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The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis

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Commentary

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The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis

The effects test, first developed in connection with litigation under Title VII of the Civil Rights Act of 1964,[1] has become perhaps the single most dominant feature of antidiscrimination law in America, notwithstanding the unwillingness of the Supreme Court to apply the test to constitutional claims.[2] Courts and administrative agencies have expanded the application of the effects test to types of employment discrimination not covered by Title VII[3] and to discrimination outside the area of employment.[4] This commen-

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified at 42 U.S.C. § 2000e (1976)). *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
2. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). *But see* Castaneda v. Partida, 430 U.S. 482 (1977).
3. *See* 41 C.F.R. § 60-741.6(c)(2) (1979) (discrimination against handicapped). *See also* 29 C.F.R. § 860.103 (1979) (discrimination on basis of age).
4. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied* 422 U.S. 1042 (1975) (housing); 12 C.F.R. § 202.6(a) n.7 (1979) (granting of credit).

   In Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court seemed to indicate that the effects test applied to cases under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which prohibits discrimination on the basis of race, color or national origin in any federally funded program. However, in Board of Regents v. Bakke, 438 U.S. 265 (1978), five members of the Court joined in concluding that the proscriptions of Title VI go no further than those of the equal protection clause of the fourteenth amendment. *See id.* at 287 (opinion of Powell, J.); *id.* at 328-355 (opinion of Brennan, White, Marshall and Blackmun, JJ.). Since the equal protection clause only prohibits intentional discrimination, *see, e.g.*, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976), *Lau* is apparently overruled on this point. *See* Board of Regents v. Bakke, 438 U.S. 265, 352 (1978) (opinion of Brennan, White, Marshall and Blackmun, JJ.).

tary will trace the outlines of the effects test analysis as it has emerged in Title VII cases, and examine the ramifications of expanding this analysis to other areas of the law.

I. DEVELOPMENTS UNDER TITLE VII

The effects test has its genesis in *Griggs v. Duke Power Co.*[5] In *Griggs*, the Court dealt with a challenge to a requirement that persons either have a high school diploma or pass a standardized general intelligence test as a condition of employment or transfer to certain jobs. There was no showing that the requirement had been adopted for the purpose of excluding blacks from certain jobs;[6] however, the effect of the requirements was to exclude a higher percentage of blacks than whites from desirable jobs. Moreover, the employer had not demonstrated that possession of a high school diploma or performance on the intelligence test was correlated to success on the relevant jobs.[7]

Rejecting the employer's theory that a subjective intent to discriminate was a necessary element of a violation of Title VII, the Court held that the enforcement of the challenged requirements violated the Civil Rights Act. Speaking for a unanimous Court, Chief Justice Burger stated that

> What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.
>
> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[8]

The Court refined the effects test in *Albemarle Paper Co. v. Moody*.[9] Like *Griggs*, the *Moody* decision dealt with an employer's use of a standardized aptitude test to select employees for certain skilled jobs. The Court implemented a three-step analysis in applying the effects test. First, the burden rests on the plaintiff to show that the challenged employment practice had the requisite disparate impact. If the plaintiff carries this burden then the employer must demonstrate that the requirement serves "the employer's legitimate interest in 'efficient and trustworthy work-

5. 401 U.S. 424 (1971).
6. *Id.* at 428.
7. *Id.* at 429.
8. *Id.* at 431.
9. 422 U.S. 405 (1975).

manship.' "[10] But such a showing is not necessarily dispositive; it still remains open to the plaintiff to show that other tests or devices might adequately serve the employer's interest without a similar disparate impact.[11]

Each step in the *Moody* analysis raises important issues. The first question is what type of statistical data will suffice to establish disparate impact. The guidelines promulgated by the agency charged with enforcing Title VII indicates that disparate impact exists where one race (or sex) is less than eighty percent as likely as another race to possess a given characteristic;[12] however, the guidelines do not identify the relevant population to which the *Griggs* analysis is to be applied. One commentator has suggested that the requirement at issue should be measured against the potential applicant pool as a whole.[13] If this position were accepted, then the most accurate method of measuring disparate impact would probably involve the use of this statistics for the population as a whole. Notwithstanding this, *New York City Transit Authority v. Beazer*[14] suggests that a different mode of analysis is appropriate. In *Beazer*, the exclusion from employment of persons undergoing methadone maintenance treatment for heroin addiction was challenged. Attempting to prove disparate impact, the plaintiffs introduced evidence indicating that sixty-three percent of the persons in public methadone maintenance programs were black or Hispanic, while only 36.3% of the total population of New York City was black or Hispanic.[15] Questioning the sufficiency of these statistics, the majority opinion in *Beazer* noted:

10. *Id.* at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).
11. *Id.*
12. 29 C.F.R. § 1607.4D (1979).
13. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VI*, 56 TEX. L. REV. 1, 8 (1977). In discussing the disparate impact problem, Professor Shoben seemed to consider *Griggs* and its progeny to be interchangeable with cases such as International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). However, the latter cases present a problem analytically quite different from that in *Griggs*. *Teamsters* and *Hazelwood* were both cases in which the government was attempting to prove that the defendants were engaged in a "pattern or practice" of racial discrimination; in such cases, the government must prove that the defendants intentionally discriminated on the basis of race in a systematic fashion. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 & n.15 (1977). Statistics in such circumstances are only evidence from which a relevant factor—intent—can be inferred. In *Griggs*, intent was irrelevant; the disparate impact *simpliciter* was the critical factor. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
14. 440 U.S. 568 (1979).
15. *See id.* at 584-86.

> We do not know . . . how many of these persons ever worked or sought work for TA [the Transit Authority]. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of *otherwise-qualified* applicants and employees . . . . The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons . . . or have received successful assistance in finding jobs with employers other than TA.[16]

Beazer indicates that the effects test analysis should not be applied to the pool of *all* potential applicants, but rather to the group of applicants who would be qualified for the position or positions in the absence of the challenged requirements. Particularly where the relevant job requires unusual qualifications, the racial or sexual composition of the relevant applicant pool may differ significantly from that of the general population. Thus, as *Beazer* recognized, statistics on the general population should not inevitably be considered definitive for the purpose of Title VII litigation.

Nonetheless, general population statistics have often been held dispositive in Title VII cases. In *Griggs*, the Court indicated that data which showed that thirty-four percent of the whites in the relevant state had obtained a high school diploma while only twelve percent of black males in the state had such a diploma[17] was sufficient to establish the requisite disparate impact. The Court used a similar technique in *Dothard v. Rawlinson*,[18] in striking down requirements for employment as a prison guard in Alabama. The state required that the guards be at least five feet, two inches tall and weigh at least one hundred and twenty pounds. Relying on the fact that the restrictions together would operate to exclude less than one percent of all American adult males but 41.13% of all adult women and that each of the requirements individually would have an analogous disproportionate effect,[19] the Court found that the imposition of such requirements violated Title VII.

The reliance on general population statistics in *Griggs* and *Dothard* seems justified by two factors, notwithstanding the potential for unreliability of such general statistics. First, it may be difficult (if not impossible) to obtain statistics which directly measure the effect of a given requirement on the pool of otherwise qualified potential applicants. If more readily obtainable alternatives are sufficiently reliable, there is little reason to place such a heavy burden on plaintiffs. Second, in cases such as *Dothard* and *Griggs*, the statistics from the general population showed such a great dis-

16. *Id.* at 585-86 (emphasis added) (footnotes omitted).
17. *See* 401 U.S. at 430 n.6.
18. 433 U.S. 320 (1977).
19. *Id.* at 329-30 & n.12.

parate impact that even if the make-up of the pool of qualified applicants differed substantially from that of the population as a whole, it seems highly unlikely that the disparity would have been eliminated entirely. In such cases, general population statistics are quite properly deemed sufficient. By contrast, where the disparate impact on the population as a whole is less dramatic, as in *Beazer*, the Court should demand more specific statistics.

The second critical issue raised by the *Griggs-Moody* analysis is how closely the challenged requirement must relate to a business purpose in the event the requirement is found to have a disparate impact. *Dothard* makes clear that something more than a marginal, indirect relationship to job performance is required. There the Court seemed to concede that the challenged height and weight restrictions were correlated with strength, and that some degree of strength was necessary to effectively perform the functions of a prison guard.[20] Nonetheless, the Court found the imposition of the standards violative of Title VII. In reaching this conclusion, the Court relied heavily on the fact that there had been no showing that the challenged requirements were related to any specific level of strength which in turn was demonstrably necessary for effective job performance.[21] The Court also noted that if the employer had truly been interested in testing for strength, it could have done so directly, rather than circuitously through the use of height and weight requirements.[22]

Dothard clearly established that a marginal, indirect connection with a legitimate business purpose is insufficient to rebut the prima facie case proved by showing disparate impact. Lower courts have gone beyond even *Dothard*, however, mandating an extremely strict approach to the concept of business relationship expressed in *Griggs*. Typical is the language in *Robinson v. Lorillard Corp.*,[23] where the court stated:

> The test is whether there exists an *overriding* legitimate business purpose such that the practice is *necessary* to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact [and] the challenged practice must effectively carry out the business purpose it is alleged to serve . . . .[24]

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20. *See id.* at 331.
21. *Id.*
22. *Id.* at 332.
23. 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972).
24. *Id.* at 798 (emphasis added). *See also, e.g.*, Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (adopting a similar test); Officers For Justice v. Civil Serv. Comm'n, 395 F. Supp. 378 (N.D. Cal. 1975) (adopting the *Lorillard* standard). *But see* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (where disparate impact was not due to environmental or genetic characteristics of protected group and rule had obvious job relationship, no statistical showing was necessary).

Recent Supreme Court decisions suggest that such a strict approach may be inappropriate. For example, in *Washington v. Davis*,[25] the Court was faced with the question of the validity of a written test which had to be passed in order to qualify as a policeman. The test, which measured reading and comprehension, verbal ability and vocabulary, had a racially disparate impact. While there was evidence to support the conclusion that performance on the test was related to performance in a job training program, there was no evidence regarding any direct relationship between performance on the test and actual effectiveness as a policeman. Applying the same standards as those applicable under Title VII,[26] the Court held the test to be sufficiently validated. Similarly, in *United States v. South Carolina*,[27] the Court affirmed a lower court decision approving the use of a test based on the test's demonstrated relationship to success in a teacher training program, rather than to actual performance as a teacher.[28]

If the *Lorillard* approach had been strictly applied, neither the test in *Davis* nor that in *South Carolina* could have withstood scrutiny under Title VII. In neither case was there a demonstration that the challenged criteria were related to an "overriding" business purpose; rather, both cases relied on showings that performance on tests predicted performance in training programs. Moreover, while in each case completion of the training program itself was on its face a valid job qualification, no attempt was made in either case to establish the degree to which such programs contributed to efficient employee performance.[29] Thus the Court seems to be applying a less demanding standard than that suggested by the court of appeals in *Lorillard*; the *Davis* Court appeared to indicate that a "direct and positive" relationship to a business purpose sufficed.[30]

25. 426 U.S. 229 (1976).
26. Title VII was not directly involved in *Davis*; however, in dealing with the various statutory claims which were raised in the case, the Court noted that "defendants . . . appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." 426 U.S. at 249 (footnote omitted).
27. 434 U.S. 1026 (1978), *aff'g without opinion*, 15 EMPL. PRAC. DEC. 6585 (D.S.C. 1977) (three judge court).
28. *See* 15 EMPL. PRAC. DEC. at 6598-99.
29. In *Davis*, the Court did state, however, that "[t]he advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded." 426 U.S. at 250.
30. *See id. Davis* did not discuss the technical requirements for evidence to demonstrate such a relationship. Such requirements are described in Albemarle Paper Co. v. Moody, 422 U.S. 405, 431-36 (1975) (quoting 29 C.F.R. § 1607 (1974)).

But the *Moody* analysis does not end with a showing of business relationship: even if such a relationship is demonstrated, the plaintiff may still prevail if he can bring forward an alternative by which the same purpose can be achieved. The significance of a showing of a less discriminatory alternative [LDA] is not entirely clear. Some lower courts have held that such a showing conclusively condemns the challenged practice under Title VII.[31] They argue that under *Griggs*, disparate impact is only justifiable by business necessity, and that where an LDA exists the impact is not necessary to the function of the relevant business.[32]

However, the formulation of the effects test in *Moody* suggests a somewhat different role for the demonstration of the existence of an LDA. There the Court noted that such a showing "would be *evidence* that the employer was using its tests merely as a 'pretext' for discrimination."[33] This language strongly indicates that the question of the LDA is not directly relevant to the effects test per se; rather, once the employer has satisfied the requirements of the effects test, the existence of an LDA would support an inference that he is engaging in *intentional* discrimination on the basis of race or sex. There seems no good reason to exclude evidence that would rebut such an inference. Thus, the existence of an LDA, while probative, would not necessarily be dispositive of the employer's liability under Title VII.

This interpretation was strongly reinforced by the Court's disposition of *Beazer*. There the lower court had found that the requisite demonstration of disparate impact had been made by the plaintiffs and concluded that the employer had made no adequate showing of business necessity in response.[34] As already noted, the Supreme Court questioned the adequacy of the evidence of disparate impact;[35] but in any event, the Court found that the employer had rebutted any prima facie case of illegal discrimination.[36]

At this stage, if, as the lower courts have suggested, the existence of an LDA would have irrebuttably established the employer's liability notwithstanding its showing of a business purpose, then the only appropriate course would have been for the Court to remand the case to the district court for further proceed-

31. *E.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972); Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 269-70 (N.D. Ind. 1977).

32. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972).

33. 422 U.S. at 425 (emphasis added) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)).

34. *See* 440 U.S. at 578-79.

35. *See* notes 14-16 & accompanying text *supra*.

36. 440 U.S. at 587 & n.31.

ings. This issue is one of fact; thus, a trial court would be the only appropriate forum to make an initial adjudication. But no such determination had yet been made in *Beazer*; since the district court had concluded that the employer had not met its own burden of showing job-relatedness, the court had made no finding on the LDA issue. Accordingly, if that issue were to be dispositive, the Supreme Court was in no position to render a final judgment in *Beazer*.

Nonetheless, the Court did not remand the case for further proceedings. Instead, the judgment for the plaintiffs was reversed outright. The only portion of the opinion which even obliquely addressed the problem of the potential that an LDA existed was a statement that "[t]he District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination."[37] But if the existence of an LDA entitled the plaintiff to judgment as a matter of law irrespective of the presence or absence of actual intent to discriminate then such a finding of intent by the district court surely would not justify a failure to remand for consideration of the LDA question.

On the other hand, if the existence of an LDA is only evidence to be considered together with other evidence to determine actual intent, then the action of the *Beazer* Court appears entirely logical. The district court's conclusion that the promulgation of the challenged rule was not motivated by racial animus was a finding of fact, reviewable only under the clearly erroneous standard. The failure of the plaintiffs to introduce evidence—such as the existence of an LDA—which would support their case would not justify a remand to reconsider such a finding. Consequently, the Court's disposition of *Beazer* strongly suggests that the existence of an LDA is only probative evidence of a Title VII violation, rather than conclusive proof of such a violation.[38]

37. *Id.* at 587.

38. The Court's formulation of the effects test in Dothard v. Rawlinson, 433 U.S. 321 (1977), taken in isolation, might be viewed as suggesting a contrary conclusion. In *Dothard*, the Court never reached the issue of whether an LDA was available; rather, it found that the employer had failed to demonstrate the requisite business purpose for its qualifications which had a disparate impact. But in purporting to restate the *Moody* criteria the Court noted that "[i]f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship,' " without the explanation from *Moody* that an LDA would be evidence that the reason given was pretextual. *Id.* at 329 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973))). The argument

II. BEYOND TITLE VII: APPLICATION OF THE EFFECTS TEST IN OTHER CIRCUMSTANCES

A. Other Types of Employment Discrimination

The Supreme Court has developed the effects test in cases involving racial discrimination in employment. The same standards have quite logically also been applied to the other types of discrimination prohibited by Title VII. But in promulgating regulations under statutes other than Title VII administrative agencies have also applied similar principles to types of discrimination in employment not covered by the Civil Rights Act of 1964. The regulations issued under the Vocational Rehabilitation Act of 1973[39] are an outstanding example. The statute was intended to eliminate discrimination against the handicapped by employers operating under federal grants. The legislative history was silent on the question of whether Congress intended the effects test to be applicable; nonetheless, the regulations clearly adopt the *Griggs* standard.[40]

Such an adoption of the judicial gloss on one statute in the implementation of an apparently similar statute would be not only unobjectionable but entirely logical if the application of the standard was costless. But the use of the effects test in the employment context plainly imposes significant costs on society—even if one leaves aside intangible values such as the desirability of limiting government interference in private affairs, for the widespread use of the *Griggs* standard will almost certainly result in the employment of a marginally less productive workforce. The most obvious loss of productivity occurs where a job qualification with a disparate impact has some relationship to job performance, but the relationship is insufficient to satisfy the standards laid down from *Griggs* to *Davis*. The employer and society lose the additional productivity that would result from the application of this standard to job applicants.

But the use of the effects test will probably also result in the abandonment of some criteria which, if validated, would satisfy the *Griggs-Moody* standards. Assume, for example, the situation

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would be that by negative inference, the Court's failure to refer to the LDA's role as mere evidence suggests that the LDA has independent significance.

But *Dothard* is at best ambiguous on this point; the Court does not define the role of the LDA, but simply states that the plaintiff may prove its existence. *See* 433 U.S. at 329. Thus, it should not be taken as contrary to the unambiguous pronouncement in *Moody*, supported by the strong implication in *Beazer*, that the LDA is to be treated simply as evidence of improper intent.

39. 29 U.S.C. §§ 701-794 (1976).

40. 41 C.F.R. § 60-741.6(c)(1979); 45 C.F.R. § 84.13 (1979).

where a business person is attempting to decide whether to consider x as a factor in making its hiring decisions for a given class of jobs.[41] In the absence of government intervention, a rational businessman will consider x if the cost $[c]$ per hired employee of obtaining the information necessary to determine x $[c(x)]$ is less than the average gain in marginal productivity per hired employee $[m]$ which consideration of x produces $[m(x)]$—in other words, if $m(x) > c(x)$. But the existence of the effects test significantly alters the parameters of the hiring businessman's decision. For if consideration of x has a disparate impact on a protected group, he must consider not only the cost of obtaining the information necessary to determine x, but also the cost per hired employee of demonstrating that x is job-related $[j(x)]$. Moreover, the likelihood that the employer will be sued under anti-discrimination laws is increased whenever he considers a criterion with a disparate impact, and thus he must also consider potential litigation costs $[l(x)]$, in making his decision on whether to consider factor x. Thus the economically rational employer will only consider factor x if: $m(x) > c(x)+j(x)+l(x)$. Obviously, there will be times when: $c(x) < m\ (x) \leq c(x)+j(x)+l(x)$. In those cases, the employer will not consider factor x, although he would have considered the factor if the effects test were not legally mandated. Thus, the employer (as well as the economy as a whole) will lose an average amount of productivity equal to $m(x) - c(x)$.[42]

41. In the example which follows, the following symbols will be used: x = potential factor to be used in hiring decisions; c = cost of obtaining information; m = marginal productivity per hired employee; j = cost per hired employee of demonstrating that a factor is job-related; l = cost of litigation.

42. In fairness it must be noted that it is theoretically possible for the application of the effects test to result in a marginally more productive workforce. Assume that an employer considers two criteria—a and b—in evaluating applicants for employment. Assume further that despite the employer's conviction that both factors are correlated with productivity, only b is in fact so related. To the extent that the employer prefers employees with a smaller b factor because they have a larger a factor, the productivity of his workforce will be reduced.

Now consider the situation in which a also has a disparate impact. Because he will not be able to show a business purpose for the use of a, the employer will be required by Title VII to abandon its use in employment decisions. Forced to rely only on b, the employer will obtain a more productive workforce.

But there are good reasons to believe that situations where an employer is considering factors such as a will be rare and generally of limited duration. Unit costs for employers considering a will be higher and thus they will be placed at a competitive disadvantage; unless they abandon the use of this criterion they will lose business to their more efficient competitors who will be able to charge lower prices for identical products. Moreover, employers gain no advantage from considering irrelevant criteria. Thus where it is impossible to show a statistical correlation between a given criterion and job

Given these observations, it becomes clear that the application of the effects test acts as a mild form of preferential treatment for protected groups. Consider, for example, a situation in which there are 200 applicants (100 white and 100 black) for 100 job openings. Assume that in the absence of Title VII, the employer would consider the x factor in judging applications. Assume further that if he does consider x he will hire eighty whites and twenty blacks, but that if he does not consider x then he will hire fifty whites and fifty blacks. If $c(x) < m(x) < c(x)+j(x)+ l(x)$, then the existence of the effects test will result in thirty blacks displacing thirty whites, notwithstanding that the whites are objectively better qualified for the position. This would be a classic case of preferential treatment on the basis of race.[43]

The justification for mandating such treatment in cases involving racial discrimination begins with the assumption that race per se is not only irrelevant to merit but also uncorrelated with those factors which determine merit. Given this assumption (which underlies much of the law dealing with racial discrimination), one would normally expect that in any two randomly selected group of 100 whites and 100 blacks, an equal number of whites and blacks would possess the qualification for any given job. Where such is not the case—as it is generally not in our society—the most plausible conclusion is that the failure of the blacks to possess the relevant qualifications is the result of either societal discrimination directly against the underachieving group, or the lingering effects of discrimination against the ancestors of that group. The loss of productivity may be viewed as the cost which society is willing to bear to redress the effects of past discrimination. The imposition

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performance, it seems logical to assume that the criterion has unquantifiable benefit, rather than no business justification whatsoever. *See, e.g.*, Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (no nepotism rule). *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 n.21 (1973).

43. If one is committed to a program of preferential treatment, then the use of the effects test has significant advantages. It in no sense operates as a quota system; there is no assurance that any particular number of members of any race will obtain employment. Instead, members of all races compete equally for jobs with the decision being based upon a reduced number of criteria. Thus, the use of the effects test increases the number of employment opportunities available to blacks while avoiding the appearance of inherent unfairness. *Cf.* Board of Regents v. Bakke, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) (condemning use of quota systems by government).

Moreover, the damage done to basic meritocratic principles by the use of the effects test is inherently self-limited. All criteria with disparate impacts are not condemned; only the use of those criteria which cannot be shown to have a business purpose is proscribed. Thus the *Griggs* standard clearly establishes that whatever the strength of the social concern in redressing the effects of past discrimination, there will be times when other legitimate interests outweigh this concern.

of such costs on employers will result in their being spread throughout society through the operation of the market system.

Nor is the theory that the effects test is grounded in part on the need to redress the effects of past discrimination based entirely on speculation; language in the Supreme Court opinions discussing the effects test strongly suggests such considerations influenced the decision to focus on disparate impact in Title VII cases. In *Griggs*, when discussing the use of the standardized test which was at issue, the Court noted that "[b]asic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools . . . ."[44] In *McDonnell-Douglas Corp. v. Green*,[45] the majority of the Court declined to follow the effects test, distinguishing *Griggs* as a case in which the Court "was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."[46]

From these passages it can fairly be inferred that one factor underlying the *Griggs* decision was a desire to ease the burden which past discrimination has imposed on blacks. But this rationale does not apply with equal force to discrimination against other groups—for example the handicapped. No doubt in some cases disabled persons are denied jobs solely on the basis of prejudice. But where a handicapped person is denied a job because he is unable to satisfy a qualification imposed in good faith by the employer, one can hardly assume that the disabled person's failure to acquire the qualification is the result of societal discrimination. By definition, a handicapped person is one who suffers from some unusual limitation in his ability to perform life functions.[47] His failure to meet the qualifications may well be the direct result of such a limitation, rather than some unfair treatment by society of the handicapped as a group. Thus the argument for application of the effects test or any other device liable to result in preferential treatment is significantly weakened.[48]

Nonetheless, in promulgating regulations interpreting prohibi-

44. 401 U.S. at 430.
45. 411 U.S. 792 (1973) (*Green* was a case alleging racial discrimination against an individual, rather than a class-based suit as were *Griggs* and its progeny).
46. *Id.* at 806.
47. *See* 41 C.F.R. § 60-741.2 (1979).
48. The same argument could have been made with respect to the job qualifications challenged in Dothard v. Rawlinson, 433 U.S. 321 (1977), discussed in text accompanying notes 18-19 *supra*. Certainly the difference in the average heights and weights of men and women cannot be viewed as the result of societal discrimination. The application of the effects test in *Dothard* there-

tions against discrimination against the handicapped in employment the responsible agencies have, with virtually no discussion, indicated that the effects test is to be applied. Of course, it is possible that the factors other than those discussed herein might justify the adoption of the *Griggs* approach even in the absence of legislative history mandating such an approach. But the failure of the responsible agencies to identify such factors suggests an insensitivity to those considerations which indicates that a different approach might be more appropriate in dealing with the problem of discrimination against the handicapped.

B. Discrimination Other than in Employment

1. Housing

Since its emergence in cases dealing with employment discrimination, the influence of the effects test in the lower courts has spread to other facets of anti-discrimination law as well. For example, in *United States v. City of Black Jack*,[49] it was argued that a city had violated the Fair Housing Act[50] by adopting a zoning ordinance prohibiting any further construction of multi-family dwelling units in the face of an attempt by builders to construct a complex of townhouses for low and moderate income families. The court held that under the Act, in order to establish a prima facie case of illegal discrimination, "the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[51] If such a showing was made, the court concluded that the challenged ordinance would fall unless necessary to serve a compelling governmental interest.[52] Finding that the ordinance would have a disparate impact because ninety-nine percent of the inhabitants of Black Jack were white and the ordinance would have the "ultimate effect" of foreclosing eighty-five

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fore cannot be viewed as a device to ameliorate the effects of such discrimination.

But discrimination on the basis of sex is banned in Title VII—just as is racial discrimination; thus to have departed from the *Griggs* standards in *Dothard* would have been incongruous to say the least. By contrast, the Vocational Rehabilitation Act is entirely separate from Title VII. Given this fact, a separate analysis of the meaning of the term "discrimination" seems entirely appropriate. *Cf.* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (differing concepts of discrimination under different sections of Title VII).

49. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). *See also*, Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).
50. 42 U.S.C. §§ 3601-3631 (1976).
51. 508 F.2d at 1184.
52. *Id.* at 1186.

percent of the blacks in the relevant metropolitan area from obtaining housing there,[53] the court struck down the ordinance because the necessary justification had not been provided.

In evaluating the *Black Jack* approach, one must begin by recognizing that local land use authorities have traditionally enjoyed very great latitude in the objectives which they are permitted to pursue;[54] insofar as the federal courts have been concerned, this discretion has been limited only by the explicit provisions of the Constitution. Further, in pursuit of many of these objectives, the local government must of necessity implement policies which have a disparate impact. For example, any attempt to preserve or raise property values lessens the opportunity for the poor to obtain housing in a given area. Since blacks represent a disproportionate number of the poor, such actions will necessarily have a disparate impact.

Given this situation, if the effects test is to be applied meaningfully to zoning decisions and the like, then some formulation must be found which acceptably limits the range of objectives open to local governmental authorities. The approach of the *Black Jack* court was to require that the challenged action be necessary to serve a "compelling" governmental interest[55]—a phrase borrowed from equal protection analysis under the Constitution. This standard of review has been described as " 'strict' in theory and fatal in fact" by one noted commentator.[56] This is something of an over-

53. This concept of a disparate impact differs somewhat from that generally applied in Title VII cases. Under Title VII, the focus of disparate impact analysis is on the particular employment practice being challenged. While statistics on the overall composition of the employer's workforce may give rise to an implication that the employer is intentionally engaging in a "pattern or practice" of deliberate discrimination, *see, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), such statistics alone are not enough to condemn any particular practice under the effects test. *But cf.* Smith v. Troyan 520 F.2d 492, 497-98 (6th Cir. 1975) (where overall employment criterion has no disparate impact, fact that part of criterion had such impact does not establish prima facie case).

If this approach had been adopted in *Black Jack*, the court would have found that the challenged ordinance did not have a disparate impact. Taken alone, it would have excluded 29% of the white families and 32% of the black families in the relevant metropolitan area. *See* 508 F.2d at 1186. This difference is insufficient to establish the degree of the disparate impact which proves a prima facie case. *See* 29 C.F.R. § 1607.4D (1979).

54. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954).

55. 508 F.2d at 1185.

56. Gunther, *Foreword: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *See also, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); Massachusetts Bd. of Retirement v.

statement even in the equal protection context;[57] nonetheless, given the near-inevitability of disparate impact in land-use regulation, application of this approach would result in a deep intrusion of the traditional prerogatives of local governments.

First, the range of objectives which they would appropriately seek to achieve would be drastically reduced; rather than being limited solely by the Constitution, land-use authorities would be restricted to that narrow range of interests which could be appropriately deemed "compelling." But equally important, local governments would be faced with the task of demonstrating that the means chosen was necessary to the furtherance of these compelling concerns. This second step will often be particularly difficult in cases involving land-use regulation, where the goal is likely to involve unquantifiable values such as the improvement or preservation of the ambience of a community. Consider for example, a denial of a permit to build a multi-unit, low-income housing project on the ground that it would disrupt the aesthetics of an area dominated by single-family homes. It is well established that considerations of aesthetics are within the purview of local land-use authorities;[58] nonetheless, (assuming that the denial of the permit was found to have a disparate impact) under the *Black Jack* approach the court would be forced to independently reevaluate the justification proffered in support of the denial. Yet there are no readily apparent objective standards to guide the court in making such a judgment; the only alternative would seem to be for the court to make its own independent evaluation of the aesthetic needs of the relevant community.

In short, the application of the *Black Jack* approach to the Fair Housing Act would radically alter the respective roles of local government and the federal courts in land-use control affecting housing patterns. Certainly if Congress had intended such a result, one would expect to find some indication of that intention in the legislative history of the Act. But the *Black Jack* opinion cites no such authority. Thus it seems inappropriate to infer from the bare prohibition against racial discrimination in housing that the *Griggs-Moody* standards should be applied to local governmental decisions affecting housing patterns.[59]

Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

57. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974) (state law survives strict scrutiny); Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (same).

58. *See, e.g.*, Berman v. Parker 348 U.S. 26, 32-33 (1954); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).

59. *Cf.* Washington v. Davis, 426 U.S. 229, 248 & n.14 (1976) (noting that applica-

2. Discrimination in the Granting of Credit

The application of the effects test to cases involving discrimination in the granting of credit is far less problematical. First, the legislative history of the Equal Credit Opportunity Act[60] [ECOA] clearly indicates that Congress intended that the *Griggs-Moody* standards govern the implementation of that Act.[61] Moreover, unlike cases involving governmental land-use regulations, the legitimate objectives of the creditor can be appropriately limited to determining the likelihood that a given prospective borrower will repay his loan on time. Further, the relationship between many factors and this objective can be relatively easily established and quantified.[62]

Nonetheless, it would be a mistake to uncritically transfer all of the concepts developed in connection with the effects test under Title VII to problems arising under ECOA. For example, in cases involving disparate impact, the regulations under Title VII governing the use of tests as criteria for employment state that any cut-off score must be consistent with "normal expectations of proficiency" in the workforce.[63] Such a requirement is entirely sensible in the context of the application of the effects test to discrimination in employment; certainly it would be antithetical to the entire concept of the effects test to totally exclude an applicant from consideration for a given position on the basis of a score which indicated that he could perform the necessary job functions in an appropriate manner.

But the process of evaluating applications for credit differs significantly from that of choosing among applicants for employment.

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tion of the effects test in constitutional cases might result in disruption of many governmental functions).

60. 15 U.S.C. § 1691 (1976).
ECOA deals with discrimination on the basis of race, color, religion, national origin, sex, marital status, age, the fact that all or part of an applicant's income derives from any public assistance program or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law accepted by the Federal Reserve Board as an approved substitute for that Act.

61. *See* S. REP. No. 589, 94th Cong., 2nd Sess. 4, *reprinted in* [1976] U.S. CODE, CONG. & AD. NEWS 403, 406; H.R. REP. No. 210, 94th Cong., 1st Sess. 5 (1975). *See also* 12 C.F.R. § 202.6 n.7 (1979) (administrative regulation adopting effects test).

62. The problem of quantification of the factors affecting decisions and relating those factors to performance has been a recurring one in Title VII cases, particularly where employment and promotion decisions have been based on subjective judgments. *See, e.g.*, United States v. Hazelwood School Dist., 534 F.2d 805, 812-13 (8th Cir. 1976), *rev'd on other grounds*, 433 U.S. 299 (1977); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

63. *See* 29 C.F.R. § 1607.6 (1979).

A prospective employer is likely to first decide how many positions there were to be filled and then choose among the qualified applicants to obtain the fixed number necessary to fill those positions. By contrast, a creditor is more likely to determine an appropriate level of profitability from each loan, and then to extend credit in all cases which he judges will generate this level of profitability (as measured by the interest rate and the creditor's estimate of the likelihood of repayment of the loan). In such a context, the analogue of a "normal expectation of efficiency" would be an appropriate level of profitability. The argument would be that where a cut-off score was set to achieve profitability above this level and a lower cut-off score would have a smaller disparate impact, then the creditor must use the lower score as his cut-off point.

But this seems an unlikely reading of ECOA; it would transform an anti-discrimination statute into a device for controlling the profit margins of creditors. Moreover, the regulations implementing the statute imply that such a reading would be inappropriate. The regulations define a demonstrably and statistically sound, empirically derived credit system which is "developed for the purpose of predicting the credit worthiness of applicants with respect to the legitimate business interests of the creditor utilizing the system, including . . . minimizing bad debt losses and operating expenses *in accordance with the creditor's business judgment.*"[64] This section clearly contemplates that the creditor should be allowed to make his own decision regarding what constitutes an acceptable level of bad debt losses (and by extension, profit). The provision does not apply to all credit allocation systems, nor is it directly tied to the discussion of the effects test in the regulation. Nonetheless, it stands as an important indication that the effects test should not be used as a vehicle to evaluate cut-off scores under ECOA.

Of course, the question of cut-off scores is not the only (or perhaps even the most important) difficulty involved in applying the effects test to the problem of discrimination in the granting of credit.[65] It does, however, illustrate the difficulties which can arise

64. 12 C.F.R. § 202.2(p)(2)(ii) (1979) (emphasis added).
All systems which do not qualify as demonstrably and statistically sound, empirically derived credit systems are judgmental systems. 12 C.F.R. § 202.2(t) (1979). The creditor who uses a demonstrably and statistically sound, empirically derived system is given slightly more flexibility in use of information; for example, he may consider the age of an applicant so long as the age of an elderly person is not assigned a negative factor or value. 12 C.F.R. § 202.6(b)(2) (1979).

65. For more detailed discussions of the problems of adapting the effects test to ECOA, see Hsia, *Credit Scoring and the Equal Credit Opportunity Act*, 30 HASTINGS L.J. 371 (1978); Maltz & Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA. L. REV. 1, 25-46 (1978); Note, *Credit Scoring and the ECOA: Applying the Effects Test*, 88 YALE L.J. 1450 (1979).

when the details of the Title VII approach are applied in other contexts, even where the basic *Griggs* analysis is plainly applicable.

III. CONCLUSION

This comment is not intended to be an exhaustive study of the problems associated with the application of the effects test in all contexts. Instead, it is simply an attempt to point out the dangers of automatically adopting the *Griggs-Moody* approach whenever a statute prohibits discrimination against a given group. The effects test is strong medicine, developed to deal with a particular type of discrimination in a limited context. Even when applied within that context, it raises difficult problems; when transferred to other areas, these problems are often magnified.

Unfortunately, some courts and administrative agencies seem to be oblivious to these problems. Particularly when dealing with problems of discrimination against the handicapped in employment and racial discrimination, the effects test seems to have been adopted almost as a reflex, with no thought apparently given to the implications of and problems associated with the application of the *Griggs-Moody* approach. Hopefully, in the future, Congress, the courts and administrative agencies will be more sensitive to the difficulties in formulating the standards for implementing anti-discrimination laws.