth Circuit, however, has equated the intent requirements of the equal protection clause and § 1981, as well as those of 42 U.S.C. § 1983 (1976). Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982).

81. *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205 (1970); Perry, *The Disproportionate Impact Theory of Racial Discrimination,* 125 U. PA. L. REV. 540 (1977); *Symposium on Legislative Motivation,* 15 SAN DIEGO L. REV. 925-1183 (1978); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 YALE L.J. 317 (1976).

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involves a type of wrong that the tort law has long been accustomed to handling. Wrongful exclusion from employment for reasons prohibited by Congress is analytically similar to wrongful discharge,[82] interference with prospective advantage,[83] fraud,[84] or deprivations of other civil rights.[85] Certainly tort law should be able to help clarify an understanding of a requirement that the defendant act "intentionally."

Motivation has never been the exclusive key to intent in torts.[86] The concept refers more to an intent to produce the certain consequences of one's act. The *Restatement (Second) of Torts* uses the term "intent" to denote more than those consequences that the actor desires to bring about. "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."[87] Similarly, Holmes clarified the concept: "If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance."[88] The standard to be applied, he noted, is external; malice, intent, and negligence in this context need an objective, external standard.[89]

Similarly, Prosser states: "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction."[90] He continues to explain that "intent" in a battery case, for example, means the desire to bring about the physical consequences, whereas "motive" refers to the more remote objective. One has the requisite intent for battery when a gun is aimed at another and a shot is taken; the motive for the shooting may range from revenge to self-defense. Moreover, intent refers not just to the desire to bring about a certain physical result. Intentional acts include not only those that bring about *desired* consequences, but also ones that produce consequences substantially certain to occur. Prosser gives as one example a man who fires a gun into a dense crowd. Even if he prays that the bullet will not hit anyone, he is said to intend to shoot whomever is hit because he must know that a gun shot into a dense crowd cannot avoid hitting someone. The result is substantially certain to follow.[91]

In contrast, if the result is not substantially certain to follow, but will possibly

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82. *See, e.g.,* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

83. *See* W. PROSSER, LAW OF TORTS 949-69 (4th ed. 1971).

84. *See id.* at 683-94.

85. *See* D. DOBBS, *supra* note 55, at 528-31.

86. W. PROSSER, *supra* note 83, at 31-34.

87. RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965).

88. Holmes, *Privilege, Malice and Intent,* 8 HARV. L. REV. 1, 1 (1894).

89. *Id.*.

90. W. PROSSER, *supra* note 83, at 31.

91. This concept of intent has been criticized by Epstein, *Intentional Harms,* 4 J. LEGAL STUD. 391 (1975).

happen because the actor has created an unreasonable risk of harm, the act is negligent rather than intentional. The woman who throws darts at a bar room dartboard may be negligent if there are people standing too closely by. Unless there are people directly in her line of fire, the result of hitting someone is not substantially certain, and thus she does not intend the contact. Nevertheless, if she acts unreasonably by throwing darts when someone might easily step into their path, then she is merely negligent. Her knowledge of the risk alone is not sufficient for intent. Thus a claim against her would be for negligence rather than for the intentional tort of battery.

Tort law has developed another concept—recklessness—that lies between intent and negligence. Recklessness encompasses acts that are "wilful" or "wanton"; Prosser categorizes all of these terms as "quasi-intent."[92] He adds: "[These terms] apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended."[93] Proof of reckless conduct will support an award of punitive damages; maliciousness—an evil motive—is merely an alternative ground for such an award.[94]

These concepts of intent and recklessness can aptly be applied in employment discrimination law.[95] The employer who adopts a requirement known to exclude on the basis of race, sex, or ethnicity can be said to be acting intentionally to exclude. There is a substantial certainty that an education or height requirement will exclude otherwise qualified individuals applying for the job. An honest belief in the validity of the requirement operates in a manner similar to self-defense; although the excluding act was intended, it was justified.[96]

Similarly, if an employer adopts a neutral requirement with no known exclusionary effects at the time of implementation, once the adverse effect is perceived, its continued use without justification amounts to a reckless disregard of its consequences. The employer can be deemed to be aware of the exclusionary effect at the point where such an effect would ordinarily be perceived.[97] The awareness

92. W. PROSSER, *supra* note 83, at 184.

93. *Id.*

94. *Id.* at 9-10.

95. Compare the split of authority about the meaning of "wilfulness" for liquidated damages under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976).

Some courts have interpreted this as a requirement of a "knowing" violation of the Act, whereas other courts have adopted a "reckless disregard" standard. For an excellent note reviewing this divergence, see Note, *The Meaning of "Wilful" Under the Liquidated Damages Provision of the Age Discrimination in Employment Act,* 68 IOWA L. REV. 333 (1983).

96. *See supra* text accompanying notes 48-52.

97. Compare Prosser's discussion of the proof of recklessness:

> The usual meaning assigned to "wilful," "wanton" or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable. Since, however, it is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. This requirement, therefore, breaks down, and receives at best lip service, in any case where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high degree of danger, either known to him or apparent to a reasonable man in his position.

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could come from studies done to comply with requirements of the Equal Employment Opportunity Commission,[98] from voluntary internal review of selection procedures,[99] or from a pattern of hiring that would suggest to the employer that the requirement was having an adverse impact on a group defined by race, sex, or ethnicity. In all these categories, statistics are relevant.[100] Whenever the pattern of rejections from a requirement, including a subjective interview, would alert an employer to the presence of an exclusionary effect, then there is the requisite awareness.[101] Statistics—on paper or not—are at the heart of such awareness. Nevertheless, statistical significance in this context is less meaningful than a concept of "psychological significance."[102] It is to these issues that we now turn.

IV
THE ROLE OF STATISTICS TO PROVE INTENT AND RECKLESSNESS

A. Statistics to Prove Intent

Statistics are relevant to the proof of intentional exclusions even when the most restrictive definition of intent is used—exclusion motivated by an invidious purpose. The Supreme Court noted in *Washington v. Davis* that even though disproportionate impact is not the "sole touchstone" of constitutionally prohibited invidious racial discrimination, such impact is nonetheless not irrelevant.[103] Moreover, the jury discrimination cases make clear, the Court said, "that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.' "[104] The reason is as follows: "It is . . . not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial

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W. PROSSER, *supra* note 83, at 185.

98. Guidelines, *supra* note 18, § 15.

99. Affirmative action plans are required of federal contractors by Exec. Order 11246, 30 Fed. Reg. 12,319 (1965), covering discrimination on the basis of race, color, religion, sex, or national origin. The Supreme Court held in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), that bona fide affirmative action plans do not violate Title VII.

100. Guidelines, *supra* note 18, § 3.

101. The Court of Appeals for the Ninth Circuit rejected a similar argument in Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531 (9th Cir. 1982). Judge Wallace stated:

> That an employer was aware of, or totally indifferent to the racially discriminatory impact of its hiring policies is not of itself sufficient to establish a prima facie case and shift the burden of explanation to the defendant. After all discriminatory intent "implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

694 F.2d at 552. The court had previously determined that statutory and constitutional requirements for intent are identical, however. *Id.* at 537. *Feeney* was a constitutional case challenging a veterans' preference as a violation of the equal protection clause. Personal Administrator v. Feeney, 442 U.S. 256, 259 (1979). If one accepts the argument that a tort theory of intent or recklessness is appropriate for statutory employment discrimination law, then Judge Wallace's conclusion does not necessarily follow.

102. *See infra* text accompanying notes 139-42.

103. 426 U.S. 229, 242 (1976).

104. *Id.* at 241 (citing Akins v. Texas, 325 U.S. 398 (1945)).

grounds."[105] The totality of the evidence in *Davis,* however, was insufficient to prove the requisite purpose.

If intent must be shown to challenge subjective interviews for employment, then statistical analysis should be highly relevant under either an invidious purpose requirement or a more general tort definition of intent. If the pattern of exclusion is sufficiently compelling, the trier of fact should be able to infer intent from the statistical evidence alone.[106] Assume, for example, that the restaurant manager in the introductory hypothetical case[107] hires a large number of people in one year, and all of them are white. For the easiest case, assume that there were large numbers of applicants, both black and white, but that only whites were hired. This result is the "inexorable zero" that has impressed so many courts in Title VII disparate impact cases.[108] The trier of fact should be free to conclude as well that such evidence indicates intentional exclusion of blacks. Moreover, in the absence of other evidence, this pattern should be sufficient to indicate racially motivated exclusion, as in the jury cases.

Partial exclusion cases are more difficult, but the same principle should apply. The reason that the inexorable zero is so compelling is that such a result is so unlikely to happen without the impermissible influence in the decisionmaking. By analogy, if someone were to flip a coin twenty times and obtain no heads, an observer would conclude that the coin was not fair because that result is so extraordinarily unlikely.[109] If the person flipping the coin were the one who supplied it, then an observer would conclude that the coin flipping was fraudulent unless there was evidence to dispel that inference. Moreover, the person flipping the coin is in the best position to dispel the inference by explaining the process that is arousing the suspicion. In the absence of a convincing explanation, the observer will conclude that the coin flipping was a hoax. Alternatively, the observer may conclude after the explanation that the coin flipper was honest, even though there was some unexplained influence causing the coin to be unfair. This is the heart of the distinction between intentional discrimination and disparate impact discrimination under *Griggs.*[110] By analogy, intentional discrimination probes "honesty" while disparate impact discrimination considers only whether there was some influence in the process, intended or not.

The Supreme Court had occasion to consider such a case in *Hazelwood School*

105. *Id.* at 242.

106. This position was recently endorsed by the Court of Appeals for the Ninth Circuit in Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 550-52 (1982). The court cautioned, however, that the statistics must be "stark." Otherwise the distinction between disparate impact and intent would be blurred. *Id.* at 552.

107. *See supra* text accompanying notes 15-23.

108. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977)("[i]n any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.' "); Valentino v. United States Postal Serv., 674 F.2d 56, 73 (D.C. Cir. 1982); Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981); EEOC v. American Nat'l Bank, 652 F.2d 1176, 1190 (4th Cir. 1981).

109. The probability of flipping a fair coin twenty times and obtaining no heads is less than one in a million.

110. Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see supra* note 5.

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District v. United States.[111] A school district in a predominantly white suburb hired school teachers by subjective interview. The case was brought by the government as a "pattern or practice" suit, and intentional discrimination was alleged. The government's evidence included both statistical disparities between the availability of black teachers and their numbers in the school district and individual instances of discrimination set against an historical background of racial exclusion. The government also emphasized that the hiring was done by standardless subjective interviews, thus presumably providing the principals with an opportunity for purposeful exclusion.[112]

It was in this case that the Court first suggested the use of statistical inference in Title VII cases. Although the importance of that development has been noted primarily on the disparate impact side of employment discrimination,[113] it is especially noteworthy here that its origin was in a case involving an allegation of intentional discrimination. The opinion by Justice Stewart said that statistics are useful in employment discrimination cases because one would ordinarily expect that over time a nondiscriminatory hiring process would result in a work force with the same racial composition as the pool from which its applicants came.[114] As the Court noted in a related case decided a month earlier, statistics showing a racial imbalance in the employer's work force are probative in an intentional discrimination case "only because such imbalance is often a telltale sign of purposeful discrimination . . . ."[115] Following up on these principles, the Court in *Hazelwood* approved the use of inferential statistics to determine the likelihood of the observed imbalance occurring by chance alone. Specifically referring to a case that discussed using the binomial distribution to assess exclusion in a jury discrimination case,[116] Justice Stewart suggested in a footnote that a difference of two or three standard deviations from the expected number of blacks in the employer's work force would "undercut the hypothesis that decisions were being made randomly with respect to race . . . ."[117] Finally, the Court noted in another portion of that opinion 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."[118]

The difference between the use of statistical inference to probe the presence of a factor causing an adverse impact and its use to probe intentional discrimination should affect a court's analysis in two ways. Most importantly, the difference between the two theories affects what kind of evidence presented by the employer should dispel the inference. In a disparate impact case the employer can only rebut the prima facie case by convincing the trier of fact that the data relied upon by the plaintiff was too unreliable or that the statistical analysis itself was faulty.

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111. 433 U.S. 299 (1977).
112. *Id.* at 302.
113. *See* Shoben, *supra* note 15.
114. 433 U.S. at 307.
115. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).
116. Castaneda v. Partida, 430 U.S. 482 (1977). The statistical approach in this jury discrimination case was originally proposed in Finkelstein, *The Application of Statistical Decision Theory to Jury Discrimination Cases,* 80 HARV. L. REV. 338 (1966).
117. 433 U.S. at 311 n.17.
118. *Id.* at 307-08.

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Alternatively, the employer must affirmatively defend by showing business necessity or validity.[119] In an intentional discrimination case, any evidence of good faith on the part of the defendant is relevant. Good faith efforts to recruit minorities,[120] voluntary affirmative action plans,[121] and good faith belief in the business necessity of the exclusionary requirements are all pertinent.[122] In a *Griggs*-based disparate impact case they are not.[123]

The second way in which the difference between the two theories should affect the case is in the assessment of the statistical proof. When statistical inference is used to probe whether a pattern of hiring reflects intentional exclusion, the danger of wrongfully finding against the employer is more important to avoid. The effect of erroneously finding a disparate impact is not to stigmatize the employer. Rather, the effect is to shift the burden to show job necessity. The effect of erroneously finding intent when there was none is more severe; not only is there a stigma, but there is no defense to intentional exclusion on the basis of race, sex, or ethnicity.

The solution to this danger is to set a higher level of significance when analyzing statistical data presented to show the employer's intent.[124] There are two dangers in statistical inference: one is to conclude that the result found was too rare to happen by chance alone when in fact it did happen by chance alone;[125] the other is to conclude that the result found could have easily happened by chance alone whereas in fact it did not.[126] Applied to the employment discrimination setting, the first type of statistical error produces an incorrect conclusion that the defendant's hiring process disproportionately excluded (or intentionally excluded) when in fact it did not do so; the apparent exclusion happened by chance alone. The second type of error produces an incorrect conclusion that the employer's process did not disproportionately (or intentionally) exclude, when in fact it did. Although both errors are serious, it is more important to avoid an incorrect finding

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119. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

120. The Supreme Court noted in Washington v. Davis, 426 U.S. 229, 235 (1976), that the police department had made substantial recruitment efforts for minorities, and that such efforts had been very successful.

121. *See supra* note 99.

122. *See supra* text accompanying notes 48-52.

123. The Supreme Court recently rejected the argument that there is no violation of Title VII in a disparate impact case if the employer uses an affirmative action plan to remove the effects of an exclusionary test. The "bottom line" does not control. Connecticut v. Teal, 455 U.S. 903 (1982).

124. For appropriate statistical methods see D. BALDUS & J. COLE, *supra* note 7, § 8.3; W. CONNELLY & D. PETERSON, *supra* note 7, at 245-51.

125. This is a Type I error. It occurs when the statistician concludes that a particular outcome was too rare to happen by chance alone when in truth the outcome did happen by chance alone. For example, a fair coin can, and sometimes does, flip ten heads in a row. An observer might conclude that such a result is so improbable as to reject the null hypothesis that a head or a tail is equally probable (a fair coin). Rejecting the null hypothesis leads to the conclusion that the coin is unfair. In fact, the observed ten heads happened by chance alone with a fair coin. Thus, this observer thus committed a Type I error. *See* L. HOROWITZ, ELEMENTS OF STATISTICS FOR PSYCHOLOGY AND EDUCATION 167-68 (1974); D. BALDUS & J. COLE, *supra* note 7, § 9.02.

126. This is a Type II error. To continue the example *supra* note 125, if a coin is tossed ten times and results in seven heads, the observer might well accept the assumption that the coin is fair. In fact, of course, the coin may not be fair. If it is not a fair coin, the observer has just made a Type II error. *See supra* note 125.

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of intentional discrimination if, in fact, there was none. Presumably, a finding of intentional discrimination is more of a stigma to an employer than a finding based on disparate impact analysis.[127] Even if this is not true, the Supreme Court appears to believe that an intent requirement necessitates a higher level of proof.[128] Therefore it is more important to avoid this first type of error in intentional discrimination cases.

The danger of wrongfully concluding that the defendant intentionally discriminated can be reduced by requiring a higher level of statistical significance. The level of significance refers to the point that the analyst selects as being a result so rare that one concludes the result did not occur by chance alone.[129] This author has argued elsewhere that the 0.05 level of significance (one chance in twenty that the result would occur by chance alone) is appropriate for disparate impact cases.[130] In intentional discrimination cases the 0.01 level (one chance in a hundred that the result would occur by chance alone) might be the most appropriate choice.[131] As in social science experiments, the choice of a significance level is an arbitrary one,[132] but it is important that the choice be made with an appreciation of how that choice relates to the two types of statistical errors. If the danger of wrongfully finding statistical significance is more important in an intentional discrimination case than in a disparate impact case, then the choice of a more conservative level of significance is appropriate. The 0.01 level is traditionally a conservative level in social science experiments.[133]

One of the unavoidable side effects of analyzing subjective interview patterns in this manner may be to encourage employers to use a surreptitious quota system, outside of the permissible parameters of a voluntary affirmative action plan.[134] If the employer uses an unspoken quota system to determine who passes a subjective interview, then the employer is acting on the basis of race, sex, or ethnicity in a manner forbidden by Title VII.[135] It will be impossible to prove this violation

127. *Cf.* Epstein, *Is Pinto a Criminal?* AEI J. GOV'T & SOC'Y, regulation 15 (Mar./Apr. 1980).

128. *See* General Bldg. Contractors Ass'n. v. Pennsylvania, 458 U.S. 375 (1982).

129. F. MOSTELLER, R. ROURKE & G. THOMAS, PROBABILITY WITH STATISTICAL APPLICATIONS 305-07, 311 (2d ed. 1970). If a result is likely to happen by chance alone less than one time in twenty, it is called significant at the .05 level. *Id.* at 306. On levels of significance in civil rights litigation see D. BALDUS & J. COLE, *supra* note 7, at 11-15.

130. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII,* 91 HARV. L. REV. 793 (1978). Arguing in favor of specific significance levels is not meant to suggest that such levels should be used arbitrarily in all cases. A generally agreed upon guideline is desirable, however, for ease of administration and for consistency of application.

131. In Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 551 (9th Cir. 1982), Judge Wallace suggests that the difference between the observed and the expected results in an intentional discrimination case should be at least three standard deviations. That level corresponds with the .0026 level advocated here. The Court of Appeals for the Fourth Circuit took the same position in a pattern or practice suit brought by the Equal Employment Opportunity Commission. EEOC v. American Nat'l Bank, 652 F.2d 1176, 1192-93 (1981). This even more conservative level reduces the possibility of Type I errors, of course, but it also increases the possibility of Type II errors.

132. The choice of the level of significance is a matter of policy. The most common level in experimental situations is the 5% or .05 level (one chance in twenty). *See* Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation,* 23 VILL. L. REV. 5, 13-14 (1977).

133. H. BLALOCK, SOCIAL STATISTICS 159-62 (2nd ed. 1972).

134. *See supra* note 99.

135. Compare the Supreme Court's rejection of bottom line analysis in *Connecticut v. Teal,* described *supra* note 123.

with statistical analysis, however, because the quota system guarantees that there will not be a significant deviation from expected representations. There is no easily apparent solution to this regrettable tendency of the Act itself. If a hiring process cannot be shown to have an impact, then there is no need to prove objectively that the process is job related.

It can only be noted that even if a pattern cannot be discerned statistically when an employer is using a secret quota, individual applicants who have been unfairly excluded may still bring *McDonnell-Douglas* claims. This problem makes it even more compelling that subjective interviews be analyzed with disparate impact analysis, like any other requirement.[136] Such an approach does not solve the problem, however. Under the method of proof that has been proposed here, the difference between the statistical analysis in an intent case and in a disparate impact case is a difference in setting the level of significance. A skillful use of a secret quota system would easily defeat either analysis.

B. Statistics to Prove Recklessness

Under the theory of recklessness in employment practices developed here, statistics are also relevant, but they play an entirely different role. The theory is that an employer is acting in reckless disregard of the consequences of a screening device once it becomes apparent that the procedure is disproportionately excluding on the basis of race, sex, or ethnicity.[137] At that point the employer must have a good faith belief in the validity of the excluding process to dispel the inference that the continued adverse effects are now desired ones. We are no longer dealing with a pattern of individual decisions from which we seek to discover if the "coin flipper" is honest. Instead we are now asking: at what point would an honest coin flipper have noticed that the pattern of results strongly suggests that something is amiss?[138] This difference in theory transforms the evidentiary question from one of objective statistical calculation of probabilities to one of subjective assessment of probabilities, or "psychological statistics."

The difference between objective and psychological statistics is surprisingly large. A pair of psychologists doing extensive work in the area, Daniel Kahneman and Amos Tversky, have discovered that people are remarkably poor at assessing probabilities.[139] Indeed, it is this lack of intuition that requires the use of statistical analysis in employment discrimination cases or other areas of the law.[140]

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136. *See supra* text accompanying notes 16-23.

137. *See supra* text accompanying notes 81-102.

138. *See supra* text accompanying notes 109-10.

139. Kahneman & Tversky *On the Psychology of Prediction,* 80 PSYCHOLOGICAL REV. 237 (1973); Kahneman & Tversky, *Subjective Probability: A Judgment of Representativeness,* 3 COGNITIVE PSYCHOLOGY 430 (1972); Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability,* 5 COGNITIVE PSYCHOLOGY 207 (1973); Tversky & Kahneman, *The Framing of Decisions and Psychology of Choice,* 211 SCIENCE 453 (1981).

140. Compare the observations of Judge Gee in Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981):

> We are no more statisticians than we are physicians, and counsel who expect of us informed and consistent treatment of such proofs are well advised to proceed as do those who advance knotty medical problems for resolution. Our innate capacity in such matters extends to "the inexorable zero" and perhaps, unevenly, somewhat beyond; but the day is long past—past at least since the Supreme

These researchers have found that people do not account for differences in sample size when asked to generate expected deviations from a mean. Intuition leads us to believe that a result of 2 heads and 8 tails in a sample of 10 coin flips is likely to happen as often as a result of 200 heads and 800 tails in a sample of 1000 coin flips.[141] Objective statistics tells us that the former is far more probable than the latter because of the difference in sample size. There is much less percentage deviation from the expected mean of half heads and half tails in a large sample because the large number of trials provides an opportunity for the more extreme results to average out. If one conceives of 1000 coin flips as being 100 groups of 10 coin flips, it is highly unlikely with a fair coin that the *average* outcome of those 100 groups of 10 coin flips will be 2 heads and 8 tails. With any one group of ten coin flips, however, 2 heads and 8 tails is not as unlikely. This fundamental effect of sample size does not appear to be readily perceived, however. Kahneman and Tversky conclude: "The notion that sampling variance decreases in proportion to sample size is apparently not part of man's repertoire of intuitions."[142]

Given that psychological assessments of the probability of a certain outcome do not match objective calculation, it is not appropriate to use objective calculation to prove that an employer must have perceived the exclusionary effect of a hiring process. The recklessness theory is that the continued use of a hiring procedure whose exclusionary effect should be *known* amounts to a disregard of the consequences in the absence of a good faith belief in validation.[143] One cannot say that the effect is *known* unless the employer should have perceived the effect. This perception would have to be based upon a subjective rather than an objective evaluation of the data. As such, the trier of fact would be in a position to assess what the defendant must have perceived from the data without benefit of expert testimony.

Knowledge of the exclusionary pattern need not come exclusively from a subjective evaluation of the improbability of the pattern of hiring, of course. There are many other possible, and more likely, sources of knowledge, such as self-study. If the effect of this approach is to discourage self-study, perhaps this theory defeats itself. The fact that self-examination is required as a routine matter by federal law[144] reduces this fear. Self-study alone does not necessarily inform the employer of the presence of an exclusionary effect of the hiring process, however. The study may result only in an awareness of the raw data—the numbers of people hired categorized by race, sex, and ethnicity. There may be no objective statistical analysis of the data; indeed, the federal Uniform Guidelines on Employee Selection Procedures do not require such analysis but rely instead on a rule that does not account for differences in sample size.[145] The subjective evaluation reflecting what

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Court's sophisticated analysis in Castaneda v. Partida, 430 U.S. 482 . . . (1977)—when we proceed with any confidence toward broad conclusions from crude and incomplete statistics . . . .

141. Kahneman & Tversky, *Subjective Probability: A Judgment of Representativeness,* 3 COGNITIVE PSYCHOLOGY 430 (1972).

142. *Id.* at 444.

143. *See supra* text accompanying notes 81-102.

144. *See* Guidelines, *supra* note 18, § 15.

145. The Guidelines, *supra* note 18, provide for a four-fifths rule of thumb. This rule states that a difference in pass rates between two groups defined by race, sex, or ethnicity is not generally considered substantial if the pass rate of one group is at least four-fifths (80%) of the pass rate for the higher group. *Id.*

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the employer "knew" about the exclusionary effect of the hiring process may thus be necessary even when there has been self-study by the employer.

V

CONCLUSION

Recent developments in employment discrimination law suggest that proof of intentional discrimination may be increasingly required. The Supreme Court has recently held that purposeful discrimination must be proven not only in constitutional cases but also in cases brought under 42 U.S.C. § 1981. Moreover, there is confusion in the circuit courts of appeals whether a challenge to the effects of subjective interviews under Title VII may employ disparate impact analysis, or whether only intentional exclusions are prohibited in a subjective process of evaluating applicants.

The concept of intent should be broadly construed for statutory violations. Borrowing from tort law, intent can be divorced from the concept of evil motive. Intent can include the adoption of requirements whose exclusionary effect on the basis of race, sex, or ethnicity is substantially certain to occur. Further, a concept of recklessness should be developed and should suffice for a showing of intentional discrimination in a statutory context. An employer can be acting in reckless disregard to the consequences to protected groups by continuing to use a hiring process once the exclusionary effect of that process is perceived. An employer should be able to defend under either of these theories by showing a good faith belief in the business necessity of the practices. With the widespread knowledge of employment discrimination requirements and the concept of validity studies, that good faith defense to dispel the inference of intent should meet a high standard. Although technical validity should not be mandatory, substantial efforts to achieve validity should be required.

Statistical proof is highly relevant in intentional discrimination cases. When the plaintiff's theory is that the employer has used subjective interviews to mask deliberate exclusion, statistical analysis of the probability of obtaining the observed pattern by chance alone should be highly probative. A highly significant disparity should suffice without any supporting proof.

When the plaintiff's theory is that the employer is acting in reckless disregard of the consequences of a hiring process, the role of statistics is much different. Then the key legal question is whether the defendant "knew" of the effect. Because people are very poor statisticians by intuition, objective calculation of probability does not probe that question unless the defendant was informed of that objective probability. A subjective assessment of the data—psychological statistics—is more probative of the defendant's knowledge. The trier of fact can determine whether the defendant would have perceived the exclusionary pattern. This approach is a less strict standard than objective statistics in almost all cases, but is necessary to probe scienter.

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§ 4D. This rule is criticized for failure to account for sample size differences and magnitude differences in Shoben, *supra* note 130, at 805-11.

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Finally, intent should not be required when analyzing the results of subjective interviews under Title VII. If intent cannot be shown under the standards outlined above, then it should suffice to show that the subjective interviews had a disparate impact on a group defined by race, sex, or ethnicity. The burden should then shift to the defendant to show the business necessity of the interview by breaking the interview down into its component parts. To hold otherwise under Title VII is to encourage employers to abandon objective screening devices in favor of unstructured subjective ones. This result would take us one step further from the goal of the Act, as identified by the Supreme Court, to "measure the person for the job and not the person in the abstract."[146]

146. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

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