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TITILE VII AND THE APPLICABILITY OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE SELECTION CRITERIA

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Discrimination-free employment practices have been mandated in this country for over twenty years, yet all members of American society do not share equal employment opportunities. One need only compare the unemployment rate of blacks to whites to conclude that complexion bears a remarkable relationship to employment experiences.1 A reminder that the earning power of American women is vastly different than that of men is evidence enough that gender is a factor in employment decisions.2

Most employers have abandoned their more overtly discriminatory practices such as outright refusals to employ members of racial minorities or women, termination of a woman on learning of her pregnancy, and separate locker rooms for whites and blacks. It is even generally acknowledged that criteria such as education requirements and height and weight minima frequently have a disparate impact on members of protected groups and thus violate anti-discrimination statutes. Other employment practices may have equally discriminatory effects, but because they are not so obviously linked to discrimination they have not been as easily challenged. Many employers use what some characterize as subjective criteria to make hiring and promotion decisions. Appearance, articulateness, fitness, ability to lead, friendliness, and aggressiveness are all examples of factors which sometimes form the basis for employment judgments. When subjective criteria are manipulated to mask intentional discrimination, their application is outlawed. Those same criteria, however, may also be utilized without intentional bias. If blacks and women are not as articulate, friendly, or aggressive as white men, the unbiased application of subjective criteria may have a disparate impact which discriminates as effectively as education prerequisites and other objective devices.

It is the thesis of this Article that subjective criteria in employment decisions must be scrutinized just as any other type of criteria which may have a disparate impact on members of minority groups and women. The use of subjective criteria constitutes a subtle barrier to equal employment opportunity as invidious as more blatant practices.

I. INTRODUCTION

A person who believes he or she is a victim of racial, color-based, gender, religious, or national origin discrimination in employment—discrimination proscribed by Title VII of the Civil Rights Act of 19643—may establish a statutory violation

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(a) It shall be an unlawful employment practice for an employer—
by using two general theories. The first theory, disparate treatment, requires proof that the defendant intended to discriminate because of the plaintiff's race, color, sex, religion, or national origin. A disparate treatment case frequently proceeds as an action by an individual alleging that a particular employment decision was based on one of the prohibited factors.\(^4\) It may also evolve as a case of systemic disparate treatment in which a class of similarly situated persons allege that a defendant's standard operating procedure is discrimination.\(^5\) In a disparate treatment case, the critical issue is whether the defendant was motivated by an intent to discriminate.\(^6\)

The second theory utilized to establish Title VII violations, disparate impact,\(^7\) requires no evidence of discriminatory intent.\(^8\) Rather, the plaintiff must demonstrate that the use of a selection device has an effect on protected group members disproportionate to the procedure's effect on others.\(^9\) Cases involving the use of such procedures describe the criteria utilized as "facially neutral"\(^10\) because they reflect no apparent bias against blacks, women, Hispanics, or any other protected group, and they are applied equally to all employees or applicants. Selection devices which have been found to have a disparate impact include a high school diploma requirement,\(^11\) height and weight minima,\(^12\) use of arrest records,\(^13\) an experience prerequisite,\(^14\) and standardized aptitude tests.\(^15\)

Within the last three to four years, several federal courts have labeled these types of selection mechanisms objective.\(^16\) In addition, they have suggested that

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sections 2000e-2(b) and 2000e-2(e) prohibit similar practices by employment agencies and labor organizations.

\(^6\) Id. at 335 n.15.
\(^7\) This theory is also sometimes referred to as discriminatory impact or effect, see Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), or adverse impact, see B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 1287 (2d ed. 1983).
\(^9\) Teamsters, 431 U.S. at 335 n.15.
\(^10\) Griggs, 401 U.S. at 430; Dothard, 433 U.S. at 329.
\(^11\) Griggs, 401 U.S. at 424.
\(^12\) Dothard, 433 U.S. at 321.
\(^13\) Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).
\(^15\) Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
employers which use subjective or nonobjective criteria for making employment decisions are immune from scrutiny under the disparate impact theory. This conclusion is startling. It means that numerous discriminatory employment decisions and practices may be insulated from effective Title VII challenge. Although an individual barred from employment because of a subjective procedure could still use the disparate treatment approach, it is far easier for a plaintiff to prevail after establishing a prima facie case of disparate impact. Proving the requisite discriminatory intent is always difficult in an action based on disparate treatment. In addition, a disparate treatment plaintiff continuously bears the burden of persuasion. With disparate impact analysis, however, once a prima facie case has been demonstrated, the defendant bears the difficult burden of persuading the court of the necessity for using the challenged selection device.

This Article will review several representative decisions dealing with subjective criteria and the use of disparate impact analysis, scrutinizing their analytical framework and ramifications. It concludes that there is no logical reason for distinguishing between subjective and objective criteria. The heart of disparate impact analysis under Title VII is facial neutrality—the absence of intentional racial, religious, gender, and national origin discrimination. Disparate impact is designed to address "artifical, arbitrary and unnecessary" employer-created barriers to professional development. Although these barriers appear less obvious when they assume the

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17 Carroll, 708 F.2d 183, High Top Coal, 508 F. Supp. 553; see also Pegues v. Mississippi State Employment Service, 699 F.2d 760 (5th Cir. 1983), cert. denied, 104 S. Ct. 482 (1983); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981); Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981); EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983); Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195 (5th Cir. 1984); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983); Antonio v. Wards Cove Parking Co., Inc., 768 F.2d 1119 (9th Cir. 1985).

18 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

19 Griggs, 401 U.S. at 432. The Fifth Circuit has explained the difference in which party bears the burden of persuasion in the following fashion:

That the burden upon the defendant in rebutting a prima facie case should vary in the two branches of Title VII law is understood by looking to the nature of the prima facie case and the plaintiff's ultimate burden. In a disparate treatment case, the plaintiff must show that he has been the victim of intentional discrimination. "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Fiumco Construciton Corp. v. Waters, 438 U.S. 567, 577 (1978). As the Court has noted "[E]stablishing a prima facie case of disparate treatment is not onerous." Burdine, 450 U.S. at 253. In making a prima facie case in a disparate impact suit, however, the plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue. It is not part of the plaintiff's burden to prove absence of a legitimate business reason for the challenged practice. Knowledge of a legitimate business reason is uniquely available to the employer who is accordingly required to persuade the court of its existence by a preponderance of the evidence.


form of subjective selection criteria, they are just as facially neutral, arbitrarily artificial, and result in the same discriminatory consequences as objective mechanisms. Consistency with established precedent of the United States Supreme Court and harmony with the spirit which permeates Title VII mandate that such barriers be subjected to disparate impact analysis.

II. UNDERSTANDING THE TITLE VII THEORIES OF DISCRIMINATION

Much of the confusion surrounding the use of subjective criteria and disparate impact analysis stems from a failure to appreciate some fundamental distinctions between an action asserting a violation of Title VII because of individual disparate treatment, a case of systemic disparate treatment, and allegations involving the discriminatory impact of a facially neutral practice. An understanding of these basic analytical formulations is crucial to any reasoned appreciation of the current controversy.

A. Individual Disparate Treatment

The elements of a prima facie case of individual disparate treatment were articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green,21 decided in 1973. The case involved a black mechanic who alleged McDonnell Douglas refused to reemploy him because of his race. Stating that it was specifically considering the "order and allocation of proof in a private, non-class action challenging employment discrimination,"22 the Court characterized the proof required in the following fashion:

The complainant in a Title VII trial must carry the burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.23

Four years later, the Court asserted that the critical inquiry in a disparate treatment case is whether the defendant intended to discriminate.24 Such intent may be inferred from a plaintiff’s prima facie case, under McDonnell Douglas, because it is presumed that "these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."25

The Court has subsequently concluded that a defendant may rebut the plaintiff’s prima facie case of individual disparate treatment by producing "evidence that the

21 McDonnell Douglas, 411 U.S. 792.
22 Id. at 800.
23 Id. at 802.
24 Teamsters, 431 U.S. at 335 n.15.
plaintiff was rejected or someone else was preferred for a legitimate, non-discriminatory reason.²⁶ When the defendant does so, the presumption of discrimination "drops from the case"²⁷ and "the district court is then in the position to decide the ultimate question in such a suit: whether the particular employment decision at issue was made on the basis of [a discriminatory criterion]."²⁸

B. Systemic Disparate Treatment

The benchmark systemic disparate treatment case is Teamsters v. United States.²⁹ The United States, as plaintiff,³⁰ alleged that the company "regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons."³¹ The Court denominated the ultimate factual issue as "whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racialy premised.'"³²

In describing plaintiff's burden in a systemic disparate treatment case the Court said, "the Government ultimately had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."³³

The plaintiff's successful prima facie case in Teamsters relied primarily on inferences drawn from statistical evidence. It was shown that of the nationwide employer's 6,472 employees, 314 (5%) were black and 257 (4%) were Spanish-surnamed.³⁴ In addition, of the 1,828 employees in the job category "line driver," only 8 (.4%) were black, and 5 (.3%) Spanish-surnamed.³⁵ All of the blacks had been hired after the litigation was initiated. Furthermore, the statistical evidence was bolstered by "the testimony of individuals who recounted over forty specific instances of discrimination."³⁶

A systemic disparate treatment case also relies on proof of discriminatory motive.³⁷ Statistically significant evidence supports the inference of impermissible

²⁶ Burdine, 450 U.S. at 254.
²⁷ Id. at 255 n.10.
²⁹ Teamsters, 431 U.S. 324.
³¹ Teamsters, 431 U.S. at 335.
³² Id. (quoting McDonnell Douglas, 411 U.S. at 805 n.18).
³³ Teamsters, 431 U.S. at 336.
³⁴ Id. at 337.
³⁵ Id.
³⁶ Id. at 338.
³⁷ Id. at 335 n.15.
motive for it dispels the likelihood that the disproportionate outcome was a result of chance. "Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic compositions of the population in the community from which employees are hired." \(^{38}\)

A defendant may respond to a claim of a pattern or practice of discrimination in two ways. The first involves "challenging the accuracy or significance of plaintiffs' proof . . . to show that the alleged disparity on which plaintiffs' case is bottomed does not exist." \(^{39}\) This might be accomplished by showing that the disparity is not statistically significant or that the figures used do not reflect the composition of the relevant labor market. \(^{40}\) The second involves arguing that:

[T]he observed disparity between the plaintiff class and the majority group does not support an inference of intentional discrimination because there is a legitimate nondiscriminatory explanation for the disparity. For example, the defendant might come forward with some additional job qualifications—not sufficiently perceptible to plaintiffs to have permitted them to account for it in their initial proof—that the plaintiff class lacks, thus explaining the disparity. \(^{41}\)

Although both individual and systemic disparate treatment cases rely on an intent to discriminate, the two types of cases are distinguishable. "The inquiry regarding an individual's claim is the reason for a particular employment decision, 'while at . . . a pattern or practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.' " \(^{42}\)

C. Disparate Impact

Disparate impact discrimination is exemplified by the Supreme Court's decision in \textit{Griggs v. Duke Power Co.}. \(^{43}\) Plaintiffs challenged the company's policy of requiring a high school education or satisfactory score on a professionally prepared aptitude test as a condition of employment and transfer. \(^{44}\) The record revealed that the requirements operated to "disqualify Negroes at a substantially higher rate than white applicants." \(^{45}\)

In concluding that the plaintiffs had established a prima facie case by demonstrating the adverse impact of the requirement, the Court opined: "The Act proscribes not only overt discrimination but also practices that are fair in form, but

\(^{38}\) \textit{Id.} at 339 n.20.
\(^{41}\) Segar, 738 F.2d at 1268.
\(^{42}\) \textit{Cooper}, 104 S. Ct. at 2800 (\textit{quoting Teamsters}, 431 U.S. at 360 n.46).
\(^{43}\) \textit{Griggs}, 401 U.S. 424.
\(^{44}\) \textit{Id.} at 425-26.
\(^{45}\) \textit{Id.}
discriminatory in operation."\textsuperscript{46} It went on to state that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."\textsuperscript{47} That the Court was completely unconcerned with a defendant's state of mind in employing the procedure is evidenced by its assertion that "the Company's lack of discriminatory intent is suggested by specific efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."\textsuperscript{48}

An employer may defend a disparate impact case by showing, just as in a systemic disparate treatment case, that there is in fact no disparate impact because of the insufficiency or misapplication of the plaintiff's statistical evidence.\textsuperscript{49} Additionally, the \textit{Griggs} Court asserted that an employer may prevail by proving that the selection device is related to job performance and therefore necessary for successful business operation.\textsuperscript{50} If the defendant can demonstrate a business necessity for the practice, it will be acceptable, regardless of the magnitude of its impact. The plaintiff's only hope is to establish that a less restrictive alternative exists which would not have the discriminatory impact, but which satisfies an employer's needs in a comparable fashion.\textsuperscript{51}

D. \textit{The Theories as They Overlap}

While it was earlier asserted that there has been a failure to appreciate the distinctions between disparate treatment and disparate impact analysis, it would be erroneous to assume that there is no similarity. Although disparate treatment "aims at discovery and elimination of intentional discrimination" and disparate impact "aims at discovery and elimination of facially neutral employment practices that adversely affect minorities and cannot be justified as necessary to an employer's business,"\textsuperscript{52} an important point of convergence between systemic disparate treatment and disparate impact is identifiable. Both involve "attacks on

\textsuperscript{46} Id. at 431.
\textsuperscript{47} Id. at 432.
\textsuperscript{48} Id. (emphasis in original).
\textsuperscript{49} SCHLEI & GROSSMAN, \textit{supra} note 7, at 1326.
\textsuperscript{50} \textit{Griggs}, 401 U.S. at 431. A discussion of the defendant's business necessity defense is beyond the scope of this article. The Supreme Court's most recent articulation is that the employer must "demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"
\textsuperscript{52} \textit{Albemarle}, 442 U.S. at 425.
\textsuperscript{53} \textit{Segar}, 738 F.2d at 1267.
the systemic results of employment practices.”53 Thus, proof of the claim under either theory “will involve a showing of disparity between the minority and majority groups in an employer’s workforce.”54

The article’s brief summary of each theory is an oversimplification since many cases do not “fit comfortably into the standard [disparate impact/disparate treatment] sequences.”55 This recognition leads to the conclusion that initial reliance by litigants on one mode of analysis does not preclude additional dependence on an alternative theory. A recent decision is illustrative.

In Walker v. Jefferson County Home,56 the plaintiff, a black woman, applied for the position of housekeeping department supervisor in a county nursing home. The county personnel board certified her and two others as qualified and referred them to the home. Following interviews, a white woman was hired. The plaintiff filed a Title VII complaint and the district court applied disparate treatment analysis.57 The defendant prevailed because the court concluded the white woman's selection was based on her more recent supervisory experience—a legitimate, nondiscriminatory reason. The plaintiff appealed contending the district court failed to apply the “proper legal analysis to the facts.”58 The Fifth Circuit held that the plaintiff had “made a showing of discrimination under the disparate impact theory.”59 Although the requirement of recent supervisory experience was facially neutral, the home’s past policies of favoring whites over blacks for “movement into positions from which they could gain initial supervisory experience [and giving] first consideration to home employees in preference to outside recruitment,”60 resulted in a disparate impact on blacks. Thus, the defendant’s defense to a disparate treatment claim became the basis for the plaintiff’s successful disparate impact showing.

Similarly, a class of individuals may bring a systemic disparate treatment case against an employer but fail to establish that the employer’s “standard operating procedure” is to discriminate. That failure does not preclude an individual from litigating whether specific conduct by an employer was in fact based on discrimination. “Rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim.”61

Finally, even if a disparate impact claim fails because the defendant demonstrates

53 Id.
54 Id.
55 Id. at 1267 n.12.
57 Walker, 726 F.2d at 1556.
58 Id. at 1557.
59 Id.
60 Id. at 1558.
61 Cooper, 104 S. Ct. at 2801.
the job-relatedness of the selection criteria, the plaintiff may still prevail on a
disparate treatment theory. The following example fully supports this analysis: "Sup-
pose it is a genuine occupational requirement that an applicant have a college degree;
fifty white applicants and one hundred black applicants, all with college degrees, 
apply for fifty positions, but the fifty positions are filled entirely by whites." The "inference that discrimination occurred" will still arise and a case of systemic 
disparate treatment will be established.

III. REJECTION OF IMPACT ANALYSIS FOR SUBJECTIVE CRITERIA

Of the several federal courts which have held that subjective criteria are 
reviewable only by using disparate treatment analysis, not one has delineated how 
it determined that the particular criteria involved were subjective rather than objec-
tive. Each decision has employed a method reminiscent of Justice Stewart's 
memorable concurrence regarding pornography: "I know it when I see it." 64

A court seeking a definition of the term objective in the context of employ-
ment decisions might begin by turning to a dictionary. At least one reference work 
describes objective as "based on facts; unbiased." 65 Subjective is an antonym of 
objective and thus may be said to mean "based on opinion; biased." Although 
these parameters could have been used in Title VII analysis, it is quite clear that 
the courts' treatment has not been governed by any standard. Criteria based on 
fact rather than opinion, and which reflect no bias, are considered subjective by 
many of the courts which have rejected impact analysis for subjective criteria. The 
courts' reasoning has made it difficult to readily distinguish subjective from objec-
tive criteria. Even if such distinctions were feasible, no authority has advanced suf-
ficient justification for the rejection of impact analysis for subjective systems.

There is an additional shortcoming in the analytical framework of the narrowly 
focused courts. Overwhelmingly, the decisions reflect an inability to appreciate the 
flexibility required when presented with Title VII claims. The courts have attemp-
ted to squeeze the facts of a case into either the treatment or impact model of 
analysis without appreciation of the areas of overlap, and the results have been completely at odds with both approaches.

One of the most frequently cited cases limiting impact analysis is Pouncy v. 
Prudential Insurance Co. of America. 66 The class representative in Pouncy argued 
that racial discrimination by Prudential was evidenced by data showing that: 1) 
the mean weekly salary of white employees was greater than that of blacks; 2) the

62 Vuyanich v. Republic Nat'l Bank of Dallas, 736 F.2d 160, 162 (5th Cir. 1984) (Rubin J., & 
Tate, J., dissenting from denial of petition for rehearing); See also Wheeler v. City of Columbus, 686 
F.2d 1144, 1152 (5th Cir. 1982); Teal, 457 U.S. at 447.
63 Vuyanich, 736 F.2d at 162.
66 Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982).
percentage of blacks receiving promotions to managerial and supervisory positions was less than the percentage of blacks in the total work force; 3) for higher level jobs, black employees had greater years of service before being promoted than whites; and 4) blacks were clustered in lower levels of the work force and were underrepresented in upper levels.67

The Fifth Circuit characterized the plaintiff, arguing that three of the employer’s employment practices were responsible for the imbalance:

1) job vacancies were not posted or otherwise made known to the employees. Rather, managers and other supervisory personnel, a majority of whom were white, selected employees for promotion using minimal objective criteria. . . .

[2]) Prudential’s level system, through which clerical employees often were hired at entry level positions and subsequently promoted through the work force retained black employees at the lowest paying and least skilled jobs [and 3]) Prudential’s use of subjective criteria in employee performance evaluations.68

Asserting that “[t]he discriminatory impact model of proof in an employment discrimination case is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company’s employment practices,”69 the court boldly stated, “[t]he disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class-based imbalance in the work force.”70 Further, the court held, “[n]one of the three Prudential ‘employment practices’ singled out . . . are akin to the ‘facially neutral employment practices’ the disparate impact model was designed to test.”71 While the Pouncy court did not use the expressions subjective or nonobjective, and even referred to the use of “minimal objective criteria,” it was firmly convinced the practices it highlighted were not facially neutral.

A close reading of Pouncy highlights additional mistaken analytical strictures which influenced the court’s position regarding the use of disparate impact analysis for subjective criteria. The court’s requirement of “proof that a specific practice results in a discriminatory impact . . . in order to fairly allocate the parties’ respective burdens of proof at trial,”72 was based on the perception that it is unfair to place “on a defendant the dual burden of articulating which of its employment practices cause the adverse impact at issue and proving the business necessity of the practice.”73

The court was also hesitant to:

permit a plaintiff to challenge an entire range of employment practices merely

67 Id. at 799.
68 Id.
69 Id. at 800.
70 Id.
71 Id. at 801.
72 Id. at 800.
73 Segar, 738 F.2d at 1270.
because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices for to do so "would allow the disparate impact of one element to require validation of other elements having no adverse effects."  

Given the court's perspective, it is obvious that making subjective criteria susceptible to disparate impact analysis would considerably increase the number of employers shouldering this burden.

The fears expressed in Pouncy do not withstand scrutiny. A defendant will not be required to justify its employment practices until "after a plaintiff class has shown a disparity . . . and if plaintiffs fail to make their prima facie case, the employer never faces this . . . burden."  

If the plaintiffs have established a substantial imbalance in the employer's work force, the employer must either demonstrate that the disparity does not exist or "advance some nondiscriminatory explanation for the disparity" to avoid liability. Thus, there is no additional burden of production on the employer. The employer may rebut the disparate treatment claim by averring that a particular employment practice caused an observed disparity.

It is also inaccurate to assert that an employer will be forced to justify all employment practices. Once the plaintiffs have shown a discriminatory impact and the employer responds by articulating a subjective factor, only that factor's effect must be scrutinized. The employer will be required "to show the job relatedness of only the practice or practices identified as the cause of the disparity."  

The Pouncy court should have analyzed the case before it in one of two ways, depending on whether the plaintiff had evidence that a particular practice of the employer had a disparate impact on blacks. If the plaintiff did not have such evidence, the court should have allowed plaintiff to prove a systemic disparate treatment case by demonstrating a disparity in the racial composition of the work force.  

Prudential could have responded by attacking the applicability of plaintiff's data or by articulating a legitimate, nondiscriminatory reason. If Prudential alleged, for instance, that the racial make-up of certain departments was explained by the fact that notices of vacancies were only posted within the affected department, the no-posting practice should have been evaluated under the disparate impact theory. Assuming the disproportionate racial impact was shown and Prudential could not demonstrate why a limited posting of openings was related to job performance, the plaintiff would have prevailed. If the Pouncy plaintiff did have evidence that

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74 Pouncy, 668 F.2d at 801 (quoting Rivera v. City of Wichita Falls, 665 F.2d 531, 539 (5th Cir. 1982)).
75 Segar, 738 F.2d at 1271.
76 Id.
77 Id.
78 It has been suggested that plaintiffs who rely wholly on statistical proof to establish a prima facie case of systemic disparate treatment must show "gross disparities." Rivera, 665 F.2d at 535 n.5
the no posting procedure had a disparate impact on blacks, then the case would have proceeded just as any other impact case.  

Even before Pouncy, the Eighth Circuit, in Harris v. Ford Motor Co., rejected disparate impact analysis for what it considered subjective and nonobjective criteria. The Harris plaintiff alleged she was discharged by Ford because of her sex. She asserted that the defendant's "subjective decisions in determining discharges for 'poor workmanship' impacts disproportionately on women." The court observed that "[n]onobjective evaluation systems may be probative of intentional discrimination" and concluded, "[a] subjective decisionmaking system . . . is not the type of practice outlawed under Griggs and cannot alone form the foundation for a discriminatory impact case."

In Harris the claim was analyzed exclusively as one of disparate treatment even though Ford's policy of discharging for "poor workmanship" may very well have had an adverse impact on women. The plaintiff was given no opportunity to show that proportionately more women than men were discharged for poor workmanship. Additionally, from the court's decision, one is unable to discern whether the poor workmanship decision was based on a whim of a supervisor or whether decidedly objective factors such as the quantity of production or score on a skills proficiency exam led to a "poor workmanship" evaluation. Use of disparate treatment analysis was not erroneous but rather incomplete.

"showing of 'marked disproportion' between the representation of the allegedly disfavored group in the employer's workforce and its representation in the labor market from which the employer hires suffices to establish a prima facie case of 'disparate impact' discrimination." Rivera, 665 F.2d at 535 n.5 (citing Griggs, 401 U.S. at 429). The court in Rivera also concluded that the "marked disproportion" standard constitutes a "lesser degree of statistical disparity," Rivera, 665 F.2d at 535 n.5, than that required for disparate treatment. Accord Page v. U.S. Indus., Inc., 726 F.2d 1038, 1054 (5th Cir. 1984).

It is not entirely clear that there is a difference between the degree of disparity required for each type of case. In Dothard v. Rawlinson, which involved impact analysis, the Supreme Court said, "The plaintiffs in a case such as this are not required to exhaust every possible source of evidence if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact." Dothard, 433 U.S. at 331 (emphasis added). Other authorities have asserted "the showing of disparity in treatment along race or gender lines would appear to be of the same level as the impact showing for a disparate impact case." C. Sullivan, M. Zimmer, & R. Richards, Federal Statutory Law of Employment Discrimination § 1.4(c) (1980) [hereinafter cited as Sullivan, Zimmer & Richards]. They believe also that, in a disparate treatment case, "once the preliminary showing of disparity is made, statistical evidence is relevant to show intent to discriminate if the impact rises to a level of 'longstanding and gross disparity between the composition of a workforce and that of the general population.' " Id. (citing Teamsters, 431 U.S. at 339 n.20). If the Pouncy case had proceeded as suggested, and it was ultimately determined that disparate treatment and disparate impact necessitate different degrees of statistical disparity, the plaintiff who had no pre-trial evidence that a particular practice was responsible for the racial composition of the workforce would have a greater burden of production than a plaintiff who possessed that evidence.

Harris, 651 F.2d 609.

Id. at 611.

Id. (emphasis added).
Relying on *Pouncy*, the Fifth Circuit asserted in *Carroll v. Sears Roebuck & Co.* that ""[t]he use of subjective criteria to evaluate employees in hiring and job placements decisions is not within the category of facially neutral procedures to which the disparate impact model is applied."" The court determined that the plaintiffs ""failed to focus on a facially neutral, objective employment practice that the disparate impact model was designed to test.""

*Carroll* involved a class action in which the plaintiffs alleged that Sears engaged in ""across the board"" racial discrimination. They attempted to prove, through statistical evidence, that Sears' hiring, job assignment, promotion, training, and termination decisions were discriminatory. The record revealed that Sears administered several scored tests which were used as part of hiring and promotion decisions. Other criteria used by Sears in making hiring decisions were the appearance of the applicants, articulateness, maturity, aggressiveness, friendliness, fitness and demonstrated ability, past work histories and abilities to produce, annual evaluations, and opinions of supervisors. The court concluded, ""[t]he flaw in the plaintiffs' proof was its failure to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force."" The Fifth Circuit went on to say, ""[t]he plaintiffs contend that this disparity results both from testing and the use of subjective hiring criteria, yet they offer no method from which this Court can ascertain whether a significant part of this disparity results from testing."" The court believed that even though objective criteria (the tests) were involved, because their results were combined with allegedly subjective criteria, the objective criteria could not be used to show an adverse impact.

Although the *Carroll* court apparently would have applied impact analysis only if the scored tests had been utilized, the presence of subjective factors rendered such analysis inappropriate. The court's approach is similar to one asserting that a plaintiff challenging a police department requirement that applicants be both 5'2"" tall and weigh 150 pounds has not established a prima facie case of disparate impact because the height requirement, by itself, has no disparate impact on women. It is the combination of factors which operates as the employment barrier; however, the Fifth Circuit, in *Carroll*, failed to consider all relevant evidence of the disparate impact.

With regard to terminations, the *Carroll* plaintiffs ""presented evidence which they argued was proof that a disproportionate number of blacks were fired.""
The district court had focused only "on firings for subjective reasons, concluding that if a black was fired for an objective reason, such as tardiness, issuing bad checks, or misappropriating company property, there could be no reasonable argument that the termination was based on racial considerations." 99 The circuit court sanctioned the lower court's analysis 94 without even pausing to consider the possible impact of what it called the objective reasons.

In Pegues v. Mississippi State Employment Service 95 the Fifth Circuit dealt with a Title VII lawsuit against an employment agency in which the plaintiffs alleged racial and sexual discrimination in: "(1) the assignment of occupational classifications to blacks and females; . . . (4) the failure to refer blacks and females to available jobs; and . . . (5) the referral of blacks and females to lower paying and less desirable jobs." 96 The employment office operated as a labor exchange with employers making known openings by placing orders and by applicants making known "their availability by requesting job referrals." 97 "Each applicant was given an application form, questioned as to job preference and directed to the interviewer who handled job codes" 98 which corresponded to their preferences. The interviewer assisted the applicant in completing the application form and questioned him about "education, vocational training, work experience, skills, work preferences, and personal interests and characteristics. Based on this information, the interviewer selected and inscribed the appropriate . . . code on the application. Work experience was a primary consideration in the coding process." 99 Job orders from employers were also processed by the interviewers. "A typical order contained information from the employer concerning the job, the number of vacancies, the desired number of referrals per vacancy, and the education and experience thresholds required." 100

The court in Pegues once again avoided application of disparate impact analysis by stating: "[b]ecause the classification and referral practices complained of effectively turn on discretionary decisons, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied." 101 In further explaining that disparate impact analysis was inappropriate
the court stated, "[s]election processes which rely on subjective judgments, despite the corraling by objective standards, provide the opportunity for intentional discrimination cognizable in a disparate treatment action."\textsuperscript{102} It obviously did not bother the court that what it characterized as "discretionary decisions" were based on some criteria—education and experience—which have long been subject to impact analysis.

The Tenth Circuit appears to have also rejected disparate impact analysis when dealing with subjective criteria. In \textit{Mortensen v. Callaway},\textsuperscript{103} plaintiff challenged a promotion decision based on a supervisor's interview in which the two candidates were evaluated "according to forty-two attributes the supervisor believed were important."\textsuperscript{104} As to each attribute the candidate was given a numeric rating from zero to four. The attributes were "grouped under the general categories of Technical, Quantity and Timeliness, Written Communication, Oral Communication, Cooperation/Consideration, Personal Relations, Stability, Supervision, and Administration."\textsuperscript{105} The plaintiff contended that the defendant had to justify the "evaluative considerations as 'testing or measuring procedures'"\textsuperscript{106} under \textit{Griggs} but the court stated that "these were not criteria an employee had to meet or tests an employee had to pass in order to be considered for the position."\textsuperscript{107}

From the court's terse descriptions, it is not possible to accurately assert exactly what characteristics the employer required. It does appear, however, that at least the category "quantity and timeliness" would be relatively "easy to quantify."\textsuperscript{108} How the court could conclude "these were not criteria an employee had to meet?\textsuperscript{109} is not fathomable.

The United States District Court for the Eastern District of Tennessee, ratified by the Sixth Circuit, has taken a similar position. In \textit{EEOC v. High Top Coal Co.},\textsuperscript{110} the plaintiff claimed that "the practice of having the foremen . . . hire their own workers on an as-needed basis without requiring them to seek applications from the general community constitutes a facially neutral device or practice."\textsuperscript{111} The court disagreed. It was "of the opinion that the practice or device required must be objectively measurable, like an I.Q. test, grade point average or level of education."\textsuperscript{112}

\begin{thebibliography}{99}
\bibitem{102} Pegues, 699 F.2d at 765.
\bibitem{103} Mortensen, 672 F.2d 822.
\bibitem{104} Id. at 824.
\bibitem{105} Id.
\bibitem{106} Id. at n.1.
\bibitem{107} Id.
\bibitem{108} At least one commentator has used this expression to describe objective criteria. Note, \textit{Title VII and Employment Discrimination in "Upper Level Jobs"}, 73 \textit{COLUM. L. REV.} 1614, 1630 (1973).
\bibitem{109} Mortensen, 672 F.2d at 824 n.1.
\bibitem{110} High Top Coal, 508 F. Supp. 553.
\bibitem{111} Id. at 556.
\bibitem{112} Id. The conclusion that an I.Q. test or any scored test is an objective measure is subject to much criticism. It has been asserted that.
\end{thebibliography}
There are several federal court decisions which have applied disparate impact theory when analyzing subjective selection criteria. In fact, during the spring of 1984, the Fifth Circuit, in a seeming reversal of Pouncy, scrutinized a "subjective promotional system" under the disparate impact model. The decisions, however, have reflected great unease about the appropriate analysis. Typical is the First Circuit's assertion in Robinson v. Polaroid Corp. that "[I]t is by no means clear that claims of 'excessive subjectivity' should not be analyzed exclusively under a discriminatory treatment rather than a disparate impact theory," and "[i]t may well be that neither approach is fully applicable in conventional form."

IV. ANALYSIS OF THE APPROPRIATENESS OF LIMITING IMPACT SCRUTINY TO OBJECTIVE CRITERIA

Generally, the cases which conclude that subjective criteria and disparate impact theory are incompatible do not cite extensive authority for, or even probe deeply into, the basis for that position. Pouncy, Carroll, Pegues, Harris, High Top,

So-called "objective" tests were once hailed as the definitive answer to "subjective," often discriminatory, hiring or promotion procedures. But it has become increasingly clear as analysis becomes more sophisticated that there can be other, much more subtle, forms of discrimination lurking in "objective" testing. It is now recognized that a test can be impeccably "objective" in the manner in which the questions are asked, the test administered, and the answers graded, and still be grossly "subjective" in the educational or social milieu in which the test is set. Allen v. City of Mobile, 466 F.2d 122, 123 (5th Cir. 1972) (Goldberg, J., dissenting), cert. denied, 412 U.S. 909 (1983).

113 Domingo v. New England Fish Co., 727 F.2d 1429, 1436 n.3, modified, 742 F.2d 520 (9th Cir. 1984); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 (6th Cir. 1982); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481-82 (9th Cir. 1983); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985).

114 Page, 726 F.2d at 1046. In deciding to proceed in this fashion that court merely noted, "the district court pointed out that many of this Court’s decisions examine the classwide impact of a subjective promotional system," and cited James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978) and Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). While it is true that Stockham Valves and Rowe did deal with subjective promotional systems and their discriminatory effects, it is by no means clear that they were analyzed using what today is termed disparate impact analysis. A very strong argument can be made that the decisions were based on systemic disparate treatment analysis. Consider, for example, the following statement from Rowe:

All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.

Rowe, 457 F.2d at 359.

Adding further confusion to the Fifth Circuit’s position regarding the applicability of impact analysis to subjective criteria is the January 1985 decision of Lewis v. N.L.R.B., 750 F.2d 1266 (5th Cir. 1985). There the court said, "'[t]his Court's recent precedent establishes that a challenge to an allegedly discretionary promotion procedure fits within the 'disparate treatment' analysis, rather than the 'disparate impact' analysis under Title VII.'" Id. at 1271.

and Mortensen reflect this paucity of analysis quite well. There are arguments, though, which can be made in support of the restrictive view.

A 1978 United States Supreme Court decision, Furnco Construction Corp. v. Waters, involved plaintiffs who alleged they were the victims of intentional racial discrimination because a job superintendent refused to hire them. Additionally, they alleged that the employer’s practices of refusing to hire “at the gate” and only hiring individuals known to the superintendent, had a disparate racial impact. The Furnco majority apparently considered the case as involving solely the disparate treatment theory stating, “[w]e agree with the Court of Appeals that the proper approach was the analysis contained in McDonnell Douglas” and noting that “[t]his case did not involve employment tests, which we dealt with in Griggs v. Duke Power Co. . . . and in Albemarle Paper Co. v. Moody . . . or particularized requirements such as the height and weight specifications considered in Dothard v. Rawlinson . . . and it was not a ‘pattern or practice’ case like Teamsters v. United States.”

The Furnco dissenters, Justices Marshall and Brennan, argued that analysis of the disparate impact claim was called for. In describing his view, Marshall wrote:

[A] practice of limiting jobs to those with prior experience working in an industry or for a particular person, or to those who hear about jobs by word of mouth would be invalid if the practice in actuality impacts more harshly on a group protected under Title VII, unless the practice can be justified by business necessity.

Nonetheless, the majority did not consider that perspective and the case was remanded only for consideration of whether plaintiffs had established a prima facie case under McDonnell Douglas.

Furnco does not provide unequivocal support for limiting the scope of disparate impact analysis to objective criteria. The Court’s footnote merely suggests there may be some selection devices for which such analysis is not appropriate. Justice Rehnquist’s opinion did not use the expression subjective or nonobjective and made no attempt to categorize the types of decisions which may have been contemplated. In addition, the heart of Furnco dealt with the “exact scope of the prima facie case under McDonnell Douglas and the nature of the evidence necessary to rebut such a case,” not with whether disparate impact analysis should be applied to the particular facts. And finally, in footnote number seven of the opinion, which listed cases to which disparate impact analysis had been applied, the Court included the Teamsters decision, a case involving systemic disparate treatment and not disparate impact. From that reference it might even be argued the Court was...

\[117\] Furnco Construction, 438 U.S. 567.
\[118\] Id. at 571-72.
\[119\] Id. at 575.
\[120\] Id. at 575 n.7.
\[121\] Id. at 583 (Marshall, J., concurring and dissenting).
\[122\] Id. at 569.
\[123\] See supra text accompanying notes 23-42.
asserting that subjective decisions can have an adverse effect and therefore disparate impact analysis is appropriate.

It has been suggested that disparate impact analysis should not be applied to subjective criteria because of the alleged "difficulty . . . of applying validation techniques to such informal or subjective methods."124 It is submitted, however, that subjective criteria are no more difficult to validate than objective criteria. The EEOC's Uniform Guidelines on Employee Selection Procedures provide that selection devices which result in an adverse impact must be validated.125 Validation assures that these selection devices actually measure skills, knowledge, or ability required for successful performance on the job.126 The EEOC has approved three types of validation analysis: criterion-related, content, or construct validity studies.127

An employer which imposes a high school diploma requirement for new employees that results in a disparate impact on blacks would have to validate the requirement by showing how the skills and abilities of high school graduates reflect the skills and abilities used on the job,128 or that there is a correlation between having a diploma and job performance,129 or "a significant relationship between the [diploma requirement] and the identification of some trait . . . which is required in the performance of the job."130 Many employers have found their objective selection devices difficult to validate.131 Although validation studies can be time consuming and extremely expensive,132 they may be worth the cost to an employer

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125 29 C.F.R. § 1607.3(A) (1984). The Uniform Guidelines provide the "framework for determining the proper use of tests and other selection procedures." Id. at § 1607.1(B). They are "designed to assist employers, labor organizations, employment agencies . . . to comply with requirements of Federal law prohibiting employment practices which discriminate." Id.
126 The weight to be given the Guidelines is subject to dispute. In Griggs the Supreme Court gave the EEOC's guidelines "great deference," Griggs, 401 U.S. at 434, and reaffirmed that view as to the 1970 revised guidelines in Albemarle. There the Court stated, "[t]he . . . Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" Albemarle, 422 U.S. at 431. For differing views on the Guidelines compare Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981) with United States v. Georgia Power Co., 474 F.2d 906, 915 (5th Cir. 1973), vacated, 634 F.2d 929 (5th Cir. 1981), vacated, Local 84 Int'l Brotherhood Electrical Workers v. United States, 456 U.S. 952 (1982).
127 See generally Schlei & Grossman, supra note 7, at 114; Larson, supra note 124, at § 77.
128 29 C.F.R. § 1607.5(A) (1984). For a general description of these validation techniques see Schlei & Grossman, supra note 7, at 114; Larson, supra note 124, at § 77.
129 Schlei & Grossman, supra note 7, at 114.
130 Id.
whose business requires assurance of certain levels of skill and ability prior to an individual's employment.

An employer which hires on the basis of a subjective criterion will have no greater validation responsibility than an employer using objective criteria and, in fact, may have a lighter burden. The Uniform Guidelines indicate there may be instances where “validity studies cannot or need not be performed.” They provide that “when an informal or unscored selection procedure which has an adverse impact is utilized, the user should . . . justify continued use of the procedure in accord with Federal law.” Professor Bartholet has noted that:

The industrial psychology literature does not support the notion that subjective systems should be immune from validation principles. The profession has taken the stand that all selection systems, including subjective ones, can and indeed should be validated. The literature contains numerous descriptions of validity studies of the most commonly used subjective processes.

A further rationale for limiting impact analysis to objective criteria is the alleged "basic incompatibility . . . with the conceptual distinction . . . between disparate impact and disparate treatment theories of discrimination litigation." It is argued that "when an employer's hiring process is subjective, there is simply no 'neutral' factor involved."

If the immediately preceding assertion is based on the notion that subjective means bias because of racial, color-based, gender, religious, or national origin prejudice, it is accurate. Consciously biased decisionmaking is that which is based on an intent to discriminate. It is true that the disparate impact theory was not designed to deal with intentional discrimination, but disparate treatment was.

The claim that subjective determinations do not involve neutral factors is clearly incorrect given the practices that the courts have labeled subjective. They use this expression in a very expansive manner. In Pouncy, for instance, Prudential did not post any notice of vacancies. That practice reflects no bias and was applied

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133 29 C.F.R. § 1697.6(B)(1) (1981). The United States Supreme Court in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) found an objective device job-related even though no validation study was attempted.
134 29 C.F.R. § 1697.6(B)(1) (1981).
135 Bartholet, supra note 56, at 988.
136 Larson, supra note 124.
137 Id. at § 76.34.
138 There is some indication that this is exactly what Professor Larson means by the expression "subjective," as evidenced by the following quotation:
As the Moody facts indicate, the use of aptitude, ability and intelligence tests as aids to employment and promotion decisions was not originally related to their potential for indirect race discrimination. If anything, the opposite was true, in that the 'objective' character of such tests presumably had the salutary effect of ruling out the factor of subjective racial bias on the part of supervisors and personnel managers.

Id. at § 75.20.
139 Pouncy, 668 F.2d at 799.
uniformly, yet the court concluded it was not facially neutral. As observed earlier, the "poor workmanship" determination in Harris, the criteria of "quantity and timeliness" and "demonstrated ability and past work histories and abilities to produce" in Carroll and Calloway, and the education and experience requirements in Pegues are all without apparent prejudice, yet all were considered subjective. The courts have not limited the term subjective to mean biased determinations, but rather have included both highly discretionary and closely circumscribed decisions.

It is quite true that subjective criteria may be applied in a fashion which represents biased decisionmaking, but so may objective criteria. Suppose an employer does not wish to employ blacks, and it does business in an area of the country where comparatively few blacks have high school diplomas. Such an employer may choose to employ a diploma requirement for all employees. After Griggs, it must be accepted that if a disparate impact can be shown, there will be a prima facie case of discrimination. If the employer could somehow establish a business justification for the diploma requirement, the plaintiff would still be allowed to present evidence of the employer's motivation by establishing that there is a less restrictive alternative which would serve the employer's legitimate interest. The Supreme Court in Albemarle Paper Co. v. Moody realistically stated that "[s]uch a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination."140

The identical analysis should be applied if the criteria were subjective and they were intentionally manipulated to bar disfavored groups. The plaintiffs against whom the intentionally discriminatory subjective criteria were directed, after establishing the impact of the criteria, could also present evidence of the motive behind the application. This analysis obviously collapses impact and treatment theory, after a certain point, into one avenue of scrutiny—disparate treatment—but there is nothing improper with using the theories in tandem when the end result is the ferreting out of discriminatory conduct and the enhancement of Title VII's goals.141

Proponents of the view that applying disparate impact analysis to subjective factors is "incompatible" with the distinction between the impact and disparate treatment theories fail to recognize that even unbiased subjective determinations may result in a disparate impact on members of protected groups. Title VII is directed not only at discriminatory motive, but also at discriminatory impact.142 That impact may be "caused by differences in characteristics of the candidates which, if measured objectively, would surely trigger a demand for proof of job-relatedness."143 There is no persuasive reason for imposing a less stringent standard of Title VII liability on some selection devices.

140 Albemarle, 422 U.S. 405, 425 (1975).
141 "Unless the disparate treatment and disparate impact doctrines work together in this fashion, it is hard to make sense of the co-existence of two theories for proving discrimination that place such different burdens of justification on the employer." Bartholet, supra note 56, at 1006 n.186.
142 Griggs, 401 U.S. at 431.
143 D. Em dbus & J. Colb, supra note 56, at 20 (1983 Supp.).
Probably the most practical and obvious reason for concluding that subjective criteria are subject to impact analysis is that it avoids the enormous task of trying to classify criteria as either subjective or objective. The consequences to parties of correctly describing a procedure would become so overwhelming\(^{144}\) that endless battles would be fought over this preliminary issue. Uniform applicability of the impact approach avoids this problem.

The essence of the concept "facial neutrality" is an absence of apparent racial, color-based, gender, religious, or national origin prejudice. It has no connection with objectivity or subjectivity.\(^{145}\) The term objective is not used in any Supreme Court disparate impact decision.\(^{146}\) The EEOC Guidelines similarly reject any objective/subjective distinction by broadly defining selection procedure as

[...]

[...] any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.\(^{147}\)

Acceptance of a limitation on the theory is also completely at odds with the language of Griggs, the original disparate impact decision,\(^{148}\) which has never been repudiated by the Court. That opinion is replete with the broad expressions "procedure,"\(^{149}\) "practices,"\(^{150}\) "fair in form"\(^{151}\) and "artificial; arbitrary and unnecessary barriers to employment."\(^{152}\) Subjective criteria clearly fall within the parameters of those phrases.

The primary consideration in justifying disparate impact analysis for subjective criteria is based on an understanding that a failure to do so is entirely inconsistent with what disparate impact theory and Title VII are designed to accomplish. The elimination of "built-in headwinds for minority groups"\(^{153}\) which are "unrelated to measuring job capability"\(^{154}\) was the thrust behind the statute. A simple exam-

\(^{144}\) See supra text accompanying notes 18-20.
\(^{145}\) See Griggs, 401 U.S. at 429. The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike.
\(^{147}\) 29 C.F.R. § 1607.16(Q) (1984).
\(^{149}\) Griggs, 401 U.S. at 430.
\(^{150}\) Id.
\(^{151}\) Id. at 431.
\(^{152}\) Id. at 432.
\(^{153}\) Id.
ple demonstrates why subjective criteria operate as "built-in headwinds" just as surely as objective devices.

Suppose an employer needs to hire clerical personnel for its facility and chooses from among the applicants based on its opinion of each applicant's "leadership ability." Further assume there is complete agreement that leadership is a subjective criterion, and in this case its use has a disparate impact on blacks. Relegating the rejected applicants to disparate treatment theory means they will undoubtedly lose a Title VII lawsuit. Leadership ability is a nondiscriminatory reason, and there is no evidence of pretext.

The use of this subjective criterion operates as a cruel barrier to equal employment opportunity. There is no reason to assume that a person's ability to lead is in any fashion related to typing perfect copy yet, despite the adverse impact, the employer will never be required to validate the criterion's use. Countless other rationales, each similarly subjective, may be interposed to frustrate the ability of qualified individuals to move into the economic mainstream. Without the availability of disparate impact analysis, their usage will never need justification. Congressional concern for the "consequences of employment practices" will be ignored.

V. CONCLUSION

The judiciary must discard its propensity to pigeonhole Title VII claims into rigid disparate treatment—disparate impact categories and acknowledge that employment practices often call into play both theories. Regardless of how parties denominate their litigation strategies, the facts presented may legitimately require both types of analysis.156

Employers need not fear that they will be unable to exercise independent judgment over employment matters. Their obligation is no different than it has been since the Civil Rights Act of 1964 was passed. Any criteria except race, sex, religion, or national origin may be utilized to make the necessary choices. If the use of such criteria has a disparate impact on members of a protected group, they may still be used if the employer can demonstrate their job-relatedness. No one can quarrel with an employer which wishes to utilize qualified individuals. It is Title VII's goal, however, to insure that qualified individuals are not arbitrarily excluded from employment opportunities. Applying disparate impact analysis to both objective and subjective criteria will ensure realization of that goal.

155 Id. at 432.

156 See Segar, 738 F.2d at 1304 (Edwards, J., concurring).