Title VII in the Academy: Barriers to Equality for Faculty Women

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INTRODUCTION

One measure of the vitality and importance of America's antidiscrimination laws[1] is the attention, via critical interpretations, that our

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[1] The focus of this article is title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980)) [hereafter title VII]. No other source of protection provides as sweeping a scope in prohibiting sex discrimination in employment. The fifth and fourteenth amendments to the United States Constitution afford limited protection against sex discrimination in employment: the Constitution may be invoked only when state action is involved. U.S. CONST. amends. V, XIV. Constitutional protection is further limited because sex as a class is subjected only to "intermediate scrutiny." *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) ("[T]he Court has never viewed such [gender] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis."). A final limitation to constitutional protection is that the more exacting legal analysis applicable to title VII claims is not available to claims brought under the fifth or fourteenth amendments, making the latter harder to prove. *See* Washington v. Davis, 426 U.S. 229 (1976) (constitutional claims require the plaintiff to prove intent). Equal protection plaintiffs must prove "purposeful" discrimination. Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979). The only other statute of benefit to women is the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1976)) [hereafter Equal Pay Act]. The Equal Pay Act prohibits only gender-based wage differentials for work that is substantially equal in skill, effect, and responsibility, performed under similar working conditions. The Equal Pay Act does not apply to discrimination in job access, or terms and conditions of employment. Corning Glass Works v. Brennan, 417 U.S. 188 (1974). Title IX of the Education Amendment of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-1686 (1976)) may prove useful in the future. The Supreme Court recently held that employment discrimination comes within title IX's prohibitions. North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982). However, it is too early to tell what theories of recovery and burdens of proof will be appropriate to title IX claims. It has been established that there is a private right of action under title IX. Cannon v. University of Chicago, 441 U.S. 677 (1979). The various state laws are beyond the scope of this Article.

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courts give those statutes. In employment discrimination law, exploding doctrinal developments have necessitated wholesale reevaluation of existing employment decisionmaking traditions. High school diploma requirements,[2] intelligence[3] and physical agility[4] tests, height and weight minima,[5] arrest information,[6] sex-based mortality tables,[7] pregnancy disability denials[8] — all, in appropriate contexts, have been repudiated by the courts as discriminatory in violation of title VII of the Civil Rights Act of 1964.[9] Few employers are immune[10] from these developments. With the exception of pregnancy discrimination, which is explicitly prohibited by statute,[11] all the above job criteria were held discriminatory not because of explicit statutory command, but by judicial explication of title VII. These interpretations have spawned law review literature of unparalleled vigor.[12] Issues yet to be resolved have also

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[2] Griggs v. Duke Power Co., 401 U.S. 424, 425 (1971) (diploma requirement with adverse impact on blacks and not justified as business necessity violates title VII).

[3] *Id.* at 426.

[4] Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378, 383 (N.D. Cal. 1975) (physical agility test with adverse impact on women and not justified as business necessity violates title VII), *aff'd*, 688 F.2d 615 (9th Cir. 1982).

[5] Dothard v. Rawlinson, 433 U.S. 321, 323 (1977) (height and weight requirements with adverse impact on females and not justified as business necessity violate title VII).

[6] Green v. Missouri Pac. R.R., 523 F.2d 1290, 1292 (8th Cir. 1975) (policy denying employment to persons convicted of crimes violates title VII unless justified by business necessity); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 402 (C.D. Cal. 1970) (denial of employment to persons with arrest records violates title VII unless justified by business necessity), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

[7] City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 704 (1978) (employee-funded pension plan requiring higher premiums from women to finance equal pension benefits violates title VII, notwithstanding that women as a group live longer than men).

[8] In reaction to the Supreme Court's decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), holding that pregnancy disability exclusion was not gender discrimination, Congress amended title VII in 1978 by adding subsection 701(k) which provides: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions . . . ." Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (Supp. IV 1980)).

[9] Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp IV 1980)).

[10] Employers with fewer than fifteen employees are exempt from title VII's commands. 42 U.S.C. § 2000e(b) (1976). Other exemptions from coverage include private clubs, *id.*; religious institutions, *id.* § 2000e(j); certain political exemptions, *id.* § 2000e(f); and the employment of aliens outside any state, *id.* § 2000e(i).

[11] *See* note 8 *supra.*

[12] *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); Bernstein & Williams, *Sex Discrimination in Pensions:* Manhart's *Hold-*

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engendered commentary of hopeful influence.[13] These scholarly comments and debates are a measure of the intellectual and political attraction of employment discrimination law.[14]

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ing v. Manhart's *Dictum*, 78 COLUM. L. REV. 1241 (1978); Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); Craver, *The Inquisitorial Process In Private Employment*, 63 CORNELL L. REV. 1 (1977); Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811 (1979); Kirp & Robyn, *Pregnancy, Justice, and the Justices*, 57 TEX. L. REV. 947 (1979); Lopatka, *A 1977 Primer On The Federal Regulation Of Employment Discrimination*, 1977 U. ILL. L.F. 69; Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980); Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979); *see also The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 (1978); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70 (1977).

[13] *See* Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71 (1981); Darcy, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 U. MICH. J.L. REF. 237 (1979); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980); Nothstein & Ayres, *Sex-Based Consideration of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239 (1981); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981); Comment, *The Comparable Worth Theory: A Critical Analysis*, 32 BAYLOR L. REV. 629 (1980); Comment, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113 (1977); Comment, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475 (1980); Comment, *Equal Pay for Comparable Work Value: The Failure of Title VII and the Equal Pay Act*, 75 NW. U.L. REV. 914 (1980); Comment, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657 (1981).

[14] A further indication of the significance of American discrimination theory is its influence on the international level. *See generally* Andiappan, *Remedies for Sex Discrimination in Employment in India and in the United States*, 45 INT'L REV. OF ADMIN. SCI. 268 (1979); Beck, *Equal Pay and the Implementation of Article 119 of the Treaty of Rome*, 13 IR. JURIST 112 (1978); Crisham, *The Equal Pay Principle: Some Recent Decisions of the European Court of Justice*, 18 COMMON MKT. L. REV. 601 (1981); Ginsburg, *The Status of Women: Introduction*, 20 AM. J. COMP. L. 585 (1972); Ireland, *International Advancement and Protection of Human Rights for Women*, 10 LAW. AM. 87 (1978); Janjic, *Diversifying Women's Employment: The Only Road to Genuine Equality of Opportunity*, 120 INT'L LAB. REV. 149 (1981); McDougal, Lasswell & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975); Plender, *Equal Pay for Men and Women: Two Recent Decisions of the European Court*, 30 AM. J. COMP. L. 627 (1982); Ricafrente, *International Labor Standards for Working*

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Two issues have received considerable attention by commentators: employment discrimination claims in upper level positions,[15] and problems facing women academics employed by colleges and universities.[16] This Article deals with sex discrimination by academic employers against academic women as the paradigm of both sex discrimination and upper level job discrimination. The Article examines both the problem and the most notable solutions proposed by various commentators, and concludes with proposals for both legal and extralegal reform.

Women, 50 PHIL. L.J. 55 (1975); Szyszczak, *Problems of Equal Pay Within the EEC Perspective*, 131 NEW L.J. 39 (1981); Note, *The Rights of Working Women: An International Perspective*, 14 VA. J. INT'L L. 729 (1974).

[15] *See, e.g.*, Bardeen, *The Legal Profession: A New Target for Title VII?*, 55 CAL. ST. B.J. 360 (1980); Bartholet, note 12 *supra*; Hunt & Pazuniak, *Special Problems in Litigating Upper Level Employment Discrimination Cases*, 4 DEL. J. CORP. L. 114 (1978); Newman, *Remedies for Discrimination in Supervisorial and Managerial Jobs*, 13 HARV. C.R.-C.L. L. REV. 633 (1978); Olmsted, *Law as a Business: The Impact of Title VII on the Legal "Industry,"* 10 VAL. U.L. REV. 479 (1976); Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615 (1967); Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973); Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457 (1980); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282 (1977); Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976); Note, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U. MICH. J.L. REF. 517 (1971).

[16] *See, e.g.*, Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J.L. & EDUC. 429 (1976); Friedman, *Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles*, 34 VAND. L. REV. 37 (1981); Runyan, *Employment Decision-Making in Educational Institutions*, 26 WAYNE L. REV. 955 (1980); Vanderwaerdt, *Higher Education Discrimination and the Courts*, 10 J.L. & EDUC. 467 (1981); Vladeck & Young, *Sex Discrimination in Higher Education: It's Not Academic*, 4 WOMEN'S RTS. L. REP. 59 (1978); Wagner, *Tenure and Promotion in Higher Education in Light of* Washington v. Davis, 24 WAYNE L. REV. 95 (1977); Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226 (1979); Young, *Sex Discrimination in Higher Education: Women's Work*, 5 CIV. LIB. REV. 41 (1978); Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473 (1980); Note, *Employment Discrimination — New Limitations on Appellate Review of Teacher Employment Discrimination Suits*, 54 N.C.L. REV. 1034 (1976). An excellent bibliography which includes extralegal literature is J. Farley, Academic Women and Employment Discrimination: A Critical Annotated Bibliography (1982) (Cornell Industrial and Labor Relations Bibliography Series No. 16).

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I. THE ACADEMY AS PARADIGM OF THE INTRACTABLE PROBLEM

A. Sex Discrimination

Title VII has erected powerful challenges to traditional employment practices based upon commonly held assumptions about how to select a competent workforce.[17] This statute outlaws employment discrimination on the bases of race, color, religion, sex, or national origin, as well as participation in enforcement processes or retaliation for filing charges.[18]

The bulk of title VII jurisprudence has evolved through the race cases,[19] the principles of which have guided the sex cases. When Congress passed title VII in 1964, it sought primarily to cure the evil of race discrimination. Few people in 1964 considered sex discrimination any evil at all. The prohibition against sex discrimination was inserted into title VII as a last ditch effort by Southern senators to scuttle the Act.[20] Thus, it is not surprising to read in the discrimination cases a judicial sensitivity to the plight of blacks, but rarely such a sensitivity to the plight of women. In fact, there are striking examples of judicial hostility to the discrimination claims of female plaintiffs. In a well-known university case, the judge allowed himself to denigrate not only the plaintiff's claims, but the plaintiff herself: "Dr. Faro, in effect, envisions herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice."[21] It would be difficult to find a twentieth century case in which the court made similar comments about

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[17] *See* notes 2-9 and accompanying text *supra*.

[18] Pub. L. No. 88-352, §§ 703, 704(a), 78 Stat. 253, 255, 257 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2, 2000e-3(a) (1976)).

[19] The landmark race cases establishing new discrimination doctrine developed along the following chronology: Griggs v. Duke Power Co., 401 U.S. 424 (1971) (theory of disparate impact); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (allocation of burdens in individual disparate treatment claims); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (validation requirements); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (interpretation of seniority defense; use of statistics to raise classwide prima facie case of disparate treatment); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (statistical requirements); United Steelworkers v. Weber, 443 U.S. 193 (1979) (voluntary affirmative action plan not violative of title VII); Connecticut v. Teal, 102 S. Ct. 2525 (1982) (bottom-line theory no defense to adverse impact of selection component).

[20] Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1090 (5th Cir. 1975); G. COOPER, H. RABB & H. RUBIN, FAIR EMPLOYMENT LITIGATION 1 (1975).

[21] Faro v. New York Univ., 502 F.2d 1229, 1231 (2d Cir. 1974) (terminated professor's claim of sex discrimination not supported by proof; district court properly denied preliminary injunction).

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a black plaintiff.

Judicial reluctance to recognize sex discrimination is illustrated by the famous Supreme Court cases on pregnancy discrimination.[22] To discriminate on the basis of pregnancy, said the Court, is not to discriminate on the basis of sex.[23] Lest anyone respond too quickly that pregnancy is not the equivalent of the female sex, it must be noted that the pregnancy cases followed the landmark Supreme Court case which held that a high school diploma requirement unlawfully discriminated against blacks.[24] More specifically, the Court held that an employment policy having an adverse effect on blacks must be justified by the employer to withstand a title VII finding of discrimination. Yet the same Court which held the high school diploma requirement to discriminate on the basis of race was unable to recognize that pregnancy classifications discriminate on the basis of sex. As another example, the federal courts took many years to understand that sexual harassment is discrimination based on sex.[25] Although it is clear that the phenomena of race discrimination and sex discrimination are quite different,[26] title

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[22] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). A similar holding under equal protection analysis was rendered in Geduldig v. Aiello, 417 U.S. 484 (1974).

[23] *Gilbert*, 429 U.S. at 136. Only one justice had the insight to note that it is the capacity to become pregnant that differentiates the female from the male of the species. *Id.* at 162 (Stevens, J., dissenting).

[24] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[25] Cooper, Book Review, 48 U. CHI. L. REV. 183, 189 & n.40, 190 (1981). Similarly, courts have found that conviction records as a bar to employment have an adverse impact on blacks; likewise, "no-spouse" rules have an adverse impact on women. Yet no-spouse rules, unlike conviction rules, are upheld. Employers are subjected to a heavy burden of empirical justification for their assumptions about the capabilities of convicts as employees; employers are not so subjected concerning assumptions about the advisability of spouses working together. *Compare* Green v. Missouri Pac. R.R., 523 F.2d 1290, 1298 (8th Cir. 1975) *with* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 499 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

[26] *See* Bartholet, note 12 *supra*, at 948 n.1. Legitimate differences in the historical treatment of race and sex discrimination exist. In particular, at the turn of the century, there was a substantial movement of women, known as "social reformers," who promoted sex discrimination in the name of protectionism. *See* K. DAVIDSON, R. GINSBURG & H. KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 15-17 (1974). Protectionism may have had its place in a different time. Although Senator Ervin's comments are anachronistic today, they may have been correct for a different work environment and contraceptive technology:

> The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nurture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and

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VII prohibits both equally.[27]

The difference in judicial approach to race and sex discrimination cases is not founded upon the statute, but upon a diffuse view that differences between the races — but not the sexes — are irrelevant to job performance. The attribution of lesser job abilities to females is predicated upon the role of the female in the procreation of humanity. Thus, it is based upon either biology or socialization processes, or an interaction of the two: women are less aggressive because they expect to be mothers, they invest less in career training and education, and they are less committed in terms of hours worked.[28] Any real differences in commitment to careers will account for differences in allocation of jobs and the associated rewards of money and prestige. The criteria of success in a university, however, are not widely believed to be distributed according to sex. Success in a university, measured by rank and tenure status, is based on some combination of teaching ability, research, and service to the university and community.[29] Yet no folklore ascribes to

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> spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nurture, care and training to their children during their early years.
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> The physiological and functional differences between men and women constitute earth's important reality. Without them human life could not exist.
>
> For this reason, any country which ignores these differences when it fashions its institutions and makes its law is woefully lacking in rationality.

116 CONG. REC. 29,670 (1970). *See generally* E. FLEXNER, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES (rev. ed. 1975).

[27] *See* note 18 and accompanying text *supra*. One important way in which title VII does *not* prohibit sex discrimination on an equal basis with race discrimination is in the bona fide occupational qualification (BFOQ) defense of § 703(e) (codified at 42 U.S.C. § 2000e-2(e) (1976)). However, the BFOQ defense has been narrowly construed. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); EEOC Interpretative Guidelines, 29 C.F.R. § 1604.2 (1982). In addition, the Bennett Amendment, § 703(h) (codified at 42 U.S.C. § 2000e-2(h) (1976)), allows sex-based wage differentials when authorized by the Equal Pay Act, 29 U.S.C. § 206(d) (1976). The Supreme Court interpreted the Bennett Amendment as incorporating the four affirmative defenses of the Equal Pay Act. County of Washington v. Gunther, 452 U.S. 161, 168 (1981). Thus read, the Bennett Amendment allows few if any defenses to sex-based wage claims that are not already contained in title VII, and which apply to both race and sex.

[28] *See* notes 135-40 and accompanying text *infra*.

[29] *See* Yurko, note 16 *supra*, at 475-82. Although these criteria are near-universal, their ambiguity is obvious. One commentator has asked whether scholarship "entails publication and if so what successful publication requires. Does teaching refer to

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women inabilities or disabilities in these matters. At the university teaching level, women professors have demonstrated their investment in education and training by acquisition of advanced degrees. Women are expected to be good teachers, to have the intelligence to produce publishable research, and to be habituated to community service. Stereotypes of women support success as college professors. Nevertheless, women do not fare well in the university reward system.[30] If real and perceived differences between the sexes do not account for the disparities in rank and tenure of academic women, then we have found evidence of pervasive misogyny. This evidence should alert judges to the plight of women as victims of discrimination, just as judicial acknowledgement that the races are innately equal in talent and abilities has caused the courts to scrutinize employment practices that disadvantage blacks. In other words, recognition that sex discrimination exists, and for reasons unrelated to job ability, should sensitize judges to the claims of female plaintiffs. No more disparagement of Joan of Arc.

B. The Upper/Lower Level Job Discrimination Dichotomy

The university's paradigmatic position in the scheme of sex discrimination is matched by its position as a model of upper level job discrimination. Courts scrupulously scrutinize lower level job criteria when there is evidence either that the criteria utilized have an adverse impact on blacks or that subjective employment standards might mask intentional or unintentional racial bias.[31] When the job in question is one of manual labor,[32] or even of public safety officers,[33] the courts are well-

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breadth of fields covered or popularity with students or student achievement; or some combination? Does colleagueship mean fitting in? Is conformity a measure of job success?" Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J.L. & EDUC. 429, 436 (1976). The ambiguity of the standards is matched by their fluidity. Thus, it is essential that a university department have the right to change its standards. *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1340 (W.D. Pa. 1977) (new departmental chairman should not be bound by standards of previous chairman). For the view that universities operate behind a mere "veil of meritocracy," see Vladeck & Young, note 16 *supra*, at 65. For the difficulties of evaluating research, see W. BOARD & N. WADE, BETRAYERS OF THE TRUTH: FRAUD AND DECEIT IN THE HALLS OF SCIENCE (1982).

[30] *See* notes 111-42 and accompanying text *infra*.

[31] *See* Bartholet, note 12 *supra*.

[32] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 408 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971); Rogers v. International Paper Co., 510 F.2d 1340, 1342 (8th Cir. 1975), *vacated and remanded*, 423 U.S. 809 (1975); Robinson v. Lorillard Corp. 444 F.2d 791, 794 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 954 (D.

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disposed to find the criteria offensive and to require the employer to devise, at whatever trouble and expense, alternate selection criteria that do not have discriminatory effects. Tests that disproportionately disqualify blacks from becoming coal handlers[34] or police officers[35] violate the law; tests that disproportionately disqualify blacks from teaching positions do not violate the law. The employer who needs coal handlers must convince the court that the test "measures the person for the job, not the person in the abstract."[36] The police department must prove that height and weight minima correlate with physical capabilities that are essential for effective police performance.[37] Before that proof is possible, the police department must present to the court a detailed job analysis that includes both the minutiae and the significa of police work. The department then must analyze the skills, knowledge, and ability essential to proficient police performance.[38] Unproven assumptions cannot stand.[39] Studies which purport to demonstrate the business necessity of minimum height requirements must consider whether those disqualified (shorter persons) *could have been* able law enforcement agents.[40] By contrast, employers who need teachers can merely shrug and admit that they do not know how to measure teaching effectiveness.[41] Discriminatory effects are allowed to persist against upper level

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D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981).

[33] *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 235 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140 (1982); United States v. City of Chicago, 549 F.2d 415, 420 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 674 (D. Md. 1979).

[34] Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971).

[35] *See* cases cited at note 33 *supra*.

[36] Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

[37] *See, e.g.*, Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 717 (D. Md. 1979); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378, 381 (N.D. Cal. 1975), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1219 (1983).

[38] *See, e.g.*, Blake v. City of Los Angeles, 595 F.2d 1367, 1378 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980).

[39] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977); Blake v. City of Los Angeles, 595 F.2d 1367, 1379 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 712-17 (D. Md. 1979); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378, 381 (N.D. Cal. 1975), *aff'd*, 688 F.2d 615 (9th Cir. 1982).

[40] *See, e.g.*, Blake v. City of Los Angeles, 594 F.2d 1367, 1380 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980).

[41] In United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978), the district

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job aspirants; it is only at the lower levels that courts work to eliminate discrimination.[42]

II. TITLE VII THEORIES OF RECOVERY

The upper/lower dichotomy is compounded by sex discrimination,[43] resulting in judicial deference to employers when women seek equality in upper echelons. This judicial attitude can be justified in one respect only: the legal theories of recovery under title VII differ for lower and upper level claimants. The lower level plaintiff is more likely to attack objective job criteria, thus invoking the disparate impact theory of recovery, which, by placing a heavy burden on the employer, favors the plaintiff. The upper level plaintiff, however, is more likely to attack the application of subjective job requirements, to which courts rarely apply the disparate impact theory. Instead, the upper level plaintiff must resort to the disparate treatment theory, which provides little hope of recovery. It is women rather than minorities who are in the vanguard of upper level claimants. Thus, judicial reluctance to interfere with traditional management prerogatives at the upper level is encouraged by disinterest in the plight of women.[44] This stands in marked

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court held that minimum National Teacher Examination scores, although adversely affecting blacks, were justified by a study correlating test scores to success in the teacher training program even though there was no attempt to correlate test scores to actual job performance. The validation study satisfied business necessity, said the court, because it was undertaken "in a responsible, professional manner designed to produce trustworthy results." 445 F. Supp. at 1114. Justice White, joined by Justice Marshall, dissented from the Supreme Court's summary affirmance on the ground that the test requirement was not a business necessity. 434 U.S. at 1027-28; *see also* Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward A Principled Deference*, 16 U.C. DAVIS L. REV. 1047, 1085 (1983) (*infra* this volume) ("*South Carolina* . . . can make the disparate impact analysis all but meaningless.").

[42] *See* notes 45-81 and acompanying text *infra.*

[43] For two prominent cases in which sex discrimination was evident, see Faro v. New York Univ., 502 F.2d 1229, 1231 (2d Cir. 1974); Hishon v. King & Spalding, 24 Fed. Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1981) (title VII not applicable to decision to deny partnership to associate attorney), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

[44] *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) *with* General Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976) (diploma requirement has an adverse impact on blacks; pregnancy disability exclusion does not have adverse impact on women); *compare also* Green v. Missouri Pac. R.R., 523 F.2d 1290, 1298 (8th Cir. 1975) *with* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 499 (7th Cir. 1977) (protecting status of ex-convict but not that of spouse), *cert. denied*, 435 U.S. 93 (1978). Moreover, courts may simply ignore evidence of sexism. *See, e.g.*, Peters v. Middlebury College, 409 F. Supp. 857, 860 (D. Vt. 1976) (employer told plaintiff she was too

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contrast to judicial understanding of the societal disadvantage suffered by blacks.

A brief primer of title VII theory is essential to an understanding of the plaintiff's plight at the university level. It is only after these theories are understood that the university can be recognized as the embodiment of the intractable problems of both the upper/lower level job distinction and insidious sex discrimination.

A. Disparate Impact Theory

A title VII claim may be brought under two alternate theories. The first, and most powerful, is the disparate impact theory. The seminal case establishing this theory is *Griggs v. Duke Power Co.*[45] To establish a prima facie case of disparate impact discrimination under *Griggs*, the plaintiff must show that a criterion for selection or allocation of any term or condition of employment has an adverse impact upon a group protected by title VII. The defending employer then must meet the burden of proving that the criterion in question is necessary to the safe and efficient operation of the business. The plaintiff's burden is usually easier to meet. The plaintiff's evidence is normally based upon statistics which show that the challenged criterion has an adverse effect upon the group of which the plaintiff is a member, which is typically blacks or hispanics. Although there have been serious restrictions on the type of statistical proof that will satisfy the prima facie standard,[46] the difficulties faced by defendants in proving business necessity can be nearly insurmountable.[47]

Although the disparate impact theory has invalidated many time-honored methods of job selection,[48] this theory has been of limited bene-

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assertive and that her feminist literary perspective was too political).

[45] 401 U.S. 424 (1971).

[46] New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (unless plaintiff's statistics show the racial composition of applicants or employees of defending employer who are rejected for methadone use, prima facie level of impact is, at best, weak); EEOC v. Greyhound Lines, Inc. 635 F.2d 188, 191 (3d Cir. 1980) (impact theory not invoked unless no-beard policy shown to have a disproportionate impact on the employer's workforce).

[47] *See* notes 37-40 and accompanying text *supra*.

[48] Section 703(a) of title VII (codified at 42 U.S.C. § 2000e-2(a) (1976)) prohibits discrimination with respect to any term or condition of employment:

> It shall be an unlawful employment practice for an employer —
>
> (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

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fit to women as a group. The disparate impact theory is most useful in challenging tests or other objective criteria. Women as a group perform well on precisely these devices. The only objective criteria that disproportionately disqualify women are height and weight requirements[49] and physical agility tests.[50] These measures are not often used as job requirements.[51]

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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 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.

[49] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 324 (1977); Horace v. City of Pontiac, 624 F.2d 765, 766 (6th Cir. 1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1374 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 718 (D. Md. 1979); Association of Flight Attendants v. Ozark Air Lines, 470 F. Supp. 1132 (N.D. Ill. 1979); United States v. City of Buffalo, 457 F. Supp. 612, 625 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (1980); Jarrell v. Eastern Air Lines, Inc., 430 F. Supp. 884, 889 (E.D. Va. 1977), *aff'd*, 577 F.2d 869 (4th Cir. 1978); Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1064 (E.D. Mo. 1976), *aff'd*, 568 F.2d 50 (8th Cir. 1977); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 882 (C.D. Cal. 1976).

[50] *See, e.g.*, Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378 (N.D. Cal. 1975), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1219 (1983); Hardy v. Stumpf, 21 Cal. 3d 1, 576 P.2d 1342, 145 Cal. Rptr. 176 (1978).

[51] These measures are used primarily in fire and police departments, in prison systems, and in the airline industry. For fire and police cases, see, e.g., Horace v. City of Pontiac, 624 F.2d 765, 766 (6th Cir. 1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1374 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 718 (D. Md. 1979); United States v. City of Buffalo, 457 F. Supp. 612, 625 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (1980); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 882 (C.D. Cal. 1976); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378, 380 (N.D. Cal. 1975), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1219 (1983). For a prison case, see Dothard v. Rawlinson, 433 U.S. 321 (1977). In these cases, the height and weight minima have been uniformly invalidated because they are not justified by business necessity. The validity of the physical agility tests depends upon their relationship to the job in question. *See, e.g.*, Officers for Justice v. Civil Serv. Com'n, 395 F. Supp. 378 (N.D. Cal. 1975) (physical agility test not job related), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1219 (1983); Hardy v. Stumpf, 21 Cal. 3d 1, 6, 576 P.2d 1342, 1345, 145 Cal. Rptr. 176, 179 (1978) (fence scaling requirement with adverse impact on women justified as business necessity when fences in community were same height as those in test).

Airline industry cases often involve grooming standards. *See, e.g.*, Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 454 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (weight restrictions for stewardesses violate title VII); Alpa v. Western Airlines, 23 Fair Empl. Prac. Cas. (BNA) 1042 (N.D. Cal. 1979) (different weight standards for males and females not violative of title VII because within individual control and

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The importance of disparate impact analysis has been to provide other minority groups access to jobs heretofore closed to them due to societal discrimination. Therefore, while disparate impact analysis has been a powerful tool in eliminating selection devices which are "fair in form, but discriminatory in operation,"[52] this theory has meant little to women.

Two features of disparate impact theory bear examination: its preference for merit-based selection devices, and its relationship to societal discrimination. Although disparate impact is of limited utility in sex discrimination claims, its policy objectives should not be disassociated from other title VII theories. It is only by incorporation of these policy objectives into the judicial application of disparate treatment theory that women can achieve further progress under title VII.

Some commentators have argued that the burden of proof allocation of *Griggs* encourages race-conscious hiring decisions.[53] This is because

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not involving a fundamental right); EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626, 627 (S.D. Tex. 1977) (maximum weight limitations not violative of title VII), *rev'd*, 619 F.2d 81 (5th Cir. 1980); Jarrell v. Eastern Air Lines, Inc., 430 F. Supp. 884, 890 (E.D. Va. 1977) (court rejected plaintiff's contention that the weight limits were more stringent for females), *aff'd*, 577 F.2d 869 (4th Cir. 1978); Leonard v. National Airlines, 434 F. Supp. 269, 275 (S.D. Fla. 1977) (no violation in spite of statistical evidence that the weight policies had a disparate impact upon women); Comstock v. Eastern Air Lines, Inc., 10 Empl. Prac. Dec. (CCH) ¶ 10,392 (E.D. Va. 1975) (different weight restrictions legal because of different frame sizes of the sexes); *see also* Association of Flight Attendants v. Ozark Air Lines, 470 F. Supp. 1132 (N.D. Ill. 1979); Air Lines Pilots Ass'n, Int'l v. United Air Lines, Inc., 26 Fair Empl. Prac. Cas. (BNA) 607, 608 (E.D. N.Y. 1979); Gerdom v. Continental Air Lines, Inc., 8 Fair Empl. Prac. Cas. (BNA) 1235, 1236 (C.D. Cal. 1974), *continued*, 13 Fair Empl. Prac. Cas. (BNA) 1205, 1207 (C.D. Cal. 1976), *reconsidered*, 18 Fair Empl. Prac. Cas. (BNA) 1118, 1121 (C.D. Cal. 1978), *aff'd in part and rev'd and remanded in part*, 648 F.2d 1223, 26 Fair Empl. Prac. Cas. (BNA) 601, 602 (9th Cir. 1981), *vacated and remanded*, 692 F.2d 602 (1982) (en banc), *cert. denied*, 103 S. Ct. 1534 (1983); EEOC Dec. No. 80-5, 26 Fair Empl. Prac. Cas. (BNA) 1786 (Mar. 25, 1980).

A height minimum has been upheld as a business necessity because pilots must be able to see over the plane's instrument panel. Boyd v. Ozark Air Lines, Inc. 419 F. Supp. 1061, 1061-65 (E.D. Mo. 1976), *aff'd*, 568 F.2d 50 (8th Cir. 1977).

[52] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[53] For a comprehensive list of articles supporting this view, see Bartholet, note 12 *supra*, at 954 n.24; *see also* Connecticut v. Teal, 102 S. Ct. 2525 (1982). For two contrasting philosophical works on the use of merit and its justifiction as a basis for the allocation of rewards, see J. RAWLS, A THEORY OF JUSTICE (1971) and R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); *see also* Daniels, *Merit and Meritocracy*, 7 PHIL. AND PUB. AFF. 206 (1978). *See generally* Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815 (1980).

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the difficult duty to justify a challenged criterion, termed the duty of "validation,"[54] is triggered only when a plaintiff statistically establishes that adverse impact exists.[55] Thus, if the defendant's workforce mirrors the qualified labor market in race, ethnicity, and gender, the employer has avoided or defeated claims based on adverse impact. Plaintiff loses for failure to state a prima facie case, or more likely, never brings suit in the first place.

Griggs may in some small measure sanction such employer avoidance, but only when no particular qualifications are needed.[56] However, an employer who needs employees with definable job qualifications that are not generally dispersed throughout the work force cannot afford to engage in race-conscious hiring. Only by measuring the necessary qualifications of job applicants will the employer be able to get the job done efficiently. If the employer devises a way of measuring the person for the job, it simply does not matter that the selection device disproportionately disqualifies disadvantaged groups.[57]

Griggs demands only that employers abandon practices that effectively discriminate, thereby expanding the pool of applicants under consideration. Merit may reign supreme, but it must be proven, not assumed. Thus, the employer bears the heavy burden of justification. Without this burden, employers could deny entry to blacks and other disadvantaged groups on the basis of "common sense" but inaccurate modes of measuring job applicants. While merit has priority over equality of result, equality of result does get its due[58] in the form of judicial scrutiny of results. Inequality of result forces the employer to justify the inequality. When societal discrimination but not merit accounts for the inequality of result, employers must change their practices. The ultimate goal of title VII is equality of results. The idea that equality implies equality of results is based on the assumption that

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[54] *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 65-131 (1976).

[55] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[56] Bartholet, note 12 *supra*, at 954.

[57] Although this scenario may find the employer forced into litigation to prove his selection device does not unlawfully discriminate, but merely lawfully discriminates between the qualified and the unqualified, the employer will ultimately prevail. The Supreme Court, in devising the business necessity defense, gave clear priority to the employer's interest in efficient job performance. Although blacks may not have the needed job qualifications because of societal discrimination — as through prior job discrimination (lawful until 1965), segregated housing, or inferior education — title VII allows the employer to insist upon merit-based selection devices over racially equal results.

[58] *See* note 53 and accompanying text *supra*.

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abilities, talent, and other types of merit are shared innately, more or less, by all human groups, and the reason that these qualities are not exhibited equally is because of societal discrimination.[59] Recognition of this social fact spurred passage of the Civil Rights Act.[60] If blacks had not been historically disadvantaged, it is unlikely that the Court would have devised the disparate impact test:[61] equality of advantages would make the disparate impact theory irrelevant.

The assumption of equal allocation of innate merit, like the disparate impact theory of discrimination, is profoundly related to societal discrimination. The Supreme Court's concern in *Griggs* was that employers not be allowed to repeat or reinstitutionalize discrimination in education into discrimination in the job place, unless the educational discrimination resulted in deficiencies in skills and abilities essential to job performance. This point bears emphasis because theories on the cutting edge of employment discrimination law, such as the movement for comparable worth or pay equity,[62] are met with the argument that title VII prohibits only *employers* from engaging in job discrimination.[63] Discrimination by other sectors of society, goes the argument, are beyond title VII's reach. *Griggs* repudiates this argument to the extent that societal discrimination tries to enter the factory door in the guise of job criteria. The present effects of past discrimination cannot be tolerated, unless the past societal discrimination has caused real, provable distinctions in the skills and abilities needed by the employers.

B. Disparate Treatment

The second theory under which a title VII claim may be brought is

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[59] *See generally* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977) (explaining probability theory and appropriate inferences of discrimination); Bartholet, note 12 *supra*, at 948 n.1.

[60] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[61] *Id.*; *see also* EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 190 n.3 (3d Cir. 1980) (disparate impact theory grounded on societal discrimination).

[62] *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399 (1979) (arguing in favor of equal pay for work of comparable value); *see also* Cooper, *Comparable Worth — The Issue of the '80's*, 5 WOMEN'S L. REP. 1 (1981) (describing developments in the comparable worth movement); Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. U. CHI. L.J. 723 (1977) (title VII equal pay claims should not be limited to the equal work standard of the Equal Pay Act).

[63] *See generally* Nelson, Opton & Wilson, note 13 *supra*, at 262; R. WILLIAMS & D. MCDOWELL, THE LEGAL FRAMEWORK IN COMPARABLE WORTH: ISSUES AND ALTERNATIVES 197, 243 (E. Livernash ed. 1980).

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the disparate treatment theory. This theory is based on common sense notions of discrimination: discrimination is intentional prejudice.[64] Thus, under disparate treatment analysis, a plaintiff must show that she or he was denied a job or job benefit *because of* the plaintiff's gender, race, or other basis cognizable under title VII.

To establish a prima facie case, the plaintiff must first raise an inference of discrimination. This is commonly done by the plaintiff showing that she is qualified for the job, has applied for it and been rejected despite her qualifications, and that thereafter the position has remained open. Statistics play a limited role in the disparate treatment prima facie case, but they may be useful in raising the inference of discrimination.[65] This prima facie burden of the plaintiff has been described as "not onerous."[66] The burden of production then shifts to the employer.[67]

To meet the plaintiff's prima facie case, the employer need simply "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[68] The burden is one of production, not persuasion.[69] Looked at another way, "the employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.' "[70]

The defendant's burden is more easily met in a disparate treatment case than in a disparate impact case, because a disparate impact case imposes upon the employer the difficult duty to prove business necessity. Comparing disparate treatment with disparate impact, there are more "legitimate reasons" rebutting disparate treatment than there are "business necessities" justifying exclusionary practices.

In order to win, the plaintiff needs to prove that the employer's asserted nondiscriminatory reason is a pretext masking intentional discrimination. Since overtly intentional discrimination rarely appears, se-

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[64] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977).

[65] *See* notes 142-67 and accompanying text *infra*.

[66] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); *see also* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342 (9th Cir. 1981) (court of appeal citing *Burdine* standard held district court erred in concluding that plaintiff had failed to establish a prima facie case), *cert. denied*, 103 S. Ct. 53 (1982); Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978) ("[P]roof of competence sufficient to make out a prima facie case of discrimination was never intended to encompass proof of superiority or flawless performance."), *cert. denied*, 439 U.S. 984 (1978).

[67] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[68] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[69] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

[70] Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1979).

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rious problems of proof arise. Courts do not expect defendants to admit to prejudice.[71] The plaintiff's ultimate burden can be met "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[72] Pretext is difficult to prove, and commonly relies on proof that comparably situated, comparably qualified employees of another race or sex were treated differently from the plaintiff.[73] The qualifications of the plaintiff and those treated more favorably, and the correct evaluation and application of those qualifications, are the essence of a disparate treatment case.

C. Special Problems in the University

Both disparate impact and disparate treatment theories pose problems for upper level job claims. Disparate impact analysis is not commonly invoked when objective criteria are the bases of employment decisions. Objective criteria are seldom the sole criteria used by employers in evaluating the candidacy of its applicants for high level positions. If objective criteria are used at all, as by requiring a law degree for the practice of law or college courses for accounting positions, they are supplemented by subjective criteria, such as leadership, conformity with the employing organization, or ability to get along with clients. The fluid and nonquantifiable aspects of subjective standards are difficult to analyze statistically for proof of disparate impact. Moreover, when subjective standards are employed, it is hard to pinpoint the specific employment rule that has produced a disparity. In order for impact analysis to be utilized by the courts, the challenged employment criterion must rise to the level of an employment "policy or practice."[74] The *Griggs* theory focuses on the impact of specific rules which are chal-

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[71] "Particularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available." Sweeney v. Board of Trustees, 569 F.2d 169, 175 (1st Cir.), *vacated and remanded per curiam*, 439 U.S. 24 (1978); *see also* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); Carton v. Trustees of Tufts College, 25 Fair Empl. Prac. Cas. (BNA) 1114, 1122 (D. Mass. 1981); Cooper v. University of Tex. at Dallas, 482 F. Supp. 187, 193 (N.D. Tex. 1979); Peters v. Middlebury College, 409 F. Supp. 857, 867 (D. Vt. 1976); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 (D. Mass 1975); Johnson v. University of Pittsburgh, 359 F. Supp. 1002, 1007 (W.D. Pa. 1973).

[72] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[73] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

[74] Wright v. National Archives and Records Serv., 609 F.2d 702, 712 (4th Cir. 1979).

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lenged as unnecessary. The Supreme Court has hinted that only "particularized" requirements are appropriate to impact analysis.[75] Vague or subjective policies and overall results will not invoke adverse impact analysis.

Although the Supreme Court has not spoken directly on the issue of the applicability of impact analysis to subjective employment criteria, its disposition of *Furnco Construction Corp. v. Waters*[76] is suggestive. The district court had analyzed the case of a construction superintendent who hired experienced bricklayers not at the jobsite but only through personal recommendations as one of both disparate impact and disparate treatment.[77] Since lower courts in similar cases had invalidated word-of-mouth recruitment in an all-white workforce because of the adverse effect on blacks,[78] there was precedent for applying disparate impact. The Supreme Court, however, treated the bricklayers' claim as one of disparate treatment only,[79] although the personal recommendations made to the white superintendent surely did not make the bricklaying jobs equally available to blacks and whites alike.[80] It appears that the Supreme Court is unwilling to apply impact analysis to subjective criteria.

The courts are afraid to impose validation requirements on employers who utilize subjective criteria. Empirical justification eludes subjective standards such as personal recommendations, so courts choose to evade the problem.[81] If courts are reluctant to impose the burden of justification on employers of bricklayers, they are even more unwilling to impose this burden on employers of teachers, lawyers, and accountants.

One overriding virtue of the disparate impact theory is its exposition of the harmful implications of traditional employment practices which

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[75] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 n.7 (1978).

[76] 438 U.S. 567 (1978).

[77] *Id.* at 572-73.

[78] *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975) (record supports district court finding that reliance on referrals from predominately white work force was discriminatory), *vacated and remanded*, 431 U.S. 951 (1977).

[79] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-76 (1978).

[80] The inconsistency is questioned by three well-known law professors: "Put bluntly, why should a test, as in *Griggs*, be subject to a stricter standard of Title VII liability than a blue-collar version of the 'old boy' system?" M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 245 (1982).

[81] *See* Bartholet, note 12 *supra*, at 959-64. Some cases have adopted impact analysis to subjective employment standards used for lower level jobs. *See, e.g.*, Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1018-19 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1982); Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972).

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reflect accumulations of societal discrimination. However, the disparate impact theory is inappropriate for high level positions, as where a university is the employer. The objective criteria required for faculty positions can scarcely be criticized: there is nothing offensive or unlawfully discriminatory about requiring mathematics professors to have doctorates in mathematics. Of all the contested university cases, few suggest that degree requirements are inappropriate for college level teaching.[82] Rarely do university employees litigate the validity of the compulsory objective criteria at the university level. It is subjective criteria — teaching, scholarship, and service — and their application that are at the heart of controversy in the university cases.[83] As explained, courts refuse to obligate employers to validate subjective standards. The courts are not inclined to so subdue management prerogatives. In this respect, the university is like any upper level employer.

When a title VII plaintiff challenges subjective criteria, the disparate treatment theory is commonly utilized. The courts rarely review the validity of the subjective criteria per se. It is implicitly assumed that the subjective criteria are reasonable job measures, if only because the courts find it difficult to imagine other ways of predicting or measuring job performance at upper levels.[84] In the common upper level disparate treatment case, the employer asserts that the successful applicants or candidates for promotion succeeded because they possessed desirable qualifications lacking in the plaintiff.[85] The plaintiff then attempts to attack this asserted legitimation by showing that the successful were no more qualified than the plaintiff. But here the courts are cautious. If the employer asserts that the successful applicants were promoted because of their leadership ability, while the plaintiff was held back because of her lack of this very talent, that usually ends the matter.[86] Courts do not want to make these evaluations anew. Unless the plain-

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[82] *But see* Campbell v. Ramsey, 484 F. Supp. 190 (E.D. Ark.), *aff'd*, 631 F.2d 597 (8th Cir. 1980) (Ph.D. requirement challenged as having disparate impact on women; university's business necessity defense accepted); Cooper v. University of Tex. at Dallas, 482 F. Supp. 187, 198 (N.D. Tex. 1979) (lack of evidence presented on Ph.D. requirement issue).

[83] *See* note 29 and accompanying text *supra*.

[84] *See* Bartholet, note 12 *supra*, at 967-70, 1023-26.

[85] *See* Cooper v. University of Tex. at Dallas, 482 F. Supp. 187, 199 (N.D. Tex. 1979).

[86] *See* Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) (university's assertion of plaintiff's inadequate scholarship supported denial of tenure; evidence of comparative qualifications of male faculty properly excluded); Cussler v. University of Md., 430 F. Supp. 602, 606 (D. Md. 1977) ("The courts . . . are reluctant to substitute their judgment for the judgment of academics with expertise in their respective fields.").

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tiff has massive statistical evidence[87] that the employer has engaged in a pattern or practice of keeping women in low level positions despite their qualifications, she will lose the disparate treatment case. The upper level positions rarely are occupied by enough people in any one establishment to make that kind of statistical showing. The weakness of disparate impact and the leniency of disparate treatment are the reasons for the frequent failures of employment discrimination cases brought by upper level job claimants.

The university, in its use of subjective criteria and its limited number of truly comparable positions, has much in common with other upper level employers. However, there are additional factors of university life that complicate the picture and make the university's position less assailable. First, the university is the guardian of academic freedom.[88] Employment decisions with respect to hiring, promotion, and tenure are commonly made by consensus of the faculty or some delegated body. The judgments to be made in these decisions include an evaluation of the applicant's research and teaching effectiveness. Each individual on the faculty committee must have the freedom to evaluate the applicant's scholarship and teaching without unwarranted intrusions by outsiders. Free thought and inquiry must be safeguarded by and in the university.

A second complicating factor is the nature of tenure. Tenure normally amounts to a lifelong employment contract between the university and the tenured professor.[89] For this reason, not every nontenured faculty member can expect to be "promoted" into a tenured position. The standards for renewal of a nontenured contract are necessarily different from and less exacting than the standards of whether or not to grant tenure. The mere fact that a nontenured teacher has had her contract renewed for several successive years does not mean that the nontenured teacher merits a positive tenure decision.[90] The university understandably may be satisfied to renew temporarily the contract of a competent but uninspiring professor, while it will refuse to grant tenure to candidates who are less than outstanding. Because tenure repre-

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[87] *See* notes 142-66 and accompanying text *infra*.

[88] *See* Kunda v. Muhlenberg College, 621 F.2d 532, 547 (3d Cir. 1980) (discussing nature of academic freedom).

[89] *See* Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980); Kunda v. Muhlenberg College, 463 F. Supp. 294, 307-08 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980). *See generally* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE (1973).

[90] *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1340 (W.D. Pa. 1977) (tenure is a privilege granted only to outstanding professors).

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sents a substantial financial commitment by the university, even outstanding professors may be denied tenure because of monetary exigencies.[91]

If courts are reluctant to scrutinize upper level employers' decisional standards, the university features of academic freedom and tenure have caused many courts to award outright deference to the university's employment policies.[92]

III. THE STATUS OF WOMEN PROFESSORS: DISPARITIES AND DISCRIMINATION

A. Background: The Smith *Case*

The above discussion has shown that the university is the paradigm of the upper level employer which often engages in sex discrimination with impunity, and it has briefed the legal theories of employment discrimination. These abstractions may now be brought to life with facts gleaned from a striking but not atypical university case.[93]

Mary Smith, a 38 year-old former nun and recent recipient of a Ph.D. from Harvard University in Sanskrit and Indian Studies, was the first full-time woman faculty member hired by the Religion Department at the University of North Carolina. During the second year of her probationary period, the tenured faculty met to discuss the renewal of Smith's teaching contract. The decision was not to renew, not to promote, and not to grant tenure.

The faculty tenure committee explained to Professor Smith the reasons for its decision: she had a limited capacity for growth and development; she channeled most of her energy into the technical aspects of the Mahabharata, ignoring the non-Western religions and the basic issues common to all religions; her discussions in faculty meetings were irrelevant and difficult to follow; she was abrasive and unresponsive to her students.

Professor Smith asked the faculty tenure committee to reconsider its decision. Upon reconsideration, the decision stood. Professor Smith next took her grievance to the Faculty Grievance Committee, which upheld the grievance, finding that the department had an admitted history of discrimination against women and had in fact discriminated against

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[91] *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229, 1231 (2d Cir. 1974) (professor discharged following termination of research grant).

[92] *Id.* at 1231-32.

[93] Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980).

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Professor Smith.[94] She had been hired as a specialist but evaluated as a generalist, while a comparable male colleague had been reappointed without evaluation. Although the grievance committee recommended that Professor Smith be given a three-year reappointment, the Department of Religion refused to abide by this decision, and it was under no contractual or legal obligation to do so.

Dr. Smith then sought protection under title VII. When the Equal Employment Opportunity Commission failed to settle the matter, Smith brought suit in federal district court. The theory of the case was disparate treatment: Smith was given less favorable treatment than similarly situated males because she was a woman. Like any disparate treatment plaintiff, she needed evidence of this claim. The grievance committee's report provided Dr. Smith with comparative data. She easily made out her prima facie case. She was qualified for reappointment, and the fact that males seemingly similarly situated were treated more favorably raised the inference of sex discrimination.

The order of a disparate treatment case now required the university to come forth and explain what it had done. The university asserted that the primary nondiscriminatory reason for denying reappointment to Dr. Smith was her lack of command of a broader range of scholarly issues and interests:

> What has seemed missing both on paper and in conversation is a command of middle range materials both primary and secondary which move from the particular focus of [her] specialized research through the whole range of scholarly issues and interests comprising the current status of Indian religious studies in general and then beyond to the area sometimes known as *Religionswissenschaft* [History of religion]. [Her] enthusiasm in these areas sometimes seems to outrun [her] command of the materials.[95]

The court acknowledged that the same professor who had found Dr. Smith's knowledge of Indian religions lacking had no knowledge of Indian religions himself.

Dr. Smith suffered total defeat. The court accepted the university's contention that Dr. Smith simply was not the generalist the department required, notwithstanding that she was hired as a Vedic specialist. The court found that two less-published males were reappointed because the department placed greater emphasis on teaching than on publications, ignoring the fact that Dr. Smith had been nominated for a teaching award. The court even concluded that the professor who knew nothing of Indian religions had mistakenly appraised Dr. Smith's competence.

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[94] *Id.* at 330-31.

[95] *Id.* at 342 (quoting letter from department chairman to plaintiff).

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Nonetheless, said the court, he was honestly mistaken, not unlawfully discriminatory in his error.[96]

The difficulties of disparate treatment analysis abound in Dr. Smith's case. The difficulties of devising alternate theories are equally apparent. Perhaps Dr. Smith really was too narrow in intellect and too difficult of spirit. How can courts be expected to evaluate these matters? Better yet, are not certain injustices simply beyond the vision of the law?

White male professors are not always promoted and tenured. Any academic can tell anecdotes of tenure denials for arbitrary or hostile reasons. Some courts are understandably baffled — even annoyed — [97] that disappointed females claim title VII's protection from the same inequities that their male colleagues have suffered.

To restate the obvious but not sufficient explanation: title VII prohibits discrimination on the basis of sex and not, say, political views or personal relationships. To refuse to grant a promotion to a Vedic specialist is not, per se, unlawful discrimination. To deny tenure to an abrasive colleague is not, without more, in violation of the Civil Rights Act. So why allow an abrasive, female Vedic specialist to demand the attention of the court when trying to get back her job? Abrasive Vedic males cannot make such gestures. Is it not unfair to protect the female but not the male?

The justification for protecting the female but not the male is that these inequitous burdens do not fall randomly upon all genders, races, or ethnic groups. Arbitrary and hostile actions fall more heavily on groups that are historically disadvantaged and yet the objects of prejudice. Irrational responses to these groups are the media through which subconscious prejudices are articulated. Thus, the evaluation that a professor is too much of a specialist, generalist, researcher or teacher, like the evaluation that a colleague is abrasive, timid, or absent-minded, is very much a conclusion that easily masks subconscious bias against the group to which the assessed professor belongs.

The nagging question is whether the evaluation of the Vedic specialist was made because of her sex or because of her temper and intellectual focus, untainted by any unlawfully discriminating factors. Would a

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[96] *Id.*

[97] *See* Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980); Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974); *see also* Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1332 (W.D. Pa. 1977). Another indication of this annoyance is the courts' inattention to evidence of sexism. *See* Peters v. Middlebury College, 409 F. Supp. 857, 864 n.4 (D. Vt. 1976).

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male have been characterized as abrasive, or instead as an aloof, demanding scholar? Would the male's very presence in the department have influenced the direction of the department, causing it to find room for yet another specialist? Those questions are difficult for the individual on the decisionmaking committee to subject to thoughtful, objective analysis, even in the privacy of his own conscience. The psychological pressure to rationalize or justify one's actions is obvious. Even stronger are the barriers to collective admissions of guilt. The resistance of the promotion and tenure committee to outside scrutiny of these matters is understandable. Not only will the committee persist in its belief of proper treatment, but it will resist any relinquishment of its autonomy. It is clear that discrimination can exist in disguised form. But how are the courts to recognize it?

B. Empirical Studies on the Status of University Women

The status of the female professors employed by academic institutions is well documented.[98] Despite the considerable attention that researchers from diverse fields pay to this issue, the data have not been utilized to spur closer scrutiny of claims of sex discrimination in the university. This is not because of neglect on the part of plaintiffs' lawyers,[99] but because of the statistical requirements imposed by the courts in title VII cases,[100] coupled with judicial unwillingness to recognize the appropriate inferences raised by these statistics.[101]

Sex discrimination in the university was rampant well into the 1970s.[102] Title VII did not apply to colleges and universities until the 1972 amendments,[103] which were spurred largely by the realization that a significant sector of our economy had been immunized by an exemption contained in the original Civil Rights Act.[104] While the university

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[98] *See* notes 111-40 and accompanying text *infra*.

[99] *E.g.*, Vladeck and Young, note 16 *supra*, at 78 (discussing use of national statistics to establish relevant labor pool, concluding that "the most carefully presented statistics may not persuade a judge who does not wish to be persuaded").

[100] Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); *see also* note 187 *infra*.

[101] *See* notes 164-78 and accompanying text *infra*.

[102] *See* Ferber & Kordick, *Sex Differentiations in the Earnings of Ph.D.s*, 31 INDUS. & LAB. REL. REV. 227 (1978).

[103] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-1 (1976 & Supp. IV 1980)) (extending coverage to employees of academic institutions).

[104] *See* note 199 and accompanying text *infra*; *see also* Vladeck & Young, note 16 *supra*, at 61 & n.20 (educational community supported the amendments).

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discriminated in much the same manner as the larger society, it was free from legal sanctions.

Publicly available data on the status of university women[105] is typically collected and reported in the aggregate, and therefore not persuasive on the ultimate legal issue of a particular university's intentional discrimination. Notwithstanding the fact that the publicly available aggregate data are insufficient to infer culpable discrimination on the part of any particular university employer, the available research is not wholly irrelevant. Women are undeniably concentrated in the lower ranks of academia, just as they are concentrated in the lowest paying ranks of our aggregate economy. Women earn substantially less than men in all sectors.[106] The dispute emerges, however, over the significance of the disparities in rank and pay.[107] When do disparities suggest or prove discrimination? Do disparities point out the inadequacies of current laws or theories of discrimination?

Available, aggregate data should be relevant in determining the existence and extent of unlawful discrimination. In a title VII disparate treatment case, the plaintiff usually loses because she fails to show pretext. Disparate treatment claims normally are resolved at the pretext stage.[108] The plaintiff must attempt to show that the defendant's asserted nondiscriminatory reason for the employment decision was either false or a mask for discrimination. This is often an issue of credibility. Those who believe that discrimination has been substantially reduced

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[105] *See* notes 111-40 and accompanying text *infra*; *see also* Thompson, Wright, Wittner & Fish, *Women Sociologists in the Midwest: A Status Report*, 21 SOC. Q. 623 (1980); Vladeck & Young, note 16 *supra*, at 60 n.14. Although the picture is generally grim, a preliminary report from law schools indicates no "statistically significant difference between the proportion of tenure decisions adverse to white men and those adverse to white women or black males." 1982 SOC'Y OF AM. L. TEACHERS NEWSLETTER 3 (July 1982). *But see* C. EPSTEIN, WOMEN IN LAW 224 (1981) (male law professors achieve tenure more quickly than females); *see also* H. KAY, SEX-BASED DISCRIMINATION: CASES AND MATERIALS 871-79 (2d ed. 1981) (women law professors concentrated at less prestigious schools).

[106] *See generally Division of Resources Analysis of the National Institutes of Health, Analysis of Sex Differentials Among Ph.D.-Holding Bioscientists* (1977); EEOC, 1978 REPORT, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, Vols. 1-2 (1980).

[107] *See, e.g.*, Milkovich, *The Emerging Debate*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 25 (E. Livernash ed. 1980); Nelson, Opton & Wilson, note 13 *supra*.

[108] Since plaintiff's burden at the prima facie stage is "not onerous," Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), and defendant's burden of rebuttal is mere articulation of a nondiscriminatory reason, *id.* at 254, the dispute will be resolved at the next stage — pretext.

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in recent years by social and legal forces will tend to defer to the employer, perhaps characterizing the plaintiff as "litigious" or "disgruntled."[109] But the judge who recognizes the magnitude and persistence of sex discrimination in our culture will be more likely to view the case with a critical eye.[110]

It is therefore appropriate to present data from the economic and statistical literature on the status of university women. One of the early studies to document the relationship between sex and university status controlled for thirty variables thought objectively related to salary, rank, and tenure status.[111] This 1969 study by Astin and Bayer demonstrated that sex predicted rank better than experience or publications.[112] Rank, in turn, was the most significant predictor of tenure status.[113] The importance of this finding cannot be overstated: initial discrimination in rank was accumulated in the tenure decision. Thus, a study which holds rank constant — as later ones have done[114] — has overlooked that factor's discriminatory predecessor. This highlights the significance of discrimination that occurs at an early point in a woman's career — precisely the time she is least likely to bring suit.[115] Litigation is a poor substitute for informal resolution, not only in terms of public policy and judicial economy, but with respect to the objective of the victim herself. To challenge a denial of promotion is to court disaster. Not only is the plaintiff likely to lose under a disparate treatment theory, but even if she wins, she loses. She has engendered conflict, invited the label of troublemaker, and created bitterness within

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[109] *See* Faro v. New York Univ., 502 F.2d 1229, 1232 (2d Cir. 1974).

[110] *See, e.g.*, Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675 (1971).

[111] Astin & Bayer, *Sex Discrimination in Academe*, 53 EDUC. REC. 101 (1972).

[112] *Id.* at 105.

[113] *Id.* at 107.

[114] *See* Hoffman, *Faculty Salaries: Is There Discrimination by Sex, Race, and Discipline? Additional Evidence*, 66 AM. ECON. REV. 196 (1976).

[115] To fail to make a timely challenge will foreclose recovery at a later date. That is, discriminatory denial of promotion can infect the tenure process and the pay structure in the future. However, the continuing impact of the discrimination is of no legal significance. United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); *see also* Presseisen v. Swarthmore College, 442 F. Supp. 593, 603 (E.D. Pa. 1977). *But see* Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384 (5th Cir. 1980) (when plaintiff claims that pre-Act and present discrimination are causally related, discovery should not be limited to post-1964 events). Although not actionable, pre-Act and time-barred discrimination may be probative of present discrimination. For characteristics of plaintiffs, see Hovman & Stallworth, *Who Files Suit and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115.

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and against herself — a path hardly conducive to a successful career. It is only at the terminal point — when the victim is discharged, normally by the denial of tenure — that the risks of litigation are justified by the hopelessness of alternative solutions. The risks remain substantial. The faculty and other university officials will parade evidence of her incompetence in open court, and the record will perhaps end up in black and white in law libraries throughout the country. The academic grapevine will turn sour. Her future is grim. As a result, university litigation typically centers on tenure,[116] more uncommonly on initial hiring,[117] and never on rank alone, unless the plaintiff is secure in a tenured position.[118] More pressing than concern for the floodgates of litigation,[119] or fear that courts will be forced to sit as "super tenure committees,"[120] hearing the "I'm as good as you are"[121] arguments of the disappointed academic, should be concern for whether existing law provides adequate protection. One wonders why these women sue at all.

The social and economic factors scrutinized by Astin and Bayer predated the 1972 amendment to title VII.[122] While sex discrimination may have been rampant in the university, it was not unlawful. One would expect the picture to change slowly but substantially as the law took effect, and university officials came to grips with their legal obligations due to threats of litigation, pressure from activist groups, and an awakened sense of the social responsibility that weighs more heavily on the university than on other sectors of society.

The picture did change. Since 1970, women have attained university faculty positions in unprecedented numbers,[123] just as throughout

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[116] *See, e.g.*, Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980); Carton v. Trustees of Tufts College, 25 Fair Empl. Prac. Cas (BNA) 1114 (D. Mass. 1981); Perham v. Ladd, 436 F. Supp. 1101 (N.D. Ill. 1977); Cap v. Lehigh Univ., 433 F. Supp. 1275 (E.D. Pa. 1977); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975).

[117] *See, e.g.*, Cooper v. University of Tex. at Dallas, 482 F. Supp. 187 (N.D. Tex. 1979) (alleging discriminatory hiring policies, promotions and salaries).

[118] *See, e.g.*, Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); Cussler v. University of Md., 430 F. Supp. 602 (D. Md. 1977) (plaintiffs who challenged promotion denial were tenured).

[119] *See, e.g.*, Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976); *see also* Friedman, note 16 *supra*, at 50.

[120] *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353 (W.D. Pa. 1977).

[121] Faro v. New York Univ., 502 F.2d 1229, 1232 (2d Cir. 1974).

[122] Astin & Bayer, note 111 *supra*, at 108.

[123] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 575, WOMEN IN THE LABOR FORCE: SOME NEW DATA SERIES 3 (Table 4) (1979) [hereafter

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America, women's rate of participation in the paid labor force has increased.[124] However, women's occupational distribution and depressed wages relative to men's have remained constant.[125] The magnitude and persistence of this occupational segregation and pay gap are mirrored in the university. In 1977 the National Institutes of Health (NIH) published an analysis of sex differentials among Ph.D.-holding bioscientists,[126] and concluded that a significant sex-based salary differential existed at all levels of experience.[127] The rewards of the academic system, academic rank and tenure, also differed significantly by sex.[128]

Experience could account for neither rank nor tenure status. Sex was the more likely predictor. The importance of this finding, supported by later studies,[129] is that it undercuts the popular view that women's lower achievement status is attributable primarily to their career interruptions or sacrifices to family demands, that is, their lesser experience.[130]

Sexual inequality in the university is highlighted by a report of the American Association of University Women (AAUW), which concluded, after surveying 600 U.S. colleges and universities, that the more prestigious institutions have the fewest women faculty members.[131] This AAUW study noted not only that the salary gap between men and women existed at every level, but also that "antagonistic attitudes of male decision-makers within the university community were the most significant barrier for women in higher education."[132]

Because of geographic or interuniversity differences in pay scales, aggregate data are less convincing that disparities reveal discrimination than the data from a single employer would be.[133] This is even more so

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LABOR FORCE]. *But see* Kunda v. Muhlenberg College, 621 F.2d 532, 550-51 (3d Cir. 1980) (female faculty participation fell between 1930 and 1970); Vladeck & Young, note 16 *supra*, at 60 n.6 (similar conclusion).

[124] LABOR FORCE, note 123 *supra*, at 1.

[125] *Id.* at 2-3 (Table 3), 6-7 (Tables 9-10).

[126] DIV. OF RESOURCES ANALYSIS, NAT'L INST. OF HEALTH, ANALYSIS OF SEX DIFFERENTIALS AMONG PH.D.-HOLDING BIOSCIENTISTS (1977).

[127] *Id.* at 9.

[128] *Id.* at 10-13.

[129] *See* note 135 and accompanying text *infra*.

[130] *Id.*

[131] Young, *Sex Discrimination in Higher Education*, 5 CIV. LIB. REV. 41 (1978); *see also* NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NO. 342, WOMEN FACULTY STILL LAG IN SALARY AND TENURE FOR THE 1979-80 ACADEMIC YEAR (1980).

[132] Young, note 131 *supra*, at 42.

[133] *See* REVIEWS OF DATA ON SCIENCE RESOURCES, NAT'L SCIENCE FOUND., NO.

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in the legal sense, to the extent that liability is assessed only against the individual employer. A pilot study of medical college faculty promotion patterns suggests that disparities exist within each university, not simply in the aggregate. Wallis, Gilder and Thaler concluded that, when compared to similarly situated males, women physicians required longer periods of service to each university studied to achieve promotions. Typically, it took women nearly twice as long as men for each promotional level.[134]

Those who believe that sex-based discrimination no longer exists to any significant degree explain the sex-correlated differences in employment rewards as the result of sex-correlated differences in career choices. They argue that women anticipate career interruptions in favor of child-rearing tasks and are unwilling to invest in "human capital,"[135] that is, education, training, overtime, mobility and such other factors which contribute to career success. The role of sex discrimination in the inferior status of women is largely discounted because, according to this theory, women experienced sexual parity in pay in their first jobs. Later sex-correlated disparities are the direct result of voluntary career interruptions, and when women join the workforce, the gap gradually narrows.

This human capital theory of sex-correlated disparities was repudiated by a 1978 study of nearly 2,000 Ph.D.-holding men and women.[136] Ferber and Kordick found no support for the commonplace assertion that women attain less in the labor market because of their voluntary decisions to leave the marketplace.[137] Ferber and Kordick's survey revealed little sex-related difference in the commitment of time to career among Ph.D.'s. The men had worked approximately 98% of the time since earning their degrees, and the women, about 92% of the time.[138] There was evidence that today's younger Ph.D. is less likely than her earlier counterpart to drop out of the work force to attend to family life.[139] Holding constant those men and women who worked full-time

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34, SEX AND ETHNIC DIFFERENTIALS IN EMPLOYMENT AND SALARIES AMONG FEDERAL SCIENTISTS AND ENGINEERS 8 (Dec. 1979).

[134] Wallis, Gilder & Thaler, *Advancement of Men and Women in Medical Academia: A Pilot Study*, 246 J. AM. MED. ASS'N 2350 (1981).

[135] This view is explained and repudiated in Ferber & Kordick, note 102 *supra*, at 232; *see also* Wright, Costello, Hachen & Sprague, *The American Class Structure*, 47 AM. SOC. REV. 709 (1982).

[136] Ferber & Kordick, note 102 *supra*, at 227.

[137] *Id.*

[138] *Id.* at 233.

[139] *Id.*

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continuously since obtaining their degrees, there was nearly an 11% pay gap in the first job, with the gap increasing in succeeding years.[140] Therefore, it is false to attribute the pay gap to job interruptions.

The above data strongly suggest that discrimination is occurring in university employment decisions. Although aggregate data cannot be used as proof that a university has discriminated against a particular plaintiff, they should be probative of general social facts, and it is therefore appropriate for courts to look to these data to provide an initial framework for employment discrimination claims.[141]

IV. STATISTICAL PROOF OF DISCRIMINATION IN DISPARATE TREATMENT CASES

Refined statistics play an important role in title VII litigation. A rule or policy that can be shown statistically to disqualify a substantially disproportionate percentage of minorities or women will establish a prima facie disparate impact case. As noted above, such a showing is rare in sex discrimination cases or in university cases, because the objective policies do not discriminate.[142] However, statistics are also useful in a disparate treatment case. If statistical disparities in outcomes are gross and supplemented by individual testimony of specific instances of discriminatory treatment, a prima facie case may exist.[143] Statistics are scrutinized more carefully in disparate treatment than in disparate impact cases, because in the former the emphasis is on the employer's motivation.[144] Courts will therefore require greater statistical accuracy, in terms of relevant time frame and relevant pool of the labor market, to support an ultimate finding of liability.[145] The Supreme Court's proclamations on the use of statistics in disparate treatment cases have raised many unanswered questions that are critical to claims of academic women.

In *International Brotherhood of Teamsters v. United States*,[146] the Supreme Court found that a comparison of the racial/ethnic composi-

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[140] *Id.* at 236.

[141] *See* notes 186-87 and accompanying text *infra*.

[142] *See* notes 74-85 and accompanying text *supra*.

[143] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); F. MORRIS, CURRENT TRENDS IN THE USE (AND MISUSE) OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION (1978).

[144] International Bhd. of Teamsters v. United States, 431 U.S. 324, 357-58 (1977).

[145] *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

[146] 431 U.S. 324 (1977).

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tion of the general population to that of the employer's workforce evidenced a gross and longstanding disparity between the positions of whites and minorities in the defendant's employ.[147] This statistical comparison, bolstered by testimony of over forty individual instances of discrimination, constituted an unrebutted prima facie case of disparate treatment.[148] Because the employer offered no legitimate explanation for the disparities, the government as plaintiff proved that race discrimination was part of the company's standard operating procedure.[149] The Court did not offer whether gross, longstanding disparities, standing alone, could constitute a prima facie case of disparate treatment. When the defendant challenged the plaintiff's use of generalized statistics, the Court noted that "fine tuning of the statistics could not have obscured the glaring absence of minority line drivers."[150] The Court termed this glaring absence "the inexorable zero."[151]

Because the skills needed for the line driver position in *Teamsters* were commonly possessed or easily acquired, the Court allowed reliance on general population data to raise the inference of discrimination. The Supreme Court's major pronouncement on the requisite fine tuning of statistics when the job does require specialized skills, training, or knowledge came in *Hazelwood School District v. United States.*[152]

The Hazelwood School District was sued for engaging in a racially discriminatory pattern or practice of hiring. Teachers were hired pursuant to unstructured procedures which granted to each school principal "virtually unlimited discretion in hiring."[153] The government's attack included evidence of statistical disparities as well as specific instances of discrimination. The Eighth Circuit Court of Appeals had held that the statistical disparity between black representation in the Hazelwood district's teaching staff, which was less than two percent, and the black representation of teachers in the relevant labor market, the St. Louis city-county area, which was over fifteen percent, constituted a prima facie case of racial discrimination.[154] The school district attacked this judgment in the Supreme Court for "its reliance on 'undifferentiated work force statistics to find an unrebutted prima facie

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[147] *Id.* at 339 n.20.

[148] *Id.* at 338.

[149] *Id.* at 342.

[150] *Id.* at 342 n.23.

[151] *Id.* (quoting the court of appeals).

[152] 433 U.S. 299 (1977).

[153] *Id.* at 302.

[154] United States v. Hazelwood School Dist., 534 F.2d 805, 809 (8th Cir. 1976), *rev'd*, 433 U.S. 299 (1977).

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case of employment discrimination.' "[155] The Supreme Court found this attack to be justified and stated that the court of appeals should have provided the school district with the opportunity to rebut this prima facie proof by challenging its reliability, its assumptions, and its frame of time and space.[156]

The Court gave several important guidelines on the use of statistics, the most easily understood of which concerns the relevant time frame.[157] The relevant time frame probative of unlawful discrimination begins with title VII's applicability to the defendant. Since Hazelwood was a public employer, it, like public universities, had no obligations under the statute until March 24, 1972.

The Court cautioned, however, that evidence of pre-Act discrimination "might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone *little* change."[158]

The relevant labor market of qualified teachers was the crux of the case.[159] Depending upon which market was chosen for comparison to the proportion of black teachers at Hazelwood, the statistical disparities ranged from minor to significant.[160] In this regard, the Court appeared to adopt the standard deviation method for determining when disparities are indicative of discrimination.[161] The Court remanded the case, instructing the trial court to consider several specific factors regarding the issue of the relevant labor market.[162] The Court also suggested that the most probative source of discrimination *vel non* would be applicant flow data.[163]

The statistical refinement seemingly demanded by *Hazelwood* has caused several courts in higher education cases to accord little or no weight to the plaintiff's statistical analyses.[164] One serious question posed by *Hazelwood* is whether its fine tuning requirement applies to

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[155] Hazelwood, 433 U.S. at 306.

[156] *Id.* at 313.

[157] *Id.* at 309.

[158] *Id.* at 309 n.15 (emphasis added).

[159] *Id.* at 310.

[160] *Id.* at 310-11.

[161] *Id.* at 308 n.14, 311 n.17.

[162] *Id.* at 312.

[163] *Id.* at 313 n.21.

[164] *See* Presseisen v. Swarthmore College, 442 F. Supp. 593, 625 (E.D. Pa. 1977). (plaintiff's statistics showing absence of women at defendant university do not establish a prima facie case because relevant labor market not identified and too few employment decisions made to raise inference of discrimination).

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the plaintiff who is simply trying to raise a prima facie case, or whether such close analysis applies to the defendant's general challenges to the plaintiff's statistics. The former interpretation is inconsistent with all Supreme Court cases defining the plaintiff's initial burden in a disparate treatment case.[165] The alternate interpretation — that defendants can rely upon *Hazelwood* to attack plaintiffs' statistics — leaves unanswered a critical question. When the defendant has challenged the plaintiff's statistics as inaccurate or unreliable, and the court finds the challenge meritorious, what is left of the plaintiff's case, absent an additional explicit showing of pretext? Post-*Hazelwood* university cases have treated the defendant's attack as totally destroying the plaintiff's statistical evidence. The practical effect of such a reading of *Hazelwood* is to render statistics all but useless in disparate treatment claims. Since statistics do come in infinite variety,[166] there will always be a challenge of some merit to the particular statistical comparisons and analyses made by plaintiffs.

V. BARRIERS TO RELIEF AND THE SEARCH FOR SOLUTIONS

Barriers to university plaintiffs are formidable. First, the most dynamic theory of recovery under title VII — the disparate impact theory of *Griggs* — is rarely available. The plaintiff must resort to disparate treatment theory, which entails proof of the defendant's motive, an element extremely difficult to prove. In university cases, attempted proof of motive normally proceeds along two separate avenues: proof that candidates inferior or equal in qualification to plaintiff received the benefit plaintiff now claims as her own,[167] and statistical demonstrations of gross disparities sufficient to show intentional discrimination.[168]

If the plaintiff is to prove motive by comparing herself to the successful candidates, two barriers are immediately posed. The weaker barrier is the university's claim of confidentiality.[169] In order for the plain-

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[165] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1980); Board of Trustees v. Sweeney, 439 U.S. 24 (1978), *vacating and remanding per curiam* 569 F.2d 169 (1st Cir. 1978); McDonnell Douglas Corp. v. Green, 411 U.S. 592 (1973).

[166] Hazelwood School Dist. v. United States, 433 U.S. 299, 312 (1977).

[167] *See* Cussler v. University of Md., 430 F. Supp. 602, 607 (D. Md. 1977).

[168] *But see* note 187 and accompanying text *infra*.

[169] At an early point, confidentiality arguments convinced courts not to compel disclosure of evaluations. *See, e.g.*, McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270, 1278 (N.D. Cal. 1975) ("[D]isclosure would represent the most serious breach of the confidentiality of the tenure selection process, a breach which even proponents of limited disclosure have opposed.") (action not based on title VII, but upon state statute).

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tiff to show that she is equal to or more qualified than the professors who were granted renewal, promotion, or tenure, she will need access to confidential evaluations made of her and similarly situated males in the promotion or tenure process. Those evaluations may be necessary to prove the comparable qualifications of all parties involved. The evaluations may prove that the asserted criteria are not applied even-handedly. The university may be expected to refuse to provide these files, contending that the evaluation process was secret, and that disclosure would violate the expected confidentiality of the evaluating professors. The university's claim of confidentiality is not a serious obstacle when the denial of an employment benefit is made on the basis of the contents of the evaluation forms.[170] In such cases, courts compel disclosure.

The barrier that is nearly insurmountable is that of the evaluation itself. When the university decision is based on a professional judgment of the plaintiff's intellectual work product, the courts are reluctant to alter the university's judgment. Courts do not want to evaluate, for example, the intellectual substance of research in Renaissance dance or computerized axial tomography. The courts don their cloak of deference to academic institutions in matters of professional judgment.[171]

More recently courts have considered claims that the confidentiality of tenure committee deliberations is guaranteed by the first amendment's protection of academic freedom. *Compare* Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982) (tenure committee member's records subject of qualified privilege but privilege outweighed by plaintiff's need for discovery) *with In re* Dinnan, 661 F.2d 426 (5th Cir. 1981) (rejecting outright such a privilege), *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982). For a discussion of these two cases and the general question of tenure committee confidentiality, see Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom*, 16 U.C. DAVIS L. REV. 1023 (1983) (*infra* this volume).

[170] *See* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1346-48 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384-85 (5th cir. 1980); *In re* Dinnan, 661 F.2d 426 (5th Cir. 1980) *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977).

[171] Several courts have elucidated the justification for deference to academic decisions: "Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." Faro v. New York Univ. 502 F.2d 1229, 1231-32 (2d Cir. 1974); *see also* Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973) (action not based on title VII); Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969) (black professor alleged college's subjective criteria a vehicle for discriminatory action) (action not based on title VII). The asserted justification for judicial deference to academic decisions centers on the court's lack of expertise in the subject matter:

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The second way to prove motive is to produce glaring statistical disparities demonstrating that the university has a pattern or practice of treating women and men differently. The obstacle here is the precision of statistical analysis seemingly required by *Hazelwood*, and so imposed by most lower courts.[172]

Perhaps an even more formidable barrier to institutional equity is the Supreme Court's decision in *Furnco*,[173] which noted that "Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[174] Later, in *Texas Department of Community Affairs v. Burdine*,[175] the Court added that "[t]he statute was

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> The Court is simply not in a position to decide this question [validity of colleagues' evaluations]; to do so would require subjective judgments which are meaningless if made by one without expertise and experience in the field. To the extent, therefore, that plaintiff seeks disclosure of the evaluations to facilitate presentations of this issue, disclosure is unnecessary.

McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270, 1278 n.13 (N.D. Cal. 1975) (citations omitted); *see also* Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1350, 1371 (W.D. Pa. 1977); Cussler v. University of Md., 430 F. Supp. 602, 605-06 (D. Md. 1977); United States v. Wattsburg Area School Dist., 429 F. Supp. 1370, 1377-78 (W.D. Pa. 1977); Peters v. Middlebury College, 409 F. Supp. 857, 868 (D. Vt. 1976); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975).

However, courts, need not defer for lack of knowledge. *See* Friedman, note 16 *supra*, at 50 (courts commonly decide difficult, complex issues, such as "patent cases, actions involving securities and other commercial transactions, and boundary and maritime disputes," relying on counsel and expert witnesses for its own education). Curiously, even when courts evaluate the university's professional judgment, the courts side with the university. Evaluation is little different from deference. *See* Carton v. Trustees of Tufts College, 25 Fair Empl. Prac. Case (BNA) 1114, 1122 (D. Mass. 1981).

It is intervention, not deference, that is more appropriate in university cases:

> [C]ourts are surely more qualified to intervene in academic decisions, with which they have some familiarity, than to decide who is qualified to serve in highly skilled blue collar jobs or how they should be chosen. It is the courts' expertise, rather than the lack of it, that makes them reluctant to interfere at the upper level. They know these decisionmakers; they sympathize and identify with their concerns and their use of traditional selection methods.

Bartholet, note 12 *supra*, at 979-80. Not all courts defer. *See* Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Kunda v. Muhlenberg College, 463 F. Supp. 294 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980). Nonetheless, the plaintiffs in *Davis* and *Powell* lost.

[172] *See* note 187 and accompanying text *infra*.

[173] Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[174] *Id.* at 577-78.

[175] 450 U.S. 248 (1981).

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not intended to 'diminish traditional management prerogatives'. . . . It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired."[176] Moreover, "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[177]

Therefore, women as equally qualified as men may be denied promotions or tenure by the university, unless there is provable motive to discriminate on the basis of sex. Direct evidence of intentional discrimination will not be available from sophisticated, highly educated employers who know their obligations under title VII. Furthermore, the university's professional evaluation of the candidates for promotion and tenure is entitled to considerable deference from the courts. Proof of motive by statistical analysis, then, seems the most likely avenue of attack. However, the constraints courts have placed upon statistical showings since *Hazelwood* have made motive virtually impossible to prove. In general, university women do not win title VII cases.[178]

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[176] *Id.* at 259.

[177] *Id.*

[178] One unfortunate aspect of media coverage of discrimination claims is that the public is led to believe that women and minorities merely have to make charges in order to win. One well-known discrimination claim involved Harvard sociologist Theda Skocpol. She made the news, she forced Harvard to face its own arbitrariness, she scored a victory from Harvard's grievance committee, but she did not get tenure from Harvard. The president of the university overruled the grievance committee. Nor did Professor Skocpol file a lawsuit. She is not a victor. *See* Schumer, *A Question of Sex Bias at Harvard*, N.Y. Times Oct. 18, 1981 (Magazine), at 96; *see also* Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 J. URB. L. 163, 212 (1976) ("Clearly, plaintiffs in university cases enjoy substantially less likelihood of success than other complainants in [professional jobs].").

Despite the barriers to title VII claims, women have won in at least four cases. Three of the winners were individual claimants, and all were rather obvious victims of discrimination. These were the rare cases in which direct proof of discrimination was available. Ms. Sweeney, for example, was denied a promotion to professor of education because her department considered her old-fashioned, concerned with trivial affairs, and unable to take high caliber minutes of faculty meetings. Sweeney v. Board of Trustees, 604 F.2d 106, 110 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). Her scholarship and teaching were never seriously questioned. Nonetheless, the court characterized this case as "close." *Id.* at 114.

Another plaintiff, Ms. Kunda, won her case after being denied promotion and tenure. Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). The university's asserted, objective standard used to deny benefits to Ms. Kunda had not been applied in an even-handed manner. All the men in the department had been counseled of the necessity to obtain a terminal degree in order to be eligible for promotion and tenure; Ms. Kunda had not. The court ordered the college to grant Ms. Kunda tenure if and when she obtained the degree. *Id.* at 535.

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A. Existing Proposals for Reform

Legislative reform is perhaps the necessary antidote, but is unlikely. Suggestions for jurisprudential reform abound. For the most part, however, these reformulations of title VII doctrine hold little promise.

Altering the burden of proof in disparate treatment cases would solve the problem. Requiring the employer to prove, not merely articulate, nondiscriminatory reasons for the adverse employment decision or statistical disparities would facilitate relief to plaintiffs unable to prove pretext. Since the employer has access to this information, it seems reasonable to require the employer to prove it. Moreover, requiring the employer to prove the existence of, and its reliance on, a legitimate reason would put disparate treatment theory on an equal footing with disparate impact theory, imposing in either case a strenuous burden

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Finally, Ms. Hill won her title VII claim on both a disparate treatment and a highly questionable disparate impact theory. Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978). The court found that Ms. Hill had been treated unfavorably because of her sex, and more specifically because of her enthusiasm in advancing the cause of women's athletic programs: "Those in authority saw Mary Alice Hill more as a symbol of her sex than as a member of the faculty and she suffered from that perception." *Id.* at 519. The department's articulated reason for refusing Ms. Hill's renewal of her contract was that she had not obtained additional credits toward a doctoral degree. However, this requirement came only after her interest in women's sports; thus, the court recognized pretext. Moreover, males hired by the physical education department were given appointments with no academic responsibilities at all. The court characterized this system as having a disparate impact on females. *Id.* However, this aspect of the case looks more like disparate treatment.

Mecklenberg v. Montana State Bd. of Regents, 13 Fair Empl. Prac. Cas. (BNA) 462 (D. Mont. 1976), is the first successful class action brought by women under title VII. J. Farley, note 16 *supra*, at 12. The court found the defendant university liable under title VII. The basis of liability was grounded upon statistical evidence showing underutilization of women in various positions and in areas of promotion, tenure and salary. The statistical findings, however, were considerably more liberal and in favor of plaintiffs than post-*Hazelwood* decisions have been. *See* note 187 and accompanying text *infra*. In an unique resolution of this class action, the court ordered the parties to negotiate a settlement. *See* Clark, *Discrimination Suits: A Unique Settlement*, 58 EDUC. REC. 233 (1977). Consent decrees and out of court settlements have been noted. Lamphere v. Brown Univ., 491 F. Supp. 232, 238-46 (D.R.I. 1980), *aff'd*, 685 F.2d 743 (1st Cir. 1982) (text of consent decree); *see also* Broad, *Ending Sex Discrimination in Academia*, 208 SCI. 1120 (1980); J. Farley, note 16 *supra*, at 42, 54-55; Vladeck & Young, note 16 *supra*, at 59 n.3; 20 Daily Lab. Rep. A-2 (1983) (Department of Justice and Burlington Community College enter into consent decree; awaiting court approval).

These four victories, while important, will do little to change the status of women in the university. The clearest message of these successful cases, particularly seen against the scores of unsuccessful plaintiffs' claims, is this: do not *overtly* discriminate.

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upon the defendant. This solution has been proposed in the legal literature,[179] but is foreclosed by *Burdine*[180] and *Sweeney.*[181]

Elizabeth Bartholet has called for a uniform standard to be applied to all title VII claims, whether brought by lower or upper level claimants.[182] She would examine even the subjective job criteria of upper level cases under disparate impact analysis.[183] Teaching, scholarship, and service — the standards used in academic affairs — could all be challenged as unessential to effective professorial performance. Bartholet further proposes overlaying this uniform standard with an accumulation of disparate treatment and disparate impact analyses. A plaintiff who raises the inference of disparate treatment is entitled, under *McDonnell Douglas* and even *Burdine*, to the employer's statement of the legitimate, nondiscriminatory basis for the action. Bartholet would then allow the plaintiff to submit the employer's precise, stated (albeit subjective) criteria to disparate impact analysis, making it unnecessary for the plaintiff to discern the "practice or policy" responsible for the racial or gender differences in outcomes.

Although Bartholet's analysis has considerable appeal, it is unlikely to be adopted. It is revolutionary to require validation of the subjective standards of upper level positions. Courts do not want to force employers to restructure employment practices any more than has already been done. That would not be reason enough to reject her hypothesis, but it is a warning to pursue supplementary formulations as well.

Under Bartholet's proposed accumulation of disparate treatment and disparate impact analyses, universities would be required to justify the three ubiquitous university criteria as business necessities. This would

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[179] Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1025 (1981); Friedman, note 16 *supra.* A different route to altering the burden of proof in the academy is proposed by Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983) (*infra* this volume). Tepker suggests an intermediate standard under which the university "should present substantial evidence that the standards are designed to achieve an important educational objective. . . . [and] demonstrate that there is substantial evidence of a policy's effectiveness and validity . . . ." *Id.* at 1086. Whether courts would allow this exception to the allocation of proof in disparate treatment claims remains to be seen; it would constitute a welcome and effective change.

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

[181] Board of Trustees v. Sweeney, 439 U.S. 24 (1978), *vacating and remanding per curiam* 569 F.2d 169 (1st Cir. 1978).

[182] Bartholet, note 12 *supra.* Her proposal finds support in some of the language contained in Connecticut v. Teal, 102 S. Ct. 2525 (1982).

[183] Bartholet, note 12 *supra*, at 1004-06, particularly 1006 n.186.

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contrast with the current judicial deference to the university in matters of intellectual judgment and the mission of the university.[184] If courts will not set aside professors' evaluations of the plaintiff's ability to teach, research, and provide service, they are even more unlikely to set aside the fundamental evaluation that teaching, scholarship, and service are necessary to the university's goals. Although Bartholet is correct to demand that we devise ways to measure higher education job criteria, that task is Herculean. There is absolutely no indication from any decided case that courts will force this work on the university.

Without Bartholet's proposal, however, the problem of sex discrimination will continue unabated. Biases, whether conscious or subconscious, have not been driven away; they have been driven underground. In the faculty evaluation process, as in any upper level evaluation process, the ways of disguising discrimination are legion. Obviously, an evaluation of a candidate's teaching, scholarship, or service can mask discrimination. Students' evaluations of teaching can reflect sex discrimination, a fact noted in the psychology literature.[185] The weight given to each of the three factors can also hide discrimination, as might a change in the department's mission. Proof can be impossible in any individual case. Yet it is undeniable that women in the university do not have an equal share in the academy's rewards.

B. A Modest Proposal

The problem can be minimized by both legal and extralegal work. The legal solution requires a restudy of *Hazelwood* and the inferences to be drawn from statistical analysis, and reemphasis on the *Teamsters* pattern or practice formulation. The extralegal activity is necessary because sex discrimination is a complex phenomenon articulated through attitudes and behaviors whose origins themselves are complex; legislation or reformation of legal doctrine alone cannot change these pervasive elements of American society.

Demands for statistical precision are in direct proportion to the user's interest in the conclusions or implications of those data. In employment discrimination cases, how the judge demarcates the relevant universe of facts and interprets ambiguous facts or difficult legal re-

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[184] *See* note 171 *supra.*

[185] Kaschak, *Sex Bias in Student Evaluations of College Professors*, 2 PSYCHOLOGY OF WOMEN Q. 235 (1978); *see also* Ayers, *Women in Positions of Authority: A Case Study of Changing Sex Roles*, 4 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 556 (1978). The "halo effect" may cause a student's overall evaluation of a teacher to be influenced by one criterion — sex bias. *See* Bartholet, note 12 *supra*, at 1007 n.188.

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quirements depends upon the judge's view of the seriousness of the problem. This view in turn depends upon the judge's identification with or understanding of the plaintiff, the defendant, and the importance to law and society of the analysis undertaken.

This fact of life and judicial behavior highlights the importance of aggregate statistics to provide an initial framework for the problem. Courts, as finders of fact, must consider all kinds of evidence and draw inferences therefrom which are reasonable in light of experience and logic. The initial framework idea gains support from cases noting that pre-Act discrimination, while not actionable, is nonetheless probative of post-Act discrimination.[186]

If a judge has knowledge of the general status of women in the university, he will be likely to consider the case before him as one worthy of serious attention. He will be less likely to characterize the plaintiff as a disgruntled Joan of Arc. Aggregate data, then, should be put into evidence and considered by the judge.

This is not to suggest that aggregate data are probative of discrimination. Plaintiffs would be foolhardy to rely on aggregate, undifferentiated statistics to prove anything. Such statistics merely provide background information, the initial framework, much as was provided by general knowledge of educational opportunity and segregation in North Carolina, the framework for *Griggs*. The university plaintiff, however, must go further and introduce refined statistics relating to the defendant's workforce in order to raise the inference of discrimination.

As mentioned above, the statistical refinement demanded by post-*Hazelwood* courts has resulted in refusal to accord weight to the university plaintiff's statistical analyses.[187] *Hazelwood*'s fine-tuning can be viewed

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[186] Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.15 (1977); *see also* Lamphere v. Brown Univ., 685 F.2d 743, 747 (1st Cir. 1982); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir. 1980).

[187] *See* Lamphere v. Brown Univ., 685 F.2d 743, 749-50 (1st Cir. 1982) (plaintiff's statistics irrelevant because they failed to establish relevant labor pool of qualified women); Wilkins v. University of Houston, 654 F.2d 388, 397 (5th Cir. 1981) (although plaintiff showed statistically significant difference between expected and actual number of women hired by university, prima facie case was not established because, *inter alia*, plaintiff failed to prove percentage of available university teachers holding doctoral degrees); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 580-82 (4th Cir. 1977) (although gender disparities in salary unexplained by university, prima facie case not established by statistics); Michigan State Univ. Faculty Ass'n v. Michigan State Univ., 93 F.R.D. 54, 60 (W.D. Mich. 1981) (although defendant's statistics were tainted by gender considerations, they dispelled any inference of discrimination raised by plaintiff's showing that only 53% of the male-female salary difference could be explained by nonsexual factors such as experience and degree); Presseisen v. Swarthmore

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in one of two ways. First, it could — but should not — be seen as imposing exacting requirements on the plaintiff who tries to raise a prima facie case through statistics. The plaintiff's burden in disparate treatment discrimination is "not onerous." Requiring the plaintiff to comply with *Hazelwood's* fine-tuning, including precise definition of the relevant labor market, would be to force the plaintiff, at the prima facie stage, to account for every conceivable legitimate reason for the protected class's failure to be hired, promoted, or tenured. Such a requirement would indeed be onerous, and would collapse the three-stage process of disparate treatment analysis into one stage. *Hazelwood*'s directive is only to allow defendants to rebut plaintiffs' statistics by means of a challenge to their significance.

A restudy of *Hazelwood*, and its predecessor, *Teamsters*, could provide a fresh approach to university claims. This restudy focuses on two aspects: reasonable inferences to be drawn from statistics, and use of the "pattern or practice" formulation. Finally, the use of a special master in academic cases is proposed.

Hazelwood makes clear that defendants may make generalized unsupported challenges to the significance of plaintiffs' statistics. It is equally clear that defendants may present their own statistics to "tell a different story."[188] All *Hazelwood* teaches is that, whichever way a defendant proceeds, the plaintiff's case is as a result no longer unrebutted,[189] and the plaintiff is no longer automatically entitled to judgement. *Hazelwood* does *not* say that the defendant now automatically wins. Even if the plaintiff is unable to present new evidence after the defendant's rebuttal phase, the court cannot automatically grant judgment in favor of the defendant. The court is obliged to consider the competing statistics and competing stories before it and draw reasonable inferences therefrom.

College, 442 F. Supp. 593, 608-27 (E.D. Pa. 1977) (notwithstanding plaintiff's massive, sophisticated statistical evidence, prima facie case not established). *Contra* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342 (9th Cir. 1981) (general statistical evidence probative of discrimination), *cert. denied*, 103 S. Ct. 53 (1982); Fisher v. Dillard Univ., 499 F. Supp. 525, 535 (E.D. La. 1980) (primarily a race case) (plaintiff's survey of defendant's pay practices, while not accounting for all legitimate variables, speaks for itself); Rajender v. University of Minn., 24 Fair Empl. Prac. Cas. (BNA) 1045, 1056 (D. Minn. 1978) (where no women held tenure track position in chemistry department in 30 years, and department interviewed 26 men but only one woman since 1971, and made job offers to 17 men and no women, prima facie case of systemic exclusion shown).

[188] Hazelwood School Dist. v. United States, 433 U.S. 299, 319 (1977) (Stevens, J., dissenting).

[189] *Id.* at 306.

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To illustrate, a university plaintiff might present statistics showing that a significantly greater percentage of the university's tenure decisions are adverse to female professors than to male professors. If this statistical information is bolstered by individual testimony tending to show intentional discrimination, the plaintiff has stated a prima facie case. Having met the "nononerous" burden, the plaintiff is entitled to judgment should the university offer no evidence in rebuttal. That is never the case, however, particularly since *Burdine* has established that the defendant's rebuttal burden is also light. Since *Hazelwood*, the defending university can rebut the plaintiff's prima facie case by challenging the plaintiff's statistics, as by contending that those statistics do not account for differences in the quality of research by the tenure candidates.

Although at this point, the plaintiff may have nothing new to add to the case, other than a general denial of the defendant's conclusion, she should not automatically lose. Plaintiffs in title VII disparate treatment claims commonly present initially all evidence relating to the issues of both inference of discrimination and pretext.[190] Defendants then not only articulate a nondiscriminatory reason for the adverse decision, but present all evidence concerning the relative qualifications of the plaintiff and the successful professors as well. It is therefore not improper for the court to weigh all evidence after the defendant's rebuttal stage, even though no new evidence is presented by the plaintiff. In the case illustrated, the judge could render a decision in favor of the plaintiff, concluding that her statistics showing a gross disparity in tenure decisions made it more likely than not that the university engaged in gender discrimination as a standard operating procedure. The plaintiff is not, however, automatically entitled to relief if the case is treated as a pattern or practice case.

The pattern or practice formulation of *Teamsters* should be used in all employment discrimination claims against universities, whether they proceed as individual claims or as class actions.[191] In *Teamsters*, as is common in complex employment discrimination litigation, the trial was bifurcated for the separate issues of liability and damages.[192] Once the

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[190] The common contraction of the three-stage *McDonnell Douglas* sequence into two is noted at C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 69-70 (1980).

[191] Individual claimants can rely on the analysis utilized in *Teamsters*, which was brought by the government seeking classwide relief. *See, e.g.*, Furnco Constr. Co. v. Waters, 438 U.S. 567, 581-82 (1978) (Marshall, J., concurring in part) (applying *Teamsters* analysis to claims for individual relief).

[192] International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977). Bi-

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government established that the defendant had engaged in a standard operating procedure of discrimination (by proof of glaring statistical disparities), the court treated each employment decision of the employer as infected by that practice.[193] With liability thus determined, each applicant within the category of presumed victims was entitled, at the damages phase of the trial, to relief absent proof by the employer that the individual was unqualified for the position to which he or she aspired.[194] Proof could be by absolute lack of qualifications or unavailability of the job sought (no vacancy). The burden of proof on the causal connection between the employer's practice and the employer's discrimination against a particular individual was placed upon the defendant.[195] There is, in fact, little or no difficulty in applying the *Teamsters* formulation to a private class action, since bifurcation of the issues of liability and damages is common in class actions. The *Teamsters* formulation has not been used in cases seeking individual rather than classwide relief. However, it is clear that individual claims can use statistical disparities to raise the inference of discrimination, which may, in proper instances, be probative of the ultimate issue of liability.[196] Individual claimants, in appropriate circumstances, should ask the court to find the defending university liable for a pattern or practice, or

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furcation is pursuant to Rule 42(b) of the Federal Rules of Civil Procedure: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue . . . ." FED. R. CIV. P. 42(b); *see also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1260 & n.131 (1976).

[193] International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977); *see also* Presseisen v. Swarthmore College, 442 F. Supp. 593, 601 (E.D. Pa. 1977).

[194] International Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977).

[195] *Id.*

[196] This was first noted in McDonnell Douglas Corp. v. Green, 411 U.S. 793 (1972):

> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general *policy and practice* with respect to minority employment. On the latter point *statistics* as to petitioner's employment policy and practice *may be helpful* to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

Id. at 804-05 (citations and footnote omitted) (emphasis added). *McDonnell Douglas* was an individual claim, not a class action. *See also* Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980). In Connecticut v. Teal, 102 S. Ct. 2525 (1982), the majority opinion refused to dissociate the policy objectives of title VII from the two legal theories by which violations may be proved. *Id.* at 2536 (Powell, J., dissenting).

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for a standard operating procedure, of sex discrimination in tenure decisions. The need for this treatment of individual claims is particularly acute when courts are denying certification of a class for lack of numerosity.[197] When the court determines liability on the issue of pattern or practice of sex discrimination, the burden would shift to the university to prove that the individual claimant was not qualified for the position, or that the position was not available.

Shifting the litigants' burden by adopting the pattern or practice analysis may be a modest step[198] in aid of university plaintiffs. Courts must still find that the statistics and other evidence make defendants' liability more likely than not. Moreover, this burden shifting still leaves the question of qualifications, which is tied directly to the university's professional evaluation of a candidate's merit. The problem is that the deference accorded the university's judgment at the rebuttal stage simply may be transplanted to the damages stage. Both deference and transference are inappropriate. Deference is wrong even at the rebuttal stage because it conflicts with Congress' manifest intent to eradicate employment discrimination in the university.[199] Moreover, the legisla-

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[197] *See* Michigan State Univ. Faculty Ass'n v. Michigan State Univ., 93 F.R.D. 54, 59-61 (D. Mich. 1981) (decentralized, departmental decisionmaking negates commonality required for class action; focus on department then negates numerosity requirement); Sanday v. Carnegie-Mellon Univ., 15 Empl. Prac. Dec. (CCH) ¶ 8088 (W.D. Pa. 1976) (denial of certification of university-wide class because of departmental autonomy; no commonality or typicality of claims). *Contra* Perk v. Oregon State Bd. of Higher Educ., 93 F.R.D. 45 (D. Or. 1981) (university-wide class certified to challenge general course of discrimination; if decentralized decisionmaking is established, subclasses are appropriate); *see also* Townsel v. University of Ala., 80 F.R.D. 741, 743 (N.D. Ala. 1978) ("Equal employment opportunity suits involving academic positions at colleges or universities are ill suited for class actions because the decision in question must be individually scrutinized."). Most recent cases, however, have certified the cases as class actions. *See, e.g.*, Rajender v. University of Minn., 546 F. Supp. 158 (D. Minn. 1982).

[198] An argument can be made that any reform should be modest in contrast to the most radical solution of imposed quotas. Even though quotas might not result in degradation of quality or merit, the imposition of quotas creates the *perception* of inadequate quality. That is, the majority tends to see minority advancement achieved through quotas as an unfair benefit, one not based on merit, and worse, one antithetical to merit. In Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980), the court, after denying the plaintiff's claim, suggested that courts should be slow to grant tenure: "To award tenure to marginally qualified candidates would block the road to advancement for more highly qualified prospects who may be coming down the tenure track in the future and seriously impair a university's quest for excellence as distinguished from mere competence." *Id.* at 70; *see also* Bartholet, note 12 *supra*, at 1022.

[199] There is scant legislative history on the purpose of the original exemption for educational institutions. *See* Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir.),

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tive history of title VII explicitly states that discrimination laws were intended to help not only victims of discrimination at lower level positions, but at all levels.[200] To accord deference to the university at the damages stage of a bifurcated trial repudiates congressional intent.

A finding of pattern or practice liability is not determinative of relief. Universities can still rely on their judgment of intellectual work product, teaching effectiveness, and the mission of the department in order to refuse relief to the individual plaintiff. However, the burden would be upon the university to prove — again, only by a preponderance of the evidence — that the proferred judgment actually was made as to the plaintiff, unrelated to her sex, and that it was a reasonable reflection of reality. The university's judgment need not be held to standards of perfection; it is enough that the university's judgment is reasonable in light of the contemporary scholarly standards of the discipline in question.

When the court feels incompetent to review the nature or accuracy of the judgment, it may appoint a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure.[201] In cases involving complex litigation, courts commonly become educated through the lawyers and experts and reach a conclusion therefrom. When the court is uncomfortable in this role, as it appears to be in university cases, it could appoint a special master of noted expertise in the discipline in question. The master's power would be limited to the filing of a report on the schol-

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cert. denied, 439 U.S. 984 (1978); Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J.L. & EDUC. 429, 429 n.4 (1976). However, it is clear that the purpose of the 1972 amendments was to combat a well-documented and chronic history of discrimination. Consider the House Report:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees — primarily teachers — from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other field of employment. . . . The committee feels that discrimination in educational institutions is especially critical. The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fuure [sic] development.

H.R. REP. NO. 238, 92d Cong., 1st Sess. 19-20, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155. When courts have given deference to the university's judgment, they have "abdicated their role as ultimate enforcers of a clearly expressed national policy against gender-based discrimination in employment." Friedman, note 16 *supra*, at 39 (footnotes omitted).

[200] 118 CONG. REC. 3802 (1972) (statement of Sen. Javits).

[201] *See* FED. R. CIV. P. 53(a).

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arly judgment of the university committee.[202] The special master is not to substitute his judgment for that of the university committee, but merely to remark upon whether the committee's judgment was reasonable in light of scholarly standards in the field, and whether the university's judgment is consistent with its past practice in evaluating male candidates.

The pattern or practice formulation recommends itself by placing disparate treatment claims on a more equal footing with disparate impact claims. The pattern or practice formulation, although still requiring a finding of intentional discrimination, focuses on the consequences of the defendant's employment practices at the employer's establishment. Both the treatment and the impact theories would then concern themselves with effects, the difference being that treatment claims emphasize effects resulting from some form of (perhaps subconscious) malice, while impact claims emphasize effects resulting from ill-considered though not malicious employment practices.

Moreover, disparate treatment theory must be informed by the policy objectives of title VII, as explained by *Griggs*. Historical disadvantage, unfair burdens, inequality — title VII seeks to eliminate them all to the extent these inequities appear in the workplace. If courts will view university plaintiffs' cases against the social facts — such as those data presented in this article — of unequal rewards for apparently equal performance, the courts will be looking squarely at title VII's concerns. Both aggregate and specific statistics could indicate that a defendant is reflecting and repeating societal discrimination. This understanding should ease the plaintiff's burden on the ultimate issue of intentional discrimination.

Any worry that this approach will wed universities to unqualified professors can be alleviated by this explanation: the courts will never tie a university to a professor unqualified in terms of the university's objective criteria. When the university's criteria are subjective and more or less elusive, the university may be stuck with a professor it did not want. However, it is possible — perhaps likely — that these professors, particularly when they are female or minority, may function particularly well in their role as exemplar to students.[203] Qualified (because

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[202] *See* FED. R. CIV. P. 53(c). At least one court has used masters to oversee settlement. *See* Broad, *Ending Sex Discrimination in Academia*, 208 SCI. 1120, 1121-22 (1980) (discussing appointment of master by U.S. District Court for the Fourth Division of Minnesota in suit brought by Shyamala Rajender; *see* Rajender v. University of Minn., 24 Fair Empl. Prac. Cas. (BNA) 1045 (D. Minn. 1978).

[203] For the concept of race as merit-related, see Bartholet, note 12 *supra*, at 1013-26;

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the university could not prove otherwise at the damages phase), these faculty may exhibit traits of creativity and integrity heretofore unrecognized by the university. Specifically, to the extent the university is forced to retain qualified faculty whom it disfavors for subjective reasons, relief to the disfavored may inject into the university healthy diversity of style and purpose. The pattern or practice approach does not deny the force of merit. Like disparate impact analysis, it is actually focused on merit. But when merit cannot be proven, discriminatory consequences cannot go unchecked.

CONCLUSION

Women do not fare well in the university reward system. Female professors who seek redress under the Civil Rights Act of 1964 face insurmountable barriers in the form of legal theories: disparate impact theory is rarely appropriate, and disparate treatment theory affords little hope of recovery. Legal and extralegal change must be initiated in order to effectuate one of the fundamental purposes of the 1972 amendments to title VII: the elimination of discrimination in university employment on the basis of sex.

The pattern or practice proposal, and the appointment of a special master, will afford no panacea to the problem, but it could minimize its severity. Any step in the right direction by the courts can be expected to exert influences on parties not yet in litigation to comply voluntarily with title VII. Adoption of the pattern or practice analysis, coupled with judicial use of special masters, will send the message to the academy that the law will not tolerate underground discrimination. The university will be instilled with a heightened awareness of its obligations under the Civil Rights Act.

Extralegal solutions must be combined with legal reform. The extralegal activity should continue to include such work as scholarly attention to the phenomenon and the establishment of special committees to collect precise data on employment decisions at particular institutions.[204] Moreover, women's groups should file amicus briefs in univer-

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see also, Fallon, note 53 *supra*, at 871-76. If race can be a merit, or related to successful job performance, so can sex.

[204] *See, e.g.*, *Association Censures Five Departments*, 23 ANTHROPOLOGY NEWSLETTER, Jan. 1982, at 1, col. 1 and 5, col. 1. A special survey on the status of women led to the adoption of a ban on sex discrimination by the American Association of Law Schools. *See* H. KAY, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 873 (2d ed. 1981); *see also* Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 532-33 (1980) (noting success

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sity cases.[205] The goal is not only informal resolution of specific problems, but the creation of an environment in which sex discrimination is recognized, by the university and throughout society. When the university recognizes that it is the paradigm of upper level sex discrimination, it can serve as a model for the solution. It then can educate in the interests of social progress.

The importance of finding a solution to this intractable problem cannot be overstated. The data on women's position in university life warrant one of two conclusions: either enormous numbers of women are unqualified for the positions to which they aspire, or sex discrimination is operating in the employment decisions of universities. Current legal theory accepts the conclusion that women are not qualified. This theory is wrong.

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of voluntary affirmative action programs in law faculty hiring); Kay, *Commentary: The Need for Self-Imposed Quotas in Academic Employment*, 1979 WASH. U.L.Q. 137.

[205] This suggestion was first made by Vladeck & Young, note 16 *supra*, at 78. It would be useful for women's groups to compile a brief bank similar to the one available on issues of sexual harassment, available from Working Women's Institute, 593 Park Ave., New York, N.Y. 10021.

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