THE BOTTOM LINE LIMITATION TO THE RULE OF *GRIGGS V. DUKE POWER COMPANY*

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In *Connecticut v. Teal*[1] the Supreme Court issued a ruling of major importance to the way the law defines employment discrimination. By a five-to-four vote, the Court resisted an effort to curb the principle that for more than a decade had been the cornerstone of equal employment opportunity. In doing so, the Court, for the present, left apparently intact the protection Title VII of the Civil Rights Act of 1964[2] has been deemed to afford individuals injured by employment practices that more heavily burden one group than another. Yet, the narrowness of the margin by which the Court reached its decision, in conjunction with the Court's failure to resolve a significant related issue, raises a question about the future of that protection.

Part I of this article analyzes the background to the *Teal* decision and the treatment by the majority and dissent of the issue known in employment discrimination law as the "bottom line" limitation to the disparate impact theory of employment discrimination. Part II explains why, for reasons beyond those considered by the *Teal* majority, not only was the Court's rejection of the bottom line theory manifestly correct, but a contrary result would have had grievous consequences. Part III then argues for a similar rejection of the bottom line limitation in those situations where most observers have taken for granted that the bottom line limitation would apply.

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1. 457 U.S. 440 (1982).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

I. THE *Teal* DECISION

In its 1971 decision in *Griggs v. Duke Power Co.*[3] a unanimous Supreme Court held that even though an employer applies the same employment criteria to all racial groups and does so without intending to discriminate on a proscribed basis, it is unlawful for the employer to use selection practices that disproportionately disadvantage racial groups unless the practice can be shown to have "a manifest relationship to the employment in question."[4] *Griggs* involved a high school diploma requirement and the use of standardized tests. The Court found that both of these criteria disproportionately disqualified blacks from certain jobs and that neither of them was shown to be related to the performance of the jobs for which they were used.

Courts subsequently applied the *Griggs* rule to a variety of practices that disparately affect minorities or women. These practices included nepotism policies,[5] refusals to hire persons with arrest[6] or conviction records,[7] discharges of persons whose wages have been garnished,[8] as well as experience[9] and height and weight requirements.[10] Its most significant application, however, continues to involve unvalidated testing practices that disadvantage blacks or Hispanics.[11] It is difficult to exaggerate the

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

4. *Id.* at 432. Elsewhere in *Griggs* the Court described the required justification for such practices as "business necessity." *Id.* at 431. While there has been considerable discussion of the significance of various formulations of the employer's burden, *see e.g.*, Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 after* Beazer and Burdine, 23 B.C.L. REV. 419 (1982); Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981), for present purposes, the phrase "job-relatedness" suffices.

5. *See* Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 3533 (1984).

6. *See* Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972).

7. *See* Green v. Missouri P. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).

8. *See* Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp. of Am., 332 F. Supp. 490 (C.D. Cal. 1971).

9. *See* Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981); Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976).

10. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977) (women/height and weight); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) (Hispanics/height only).

11. The lower courts originally relied on *Griggs* to bolster an existing line of authority invalidating departmental seniority systems that perpetuated past discriminatory assignment patterns. *See, e.g.*, United States v. St. Louis-S.F. Ry. Co., 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); Robinson v. Lorillard Corp., 444 F.2d 791

rule's significance in ensuring that employers evaluate all individuals without regard to arbitrary criteria that, for an assortment of reasons, more heavily burden minorities or women.

In *Teal* the Court faced the question whether, under *Griggs*, an employer need demonstrate the job-relatedness of each element of its selection process that has a disparate impact upon a certain group, if the overall ("bottom line") result of the entire process is the selection of members of that group at a rate equal to the group's representation in the relevant labor pool. The plaintiffs in *Teal* were black employees of the Department of Income Maintenance of the State of Connecticut who were denied promotion to the position of Welfare Eligibility Supervisor because they failed an examination shown to have an adverse impact on blacks. Notwithstanding the adverse impact of the test, however, blacks were selected at a high enough rate from among those who passed the test, evidently as a result of affirmative action on the part of the State, that the overall selection rate of black candidates was higher than that of whites. Hence, the State argued, because the selection process did not have an adverse impact at the bottom line, it should not be required to prove the job-relatedness of the test.

The district court agreed with this argument.[12] This decision accorded with other lower court authority that had also upheld the bottom line approach to *Griggs*.[13] Nevertheless, the Court of Appeals for the Second Circuit reversed, rejecting the approach in the circumstances before it.[14] The court, however, explicitly limited its ruling to the situation where the discriminatory ele-

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(4th Cir.), *cert. denied*, 404 U.S. 1006 (1971). In Teamsters v. United States, 431 U.S. 324 (1977), however, while acknowledging the applicability of the *Griggs* rule to such situations, the Court held that Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h) (1982), insulated bona fide seniority systems from such an attack. In light of the Court's subsequent broad interpretations of what constitutes a bona fide seniority system in California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980), and American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), *Griggs* is unlikely to be of further importance in this area.

12. Teal v. Connecticut, No. B-79-128 (D. Conn. Aug. 8, 1980), *rev'd*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982).

13. Among those decisions deemed by the *Teal* dissent to have squarely considered the issue, and in each instance to have accepted the bottom line approach to *Griggs*, were: EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980); EEOC v. Navaho Ref. Co., 593 F.2d 988 (10th Cir. 1979); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Rule v. Ironworkers Local 396, 568 F.2d 558 (8th Cir. 1977); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Williams v. City & County of San Francisco, 483 F. Supp. 335 (N.D. Cal. 1979), *rev'd mem.*, 685 F.2d 450 (9th Cir. 1982); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256 (D. Conn. 1979); Lee v. City of Richmond, 456 F. Supp. 756 (E.D. Va. 1978). *See* 457 U.S. at 460 n.5 (Powell, J., dissenting).

14. Teal v. Connecticut, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982).

ment in the selection process presents a pass-fail barrier that could disqualify a candidate from further consideration and suggested that it would reach a different result where the element merely received a certain weight in a multi-component selection process.[15]

When the Supreme Court granted *certiorari*, two considerations seemed to enhance the plaintiffs' position. First, as noted, *Teal* involved a pass-fail barrier that could absolutely preclude a candidate from further consideration. At a minimum, this precluded the defendant from portraying the situation as involving a complex aggregate of varied selection devices—some favoring whites and some favoring blacks, some job related and some not—where the complicated process of sorting out the impact of each device and determining its job-relatedness was unlikely to be worth the effort, if, indeed, it was possible at all.[16] Second, because the State's bottom line performance had clearly resulted from affirmative action in the form of preferential selections from among blacks who passed the test, those opposed to or uneasy with affirmative action might be inclined to support the plaintiffs' position.[17]

The Supreme Court affirmed the Second Circuit's decision. Writing for the five-member majority,[18] Justice Brennan consid-

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15. *Id.* at 138-39.

16. The Lawyers' Committee for Civil Rights Under Law, for instance, in its *amicus curiae* brief requesting the Court to reject the bottom line in *Teal*, indicated that it believed the bottom line limitation on *Griggs* should apply where the discriminatory element in the selection process was not a pass-fail barrier, but only an intermediate step in a multifaceted selection process. Brief for the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in Support of Respondents at 5.

17. The AFL-CIO argued before the Court that the bottom line theory in *Teal* amounted to "the proposition that two wrongs make a right." Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Respondents at 6-7.

18. Calling the decision "a long and unhappy step in the direction of confusion," Justice Powell, joined by Justices Burger, Rehnquist, and O'Connor, primarily attacked the majority's holding as blurring the distinction between disparate impact and disparate treatment theories of employment discrimination. Arguing that plaintiffs "cannot have it both ways" by relying on group figures to prove discrimination at one point in the process while not accepting group figures to prove nondiscrimination in the overall process, the strongly worded dissent found it unnecessary to analyze the bottom line theory in its alternative formulation as an affirmative defense, evidently believing it sufficiently clear that no prima facie case was established. 457 U.S. at 456-60.

The dissent went on to dispute the majority's reliance on the Court's prior decisions. It argued that, of the cases on which the majority purported to find support, those involving disparate impact, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), Dothard v. Rawlinson, 433 U.S. 321 (1977), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), had not treated the bottom line issue and those stressing Title VII's protection of individuals, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), and City of Los Angeles Dep't of

ered and rejected contentions (1) that the nondiscriminatory[19] bottom line result precluded plaintiffs from establishing a *prima facie* case, or, alternatively, (2) that this result provided an affirmative defense.[20] In treating the first contention, Brennan stressed Title VII's focus on the opportunity to be selected for employment rather than the actual selection. He then rejected the affirmative defense as inconsistent with Title VII's protection of individuals.

The Court commenced its analysis of the prima facie case[21] by quoting section 703(a)(2) of Title VII[22] and then discussed its holding in *Griggs* that, irrespective of the fact that a practice applies to blacks and whites alike, Title VII prohibits a practice that denies employment opportunities to a disproportionate number of blacks, unless it relates to job performance.[23] In finding that the practice in question fell within the language of the statute as interpreted in *Griggs*, the Court gave considerable em-

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Water & Power v. Manhart, 435 U.S. 702 (1978), had involved disparate treatment. 457 U.S. at 460-63. The dissent then briefly addressed the policy implications of the decision, observing that the expense of ensuring the job-relatedness of selection procedures might well lead to "the adoption of simple quota hiring." That result, it reasoned, was unfair to individuals, was unlikely to lead to a competent work force, and might ultimately result in the employment of fewer minorities. *Id.* at 463-64.

The dissent did not even mention that the favorable overall black selection rate had resulted from affirmative action. Indeed, as just noted, it observed that the result reached by the majority itself might lead to quota hiring. As to the pass-fail character of the test at issue, although the dissent had caustically disparaged the majority's reasoning throughout, it did note that it understood this reasoning to permit the application of the bottom line limitation where the test constituted only one factor in a multi-component selection process rather than a pass-fail barrier, *id.* at 463 n.8; presumably the dissent agreed with this result.

19. This article will use *nondiscriminatory*, the word that the *Teal* majority used to describe the bottom line result relied upon by the employer, *e.g.*, 457 U.S. at 447 n.7, 454. For reasons stated throughout the article, however, the word has its shortcomings.

20. *Id.* at 447 n.7.

In Part II.B. of the opinion, *id.* at 451-52, the Court also treated, and rejected, an argument of the *amicus curiae* United States Department of Justice that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982), precluded plaintiffs from challenging a professionally developed examination where the bottom line result of the selection process was nondiscriminatory.

21. 457 U.S. at 445-51.

22. Section 703(a)(2) states:

> It shall be an unlawful employment practice for an employer—
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> . . . .
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (1982).

23. 457 U.S. at 445-49.

phasis to the word "opportunities." It noted in particular that "[t]he statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[24] In a footnote,[25] the Court underlined its distinction between the opportunity to be selected and the actual selections themselves by distinguishing section 703(a)(2) from section 703(a)(1). The latter section makes it an unlawful employment practice "to fail or refuse to hire or to discharge any individual,"[26] but does not refer to employment opportunities generally. The Court reasoned that although section 703(a)(1) might only apply to actual selections, 703(a)(2) prevents employers from discriminating as to employment opportunities.

The Court went on to stress the word "opportunity(ies)" several more times in finding that the practice at issue presented precisely the type of "barrier" to equal employment opportunity that concerned the Court in *Griggs*.[27] It found support for this focus in the legislative history to the 1972 amendments of Title VII,[28] which extended its coverage to state and municipal employers, and in its own prior decisions.[29] Thus, the Court concluded that the plaintiffs had established a *prima facie* case, observing that "[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."[30]

In Part III of the opinion,[31] the Court rejected the argument, advanced by the State and certain *amici curiae*, that it should accept nondiscriminatory bottom line performance as an affirmative defense, terming the argument "in essence nothing more than a request that we redefine the protections guaranteed by Title VII."[32] In treating this point, the Court shifted its empha-

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24. *Id.* at 448 (emphasis in original).
25. *Id.* at 448 n.9.
26. 42 U.S.C. § 2000e-2(a)(1) (1982).
27. 457 U.S. at 448-51.
28. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13.
29. The Court cited New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a refusal to hire persons using methadone against allegation that it had a disparate impact upon blacks); Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding height and weight requirements that disparately affected women unlawful); and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (holding tests that disparately affected blacks unlawful). 457 U.S. at 450.
30. 457 U.S. at 451 (emphasis in the original).
31. *Id.* at 452-56.
32. *Id.* at 453.

sis slightly to the word "individual" in Title VII's proscription of employment discrimination. It observed that, in arguing that bottom line performance might be a defense to a disparate impact claim, the State and its supporting *amici curiae* "appear to confuse unlawful discrimination with discriminatory intent."[33] An employer's overall performance, the Court noted, has relevance only to the question of intent—a question not at issue in a disparate impact case.[34] The Court went on to emphasize that its prior decisions[35] had found that "the 'statute's focus on the individual is unambiguous.' "[36] The Court rejected efforts to distinguish these cases on the grounds that they involved facially discriminatory policies, concluding that "irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of . . . discrimination.' "[37]

In reaching its decision, the Court apparently gave no weight to the fact that the favorable overall black selection rate resulted from affirmative action.[38] While pointing out that the Second Circuit had characterized the final aspect of the selection process as an affirmative action program, the Court noted that the State contested that characterization and that it was unnecessary to resolve the dispute in the case before it.[39] As to the nature of the discriminatory element in the selection process, although the Court did quote the Second Circuit to the effect that the pass-fail barrier at issue precluded those who failed the test

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33. *Id.* at 454.

34. *Id.*

35. The cases cited by the Court (and their relevant holdings) are: Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (holding refusal to hire mothers of preschool age children unlawful notwithstanding that 70-75% of applicants and 75-80% of the hires for the position in question were women); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (holding balanced work force not a defense to purposeful discrimination against an individual); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding requirement of larger contributions to pension fund from female employees unlawful notwithstanding that women lived longer as a group); and Teamsters v. United States, 431 U.S. 324 (1977) (holding employer's subsequent hiring of minorities not a defense to earlier post-Act unlawful discrimination). 437 U.S. at 454-55.

36. 457 U.S. at 455 (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978)).

37. 457 U.S. at 455 (quoting Teamsters v. United States, 431 U.S. 324, 342 (1977)).

38. Nevertheless, the Court did state: "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." 457 U.S. at 455. Whether or not the Court intended "favorably treats" to connote affirmative action, it seems not to have been imparting particular significance to the matter of the means by which the employer reached a nondiscriminatory bottom line result.

39. *Id.* at 444 & n.5.

from further consideration,[40] the Court did not state whether it considered the nature of the barrier to be a relevant factor.

II. WHY *Teal* Was Correctly Decided

In concluding a strongly worded dissent,[41] Justice Powell observed that a potential ramification of the majority's rejection of the bottom line theory was that the expense of ensuring the job-relatedness of selection procedures would lead to "the adoption of simple quota hiring."[42] In fact, it is the bottom line approach to *Griggs* that subordinates a person's right to be considered on the basis of individual merit to a quota system that, for the purpose of compliance with the nation's employment discrimination laws, deems fungible all persons designated as members of the same minority group. Regardless of the wisdom or propriety of remedial quotas directed at ameliorating the effects of past discrimination, in the bottom line context there exist some very strong reasons—most of which *Teal* failed to discuss—for objecting to this subordination of individual to group rights. This part of the article appraises the correctness of the *Teal* decision in the context of the pass-fail barrier that was before the Court. Part III then discusses the bottom line issue where the discriminatory element in the selection process is but one of a number of weighted factors. The first section of this Part argues that the *Teal* majority correctly analyzed the statutory language that constituted its principal focus in deciding the case. The second considers the policy considerations largely ignored by the *Teal* majority that, fully explored, add substantial support for the Court's decision.

A. Language and Logic

Because little doubt exists that the State achieved its acceptable overall selection rate through affirmative action measures on the part of the employer,[43] it remains debatable whether one

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40. "[W]here 'an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process,' that barrier must be shown to be job related." *Id.* at 445 (quoting Teal v. Connecticut, 648 F.2d 133, 138 (2d Cir. 1981)).

41. *See supra* note 18.

42. 457 U.S. at 463-64 (Powell, J., dissenting).

43. The State did not make a colorable argument before the Court that affirmative

should regard *Teal* as actually presenting a situation where an element in a selection process disqualified a disproportionate number of individuals from a certain racial[44] group but the process as a whole did not disproportionately exclude the group. Rather, it might be argued, the "selection process"—the phrase commonly understood to mean the evaluative process that purports to determine the candidates' relative abilities to perform a particular job—did have an adverse impact upon blacks as a group. One can view the subsequent affirmative action as an artificial measure taken to correct the impact upon the group though not to remedy the harm to each individual affected by the policy.

For present purposes, however, we may leave aside whether this consideration ought itself to decide the issue in favor of the *Teal* plaintiffs. Assuming that the *Teal* case did actually raise the question whether harm to the individual or harm to the group represents the critical inquiry under Title VII and *Griggs*, the majority reached the correct result. In its analysis of the *prima facie* case,[45] however, the Court apparently deemed it necessary to find a disparate impact upon blacks as a group at the point in the process where blacks were disproportionately excluded from the pool of persons eligible for further consideration. This approach, while supportive of the appropriate result in *Teal*, constituted an unnecessarily subtle way of arriving at that result, one which may prove unsatisfactory in other circumstances.

The Court's focus on Title VII's guarantee of equal treatment of the individual,[46] expressed only in rejecting nondiscriminatory bottom line performance as an affirmative defense, more accurately captured the wisdom of *Griggs*'s interpretation of the statute. Although many may have thought that *Griggs* involves a concept of group rights because its application in a particular factual situation necessarily entails statistical inquiry into the way a practice affects a group,[47] the protection of individual

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action had not caused the favorable overall black selection rate. *See* Brief of Petitioners at 4 n.1; Brief of Respondents at 5, 22-23; Reply Brief of Petitioners at 3-4.

44. For ease of reference, I will usually discuss the issues in terms of racial impact. Unless otherwise indicated, these statements pertain to disparate impacts upon gender and ethnic groups as well.

45. 457 U.S. at 445-51.

46. *Id.* at 452-56.

47. *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 504, 508-11 (1980); Jain & Ledvinka,

rights remains *Grigg*'s primary focus. The *Griggs* rule simply embodies the common sense proposition that to discriminate against an individual on the basis of a characteristic he is more likely to have because of his race is to discriminate against the individual on the basis of his race.[48] This characterization is not merely convenient phrasing to lend appeal to a certain way of looking at the bottom line issue. It also makes a difference in contexts beyond the bottom line issue.[49]

Economic Inequality and the Concept of Employment Discrimination, 26 LAB. L.J. 579 (1975).

48. Even if a reading of *Griggs* as primarily guaranteeing group rights had more support than it does, the explicitness of Title VII's focus upon the individual in its proscription of discrimination because of race, § 703(a)(1) and (2) of Title VII, 42 U.S.C. § 2000e-2(a)(1) and (2) (1982) (quoted in relevant part *supra* note 22 and text accompanying notes 18-26), dictates a reading of the *Griggs* rule as protecting individuals from discrimination on the basis of race-related characteristics. Such an interpretation finds ample support in Title VII's legislative history, the language of *Griggs* itself, and the Court's post-*Griggs* interpretations of the statute—all of which stress that Title VII's role as a nondiscrimination statute is based on the principle of fairness to the individual. *See* Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979); *see also Teal*, 457 U.S. at 452-55 (discussing the statute's focus on the individual); *see also id.* at 454-55 (discussing Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), a case not mentioned in the Comment). To be sure, concern about the status of blacks as a group played an important role in prompting Congress's enactment of Title VII. The Supreme Court relied on indications of this concern to hold in United Steelworkers v. Weber, 443 U.S. 193 (1979), that Title VII did not prohibit voluntary race-conscious affirmative action efforts.These expressions of concern, however, in no way conflict with the view that guaranteeing individual fairness represents the mechanism for addressing the problem. *Cf.* Comment, *supra*, at 932 n.109. Moreover, even if Congress indicated a belief that this guarantee would prove inadequate, this would hardly suggest that courts should overlook the guarantee of the rights of blacks as individuals. In any case, the legislative history as a whole makes clear that Congress believed the guarantee of fair treatment of individuals would at least be Title VII's *primary* means of elevating the economic status of blacks and other groups that had previously been denied fair treatment. *See id.* at 926-28; *see also Teal*, 457 U.S. at 454. After all, this approach seems to reflect what a reasonable person would presume a ban on discrimination means.

49. *See* Comment, *supra* note 48. The Comment, relying on theories expressed in Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 299-304 (1971), argues for an interpretation of *Griggs* as prohibiting discrimination on the basis of characteristics that are the "functional equivalents" of race, an interpretation similar to that expressed here. The Comment contrasts this fairness concept of "equal treatment" for individual members of the group with a social policy concept of "equal achievement" for the group, and argues that, while the equal achievement/social policy concept might justify a virtually limitless standard of business necessity, the functional equivalence/equal treatment/fairness concept would entail a business necessity standard considerably more lenient than that typically imposed by the courts. The Comment bases this argument on the fact that an element of the functional equivalence/equal treatment/fairness concept, as originally formulated in Fiss, *supra*, at 301-02, is that the criterion at issue serves no legitimate business purpose. *See* Comment, *supra* note 48, at 924-25.

Yet, it does not necessarily follow that to disadvantage a person on the basis of a race-related characteristic is any less unfair because the employer derives *some* benefit from the practice. Indeed, even when the employer's reasons for a policy satisfy the most

Watkins v. United States Workers of America, Local No. 2369,[50] a case decided early in the post-*Griggs* development of the disparate impact theory, demonstrates this difference. *Watkins* involved a challenge to a "last- hired/first-fired" provision of a negotiated seniority system. The employer had had a long history of racial discrimination in hiring but for over ten years had hired blacks on an equal basis with whites. Consequently, when it implemented a major layoff on the basis of the seniority system, the layoff fell far more heavily on the employer's black work force than its white work force. Plaintiffs argued that the implementation of the layoff constituted a neutral practice that disproportionately disadvantaged blacks and, under *Griggs*, violated Title VII unless justified by business necessity.

The Fifth Circuit, on appeal of a district court ruling for plaintiffs,[51] reversed, refusing to apply *Griggs* to such a situation. It distinguished *Griggs* by noting that in that case, "[w]ithout business necessity, black applicants, otherwise equal with white applicants in ability to perform the job, were more likely to be eliminated from employment by [the high school diploma requirement, an] irrelevant criteri[on]."[52] In *Watkins*, however, each plaintiff was "treated equally with white persons who have places equal to his in the [employment] hierarchy. No individual black employee is, because of his race, more likely than his white counterpart to be affected by the applicable criteria, seniority."[53]

The last sentence provides the key to the court's analysis. If a person disadvantaged by a neutral policy can show that his race made it more likely that he would be affected, *Griggs* applies; if he was not more likely to be affected by the policy because of his race, *Griggs* does not apply. Layoffs disproportionately disadvantaged blacks as a group; nevertheless, no black was treated unfairly, since no black affected by the policy was more likely to be affected because of anything to do with his race.[54]

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stringent business necessity test, it would seem still to be unfair that the policy disadvantage individuals because of a race-related characteristic, although the law permits the unfairness. Nor is it clear that society should be willing to impose (bear) a greater economic cost to raise the economic status of a disadvantaged group than to ensure fairness to individual members of the group, particularly when ensuring that fairness at the same time raises the economic status of the group. The cost society is willing to bear to guarantee the rights of a criminal defendant, for example, suggests that society places a considerable premium on individual fairness.

50. 516 F.2d 41 (5th Cir. 1975).

51. 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975).

52. 516 F.2d at 45.

53. *Id.*

54. Although the *Watkins* court read *Griggs* correctly, it does not necessarily follow

Costa v. Markey,[55] the first appellate case to explore the implications of *Teal*, also illustrates that the issue of whether *Griggs* is deemed to protect groups or individuals who possess characteristics of the group goes beyond the bottom line issue. *Costa* presented a situation where a local police department had to hire a woman police officer to perform duties that only a woman could perform. In making the selection for the position the department imposed a 5'6" height requirement which, plaintiff asserted, had an unlawful disparate impact on women.

Originally deciding the case while *Teal* was pending before the Supreme Court, the First Circuit held that *Griggs* did not apply.[56] At that time the majority found the case to involve essentially the same issue as the *Teal* case, but specifically rejected the Second Circuit's approach.[57] After the Supreme Court affirmed the Second Circuit's decision in *Teal*, the First Circuit granted rehearing in *Costa* and ruled for the plaintiff.[58] Although recognizing arguable distinctions between *Teal* and the case before it where only women could be hired,[59] the court nevertheless reversed itself, finding that *Teal* required that "[t]he Court's focus must be on the first step in the employment process that produces an adverse impact on a group protected by Title VII, not the end result of the employment process as a whole."[60]

In his dissent Judge Coffin relied on the distinctions between *Costa* and *Teal*. Apologizing for having, as author of the first panel opinion, originally equated the case with *Teal*, he stated that he now believed that the cases were significantly different, and that the Supreme Court's affirmance of *Teal* ought not affect the result in *Costa*. Judge Coffin pointed out that, unlike *Teal*, where the employer made up for a disparate impact at one point in the selection process by action at another point in that process, in *Costa*, because of the initial determination to hire only women, men and women did not compete at any point in

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that the statute itself compelled its holding. Out of its concern for the status of blacks as a group, Congress could also have intended that employers justify practices if they have a group impact, even though they do not involve race-related unfairness to individuals. *See supra* note 48.

55. 677 F.2d 158 (1st Cir.), *rev'd on reh'g*, 706 F.2d 1 (1st Cir. 1982), *rev'd on reh'g*, 706 F.2d 10 (1st Cir.) (en banc), *cert. denied*, 464 U.S. 1017 (1983).

56. *Id.* at 160-61.

57. *Id.* at 161-62.

58. 706 F.2d 1 (1st Cir. 1982), *rev'd on reh'g*, 706 F.2d 10 (1st Cir.) (en banc), *cert. denied*, 464 U.S. 1017 (1983).

59. *Id.* at 5.

60. *Id.* at 4-5.

the selection process; hence, the height requirement never had a disparate impact on women.[61] Ultimately that view prevailed. The First Circuit granted rehearing *en banc* and, in an opinion authored by Judge Coffin,[62] found for the defendant on the grounds that "the height requirement cannot be viewed as having a disparate effect on women. In the absence of a discriminatory effect *Teal* simply does not apply."[63]

Judge Coffin's point had merit in removing *Costa* from the controlling principle of the majority's *prima facie* analysis in *Teal*. To the extent that this analysis looked for a group impact at some point in the process, it should not control in *Costa* where the height requirement at no step excluded a disproportionate number of women (compared with men) from further consideration. Nevertheless, the height requirement plainly excluded women from consideration because of a sex-related characteristic. From this perspective, the practice in *Costa* clearly involved sex discrimination, just as the practice in *Teal* involved race discrimination.[64] Thus, for the same reason *Teal* was rightly

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61. *Id.* at 8-10.

62. 706 F.2d 10 (1st Cir.) (en banc), *cert. denied*, 464 U.S. 1017 (1983).

63. *Id.* at 12.

64. In the *en banc* opinion, the First Circuit also discussed a challenge to its earlier reliance, *see* 677 F.2d at 160, on a line of cases, including Stroud v. Delta Airlines, Inc., 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977), which held that the disparate impact theory could not apply where the sexes did not compete. The court correctly rejected arguments that Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983), and County of Washington v. Gunther, 452 U.S. 161 (1981), cast doubt on that line of cases. 706 F.2d at 12. Nevertheless, *Stroud* really had nothing to do with the issue in *Costa*. *Stroud* involved a challenge to a no-marriage rule for a job classification that was entirely female. The plaintiff claimed only that application of the rule to that classification, but not to other classifications that had lower female proportions of employees, had an unlawful disparate impact. (The argument, whatever its merit, would have applied as well if the classification to which the rule was applied were merely disproportionately female, relative to classifications to which the rule was not applied.) The plaintiff did not, however, claim that women were more likely to be married than men. Thus, as in *Watkins*, the employer denied no person an opportunity for a reason in any way linked to his or her race or sex.

In James v. Delta Air Lines, 571 F.2d 1376 (5th Cir.), *cert. denied*, 439 U.S. 864 (1978), the court did rely on *Stroud* to reject a claim that a mandatory maternity leave rule imposed upon an all-female job classification was unlawful sex discrimination. Still, even if one considers discrimination against pregnant employees amenable only to a disparate impact analysis, and not to a disparate treatment analysis as well, *see* Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), *Stroud* did not dictate the *James* result nor, it would seem, was that result correct. For in *James*, unlike *Stroud*, the policy disadvantaged persons by a characteristic related to their sex.

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), presents the more troubling authority for the *Costa* issue. In *Farah*, the Court held, in a context where Hispanics comprised 96% of the employer's work force at the subject (San Antonio, Texas) facility, that a refusal to hire noncitizens did not constitute national origin discrimination, although the policy clearly disproportionately disadvantaged persons of Hispanic origin. In so ruling

decided, *Costa*, it is submitted, was wrongly decided; in either case, whether or not the practice at issue ultimately harmed the group, it harmed individuals for reasons associated with their race or sex.

B. Policy

As the *Teal* dissent observed,[65] the development of job-related selection procedures can be an expensive undertaking. Expensive as well is the litigation of questions of impact and job-relatedness not only for the litigants but also for a legal system so burdened by employment discrimination litigation over the last decade. In fact, this represents the primary reason that, notwithstanding the quota aspect of the bottom line issue as it arose in *Teal*, the bottom line limitation on *Griggs* received widespread support from employer groups[66] and even from a Department of Justice that was at the same time decidedly moving away from quotas.[67] After an expensive and in many respects unsatisfactory decade of a meticulous approach to remedying the plight of blacks in America, many felt that if, at lower cost, acceptable treatment of the group as group could be achieved, the individuals could safely be left to take care of themselves.

This view, however, presents two major problems. First, most of the advantages thought to be associated with the bottom line

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the Court noted "there is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating on the basis of Mexican national origin." *Id.* at 93. Although one could read this remark to mean that there can be no disparate impact claim in the absence of competition among groups, one could also read it to mean simply that the plaintiff did not pursue such a disparate impact theory. If the former reading of *Farah* is correct and has not been implicitly overruled by *Teal*, it is submitted that, for reasons expressed generally herein, *see infra* section II.B.2, it should be explicitly overruled.

65. 457 U.S. at 463 (Powell, J., dissenting). *See supra* note 18.

66. At least one court has noted that employers may prefer the use of quotas to actually ensuring that their practices conform to the requirements of the law and noted the reasons for that preference. United States v. Virginia Dep't of Highways & Transp., 554 F. Supp. 268, 270 & n.3 (E.D. Va. 1983); *see also* Seligman, *Affirmative Action is Here to Stay*, FORTUNE, Apr. 19, 1982, at 143, 162.

67. Misgivings within the Reagan administration about the appropriateness of affirmative action remedies that had been staples of government enforcement policy for more than a decade appeared as early as January 1981. *See Transition Team Calls for Cutbacks in Affirmative Action; Year-Long Freeze on EEOC Lawsuits, Guidelines*, Daily Lab. Rep., Jan. 23, 1981, at 1, 7-9. The Government's definitive change of position first manifested itself in January 1983 when the Justice Department sought to intervene to challenge a ruling upholding quota remedies for the New Orleans Police Department in Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982). *See* United States v. Virginia Dep't of Highways & Transp., 558 F. Supp. 99 (E.D. Va. 1983).

approach to *Griggs* do not exist at all; in fact, that approach may well be the more costly method of achieving even the putatively acceptable treatment of the group. Second, difficulties with the assumption of the essential fungibility of members of a minority group that underlies the bottom line theory raise a serious question whether the group treatment it contemplates can begin to fairly or effectively address the problems of disadvantaged groups or their members.

1. Illusory advantages of the bottom line—

a. Res judicata and collateral estoppel effects— Without the bottom line defense to a disparate impact claim, an employer sued on such a claim receives a determination of the impact and job-relatedness of its procedures in as timely a fashion as an overburdened judicial system can provide it. Such determinations generally would resolve the matter even as to persons not before the court.[68] Thus, whether successful or unsuccessful in defending its procedures, the employer has received useful guidance about how it may lawfully proceed in the future.

If, however, the Court upheld the bottom line approach to *Griggs*, any ruling that permits an employer to use a selection device—because for the time period at issue it has performed satisfactorily at the bottom line—will not have a conclusive effect. Because a ruling on an employer's bottom line performance for one time period could have no *res judicata* or collateral estoppel effect for other time periods, persons adversely affected by the selection practice could challenge it each time it is used.[69]

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68. When a court decides the issue of a practice's job-relatedness against the employer, it will as a rule enjoin the future use of the practice. When it decides in an employer's favor, there is as a practical matter little chance that an adversely affected individual will raise the issue again in a subsequent action. Potential Title VII litigants encounter significant difficulty in obtaining counsel. *See* Petete v. Consol. Freightways, 313 F. Supp. 1271 (N.D. Tex. 1970). An adverse decision on a job-relatedness issue rendered by a district court would probably make it impossible for an individual to retain counsel to relitigate the question. Courts that have deemed even EEOC findings of no reasonable cause highly probative in determining whether to appoint counsel, *e.g.*, Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1309 (5th Cir. 1977); McIntyre v. Michelin Tire Corp., 464 F. Supp. 1005, 1008 (D.S.C. 1978), are unlikely to appoint counsel in the face of an adverse court judgment. Moreover, Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (1982), provides for an award of attorney's fees to the prevailing party in a Title VII action. Although such awards are available to defendants only when the suit is "frivolous, unreasonable, or groundless," Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1977), the relitigation of an issue already decided by a district court in another proceeding might well be held to satisfy that standard.

69. The likelihood of subsequent litigation (and attendant uncertainty for all who might be affected thereby) may be substantial if in the first attempt to challenge a practice evidence as to the lack of job-relatedness of the practice has been developed in the EEOC investigation, during discovery, or in court. Moveover, while the job-relatedness issue would not have to be reached in court, it might well be reached anyway (for exam-

Each challenge would require at least an examination of the employer's bottom line performance, until the challenge involves a time period when the employer's bottom line performance falls short of that deemed acceptable. At that point a court would have to determine the impact and job-relatedness of the device. Such a situation does not serve judicial economy, the employer's interest in being able to rely on the legality of its practices, or the interest of employees in being able to make career choices knowing that litigation will not subsequently alter their places in the employment hierarchy.

b. Time period measured— The reference in the preceding paragraph to "the time period for which that [bottom line] performance is measured" raises an exceedingly difficult technical issue that may defy satisfactory resolution. Courts clearly must measure an employer's bottom line performance over some time frame—or, to state the same problem in different words, with regard to a defined set of employment decisions—just as in cases not involving the bottom line issue. There exists, however, no logical restriction upon how a plaintiff may focus upon a time period for demonstrating that, even if the employer discriminated at no other time, it did discriminate in the subject time period. Thus, a plaintiff could challenge the use of a discriminatory device for any group of selections for which the defendant failed to achieve a nondiscriminatory selection rate.[70] Indeed,

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ple, when during a full trial it is asserted as an alternative defense). If decided against the employer, the persons adversely affected by the practice may likely launch a renewed attack when they believe the employer's bottom line performance is unsatisfactory.

70. Issues of statistical significance ought not to present obstacles to an individual's challenging the use of a device for a small number of selections. Reference to a larger time period than that which the plaintiff puts at issue can usually show that the device has a disparate impact, because the tendency of a device to disadvantage certain groups will ordinarily vary little over even substantial periods of time. Moreover, even during the time period at issue, while there may be few selections, the employer may have administered the selection device to a great many candidates. In *Teal* 307 persons were tested in a selection process which produced 46 promotions. 457 U.S. at 444. Of course, with some criteria, such as height or weight requirements, it may be unnecessary even to examine the impact of the device on actual applicants. *See* Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977).

The absence of statistical significance in the selection rates also should not pose a problem. Because one would expect the overall result of the selection process to reflect the adverse impact of a device used in that process, the court does not need a statistically significant bottom line disparity to infer that the entire process has a tendency to discriminate. For example, if 100 whites and 100 blacks take a pass-fail exam, 70 whites and only 30 blacks pass, and 7 whites and 3 blacks (or even 6 whites and 4 blacks) are selected, it is clearly more reasonable to assume that the selection disparity, even if not statistically significant, results from the discriminatory element in the selection process rather than from chance. This connection between the impact of the device and the overall selection rates will be even clearer when the system actually ranks candidates. Where

even when the employer makes only one selection, problems may arise. An individual could challenge a device that had a disparate impact on his group if the employer selected a person from another group. Of course, permitting such challenges would completely undermine the utility of the bottom line approach to *Griggs*.

Yet, even if courts do not permit the plaintiff to define the time period for measuring the employer's bottom line performance, they have no basis for establishing a time period in a manner that will satisfactorily serve the purpose of the statute as informed by the legitimate ends of the bottom line theory. Only one principled restriction exists: under no circumstances should courts consider employment decisions made subsequent to the employer's notification of the EEOC charge.[71] Without this restriction, employers could with impunity use whatever unvalidated neutral practices they liked, while making up for any discriminatory impact by affirmative action selections only in those cases where a practice is actually challenged. Under such circumstances, most of these employers' neutral selection procedures would not, in the long run, perform nondiscriminatorily at the bottom line.[72]

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the rankings significantly correlate with the adverse impact of the device (or with race itself), the absence of statistically significant disparity between the actual and expected selections of a group for a small number of selections based on those rankings has no relevance.

The situation may be different where the employer's bottom line performance tends ordinarily to be nondiscriminatory because the group disadvantaged by the challenged practice performs better than other groups on other elements in the selection process. In such cases, evidence of the results of the selection process during other time periods might demonstrate that the entire selection process does not really tend to discriminate against the group disadvantaged by the challenged element; rather, the observed disparity for the period the plaintiff puts at issue may really result from chance. In the usual case, however, where the nondiscriminatory bottom line selection rate is due not to the group's superior performance on other elements in the selection process, but to affirmative action decisions of the employer, the selection rates during other time periods are irrelevant. What the employer chooses to do during other time frames does nothing to undermine the assumption that the observed disparity during the period the plaintiff puts at issue more likely results naturally from the discriminatory element in the selection process than from chance.

71. Reference to the EEOC charge is for the sake of simplicity. Actually there are certain other occasions, including, for example, notification of a charge with a state or local agency or the suit itself, *see infra* note 73, that might constitute an employer's first notification that the device in question is being seriously challenged. The key is that the challenge appears to the employer to be serious. Thus, whatever may be said for the significance of other events may be said more strongly for the filing of a suit.

72. In cases not involving the bottom line, courts have usually refused to permit the employer to rely on decisions subsequent to the filing of the charge to detract from the plaintiff's pre-charge case. *E.g.*, Rich v. Martin Marietta Corp., 522 F.2d 333, 346 (10th Cir. 1975); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970);

Beyond this single rule, courts could develop only arbitrary criteria for defining time periods for measuring bottom line performance. Even the arbitrary rules, however, would probably produce unsatisfactory results. Whatever criterion might be used for establishing the date commencing the time period, the plaintiff's discretion as to when to file his charge[73] would dictate the date ending the period, thus placing the employer that wishes to rely on its nondiscriminatory bottom line performance at a considerable disadvantage. At best, it would seem, the employer might avoid vulnerability by maintaining a rigid quota system, greatly impairing its flexibility in making selections at any point in time. Although this analysis only touches upon this issue, it serves to illustrate one further difficulty with the belief that the bottom line limitation to *Griggs* will greatly simplify employers' efforts to comply with the obligations of Title VII and the courts' resolution of challenges to the legitimacy of those efforts.

c. Nondiscriminatory selection rate— The *Teal* case itself involved a situation where the court could with relative ease determine the selection rate that constituted nondiscriminatory bottom line performance: the black representation among candidates eligible for promotion established the nondiscriminatory bottom line promotion rate. Rarely is the matter so simple. Typically, determining what constitutes nondiscriminatory bottom

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Patterson v. Youngstown Sheet & Tube Co., 440 F. Supp. 409, 413 (N.D. Ind. 1977), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 454 U.S. 1100 (1981); *cf.* Capaci v. Katz & Besthoff Inc., 711 F.2d 647, 657 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1709 (1984). This is sound law even in the usual (non-bottom line) cases where the challenged practices are a combination of the employer's intent and a system involving many other factors over which the employer may have greater or lesser control. The argument for such a rule is even stronger in the bottom line context, where the employer's post-charge affirmative action selections are matters entirely within the employer's control.

Actually, *Teal* itself presented a situation where the timing of the employer's selections rendered it manifestly inappropriate to consider a bottom line defense at all. All promotions in question came not only after the charge was filed, but after the suit was filed as well. *See* 457 U.S. at 444. The situation did not conform to the classic situation of concern, for example, where the post-charge/suit selections correct the employer's inadequate pre-charge/suit bottom line performance, but the principle is the same.

73. That discretion has limits. Section 706(e) of Title VII, as amended, 42 U.S.C. § 2000e-5(e) (1982), requires that an EEOC charge be filed by, or on behalf of, a person claiming to be aggrieved within 180 days after the alleged discriminatory act, or within 300 days after the act where proceedings have first been commenced with a state or local agency that can grant or seek relief for the alleged discrimination or institute criminal proceedings with respect thereto. Beyond the scope of this article are certain unresolved issues respecting the circumstances under which an individual may avail himself of the longer period in certain jurisdictions. *See* Mohasco Corp. v. Silver, 447 U.S. 807 (1980); Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2151 (1984); Wilson v. Wehadkee Yard Mills, 32 Fair Empl. Prac. Cas. (BNA) 847 (M.D. Ala. 1983); McGuire v. Peter Eckrich & Sons, Inc., 32 Fair Empl. Prac. Cas. (BNA) 933 (N.D. Ill. 1983).

line performance involves considerable speculation.

In *EEOC v. Greyhound Lines, Inc.*,[74] for example, the Third Circuit found the employer to have met its bottom line requirement because the black male proportion of its male work force covered by the policy in question exceeded the black male proportion of the male civilian labor force in the Philadelphia Standard Metropolitan Statistical Area (SMSA).[75] In *Greyhound* the policy at issue—a no-beard rule for public contact positions which plaintiff contended had a disparate impact on blacks[76]—may simply not have affected enough persons to materially alter the employer's bottom line performance or the employer's affirmative action efforts may have compensated for its effect. Nevertheless, one has good reason to doubt the validity of using a group's overall representation in the civilian labor force as an indicator of the group's actual representation in the interested and qualified labor force for a particular job with a particular employer. Depending on a number of factors, which include the location of a facility within the SMSA and the skills required for the job, the group may have a much higher representation in the labor force interested in and qualified for the job than it has in the SMSA's civilian labor force as a whole.[77] Thus *Greyhound* may well have involved a situation where the bottom line performance was not actually nondiscriminatory at all.

Even where there exists applicant flow information, generally considered a more reliable indicator of a nondiscriminatory hiring rate,[78] the bottom line adverse impact may go undetected.

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74. 635 F.2d 188 (3d Cir. 1980).

75. *Id.* at 191-92.

76. *See infra* text accompanying notes 104-07 for further discussion of the policy at issue in *Greyhound*.

77. As Judge Sloviter observed in her dissent in *Greyhound*:

> Even under the majority's view holding workforce percentage relevant in determining impact, it would be necessary, at a minimum, to consider whether, in the absence of the disputed policy, there might be an even higher percentage of black employees. It is more than likely that jobs at Greyhound and at other bus companies might have particular attraction to blacks who are still deprived of equal employment opportunities in certain other industries or who may still suffer from earlier educational deprivations in their quest for employment in certain other fields.

635 F.2d at 197. Indeed, what could be clearer than that if minorities who comprise a certain percentage of the overall civilian labor force comprise a substantially smaller percentage of the persons qualified for the more skilled positions in the work force, they must comprise a substantially higher percentage of the labor force for relatively unskilled positions? The alternative is that a large proportion of the minority population is unemployed.

78. United States v. County of Fairfax, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); Hester v. Southern Ry. Co., 497 F.2d 1374, 1379 (5th Cir. 1974). *See* Hazlewood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

The Court has recognized that awareness of a discriminatory selection practice may discourage applicants from applying, disguising the true discriminatory impact of the practice.[79]

Thus, on the one hand, a selection device may exist that can usually be reliably determined to disproportionately disadvantage a certain group. On the other, the employer's bottom line performance may often be determined to approximate the group's representation in the relevant labor market only on the basis of considerable speculation. Regardless of whether one accepts nondiscriminatory bottom line performance as the essential concern, one must question the wisdom of allowing a highly speculative absence of ultimate harm to the group to insulate from attack a device that has a clearly observable impact at an intermediate state in the process.

d. Superior performance on job-related criteria— Finally, although it would seem that the apparently nondiscriminatory bottom line selection rate would infrequently result from the subject group's superior performance on other elements in the selection process,[80] this may sometimes happen. If the device on which the group performs poorly is not job related, and that on which it performs well is job related, the apparently nondiscriminatory bottom line selection rate does not really reflect the group's representation in the interested and qualified labor force. In such cases, the group should receive a share of the selections commensurate with the relative superiority of its job-related skills. This corresponds to giving whites (as is often the case) an apparently disproportionate share of selections where the criteria that disproportionately disqualify minorities are shown to be job related.

2. Shortcomings of dispensing justice on a group basis— Even if the bottom line approach to *Griggs* were an efficient method of ensuring that members of a group are selected at rates representative of the group's presence in the relevant labor market, considerations of equity and social policy seriously detract from the value of that assurance—to the group and to society. With regard to minorities these considerations all involve the speciousness of the premise that, in this context, all persons in some matter identified as belonging to a certain minority group may fairly or usefully be deemed interchangeable.[81]

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79. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

80. *See infra* text accompanying notes 120-21.

81. Remedial quotas also regard members of minority groups as essentially interchangeable. Yet, whatever the appropriateness of such measures, allocating remedial benefits generally among a disadvantged group when one cannot identify, without exor-

The first such consideration concerns simple equity. While the *Griggs* rule has not been limited to situations where the challenged practice perpetuates past discrimination,[82] in most cases the reason a selection criterion disproportionately disadvantages a racial group is that the group has experienced past discrimination. The *Griggs* opinion specifically discussed the inferior education received by blacks in racially segregated schools and its causal connection with the black/white differences in test scores and high school completion rates.[83] So situations where the practice at issue perpetuates past discrimination present the most compelling case for applying the *Griggs* rule. Yet, the application of the bottom line limitation to *Griggs* will in most cases deny protection to the persons who have most suffered from past discrimination, while favoring those persons who have least suffered from past discrimination.

The second consideration is a practical one and the one that most challenges the notion that indiscriminate treatment of a group can fairly or adequately address the problems of its members. It is exceedingly simple: if blacks who do not score well on tests and who have limited educational backgrounds are denied those jobs for which high test scores and substantial educational backgrounds are unnecessary, what jobs will remain for them? Whatever the implications of the underrepresentation of blacks among the middle and upper levels of the employment spectrum, the nation's most serious problem of racial equality lies in

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bitant expense, the actual victims of the discrimination that the quota seeks to remedy differs from permitting discrimination against identified persons because other members of their group benefit. Moreover, quota remedies have no inherent tendency to distinguish among members of minority groups in the ways found objectionable in the discussion in the succeeding text.

82. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977), where the Court applied *Griggs* to height and weight requirements that obviously had nothing to do with past discrimination. *Cf.* Wallace v. Debron Corp., 494 F.2d 674, 675-76 (8th Cir. 1974), and Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1971), where the courts rejected contentions that *Griggs* only applied to situations where the rule in question perpetuated the employer's past discrimination. (Although the courts did not discuss the matter, one could readily find that the policies in question—discharge for garnishment in *Wallace*; disqualification for arrest record in *Gregory*—related to societal discrimination.) *But see* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 500 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978), where, while accepting that *Griggs* applied to a no-spouse rule at a facility with an overwhelmingly male work force, the court applied a very relaxed standard of job-relatedness "because [the rule] does not penalize women on the basis of their environmental or genetic background . . . ." The restrictive interpretation of *Griggs* in *Yuhas* may, however, represent an aberration that is peculiar to no-spouse rules. Unlike tests and most other policies that may disqualify an individual with many employers, and hence materially detract from his opportunities throughout the labor market, a no-spouse rule merely prevents a person from working for one employer.

83. 431 U.S. at 401.

the high unemployment rates among the least educated and marginally skilled black labor force.[84] A policy that can only exacerbate the exclusion of a subgroup of the b' ck population from the economic mainstream is neither good for the group nor good for society.

Implicit in these considerations rests an additional troubling aspect of the bottom line approach to *Griggs*. In an *amicus curiae* brief filed in opposition to the bottom line theory, the Lawyer's Committee for Civil Rights Under Law observed that allowing employers to escape liability on the basis of their bottom line performance is like permitting employers to favor lighter-skinned blacks over darker-skinned blacks.[85] Supporters of the bottom line theory in *Teal* would argue against the aptness of this analogy because the bottom line theory applies only to unintentional discrimination. Whatever the merit of that distinction as a legal matter, as a policy matter one must consider the implications of the fact that there exists ample reason to believe the effect of the bottom line limitation of *Griggs* would be precisely to favor lighter-skinned blacks over darker-skinned blacks.

Issues of nature or nurture and cause or effect aside, I.Q. and educational attainment correlate highly with socioeconomic status;[86] among black Americans socioeconomic status has historically been markedly related to skin color.[87] In addition, darker-skinned blacks are disproportionately concentrated in, or they or their families have more recently immigrated from, the South,[88]

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84. *See generally* D. GLASGOW, THE BLACK UNDERCLASS (1980).

85. Brief for the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in Support of Respondents at 5.

86. PROFILE OF AMERICAN YOUTH: 1980 NATIONWIDE ADMINISTRATION OF THE ARMED SERVICES VOCATIONAL APTITUDE BATTERY 40-42 (1982) [hereinafter cited as PROFILE OF AMERICAN YOUTH]; L. TYLER, THE PSYCHOLOGY OF HUMAN DIFFERENCES 138-51 (3d ed. 1965); W. SEWELL & R. HAUSER, EDUCATION, OCCUPATION, AND EARNINGS (1975).

87. J. FLYNN, RACE, IQ AND JENSEN 76 (1980); M. HERSKOVITS, THE AMERICAN NEGRO: A STUDY IN RACIAL CROSSING 56-62 (1964 ed.); S. KRONUS, THE BLACK MIDDLE CLASS 3-4 (1971); G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 695-700 (1962 ed.); T. SOWELL, ETHNIC AMERICA 206 (1981).

Even in the late 1960's a study, which categorized blacks into "dark," "medium," and "light," found, for example, that twice the percentage of "light" blacks as "dark" blacks had attended college; almost twice the percentage of "light" blacks were in white collar occupations; four times the percentage of "light" blacks had a father who attended college. (The fifteen cities in the study were mostly Northern: Baltimore, Boston, Chicago, Cincinnati, Cleveland, Detroit, Gary, Milwaukee, Newark, New York (Brooklyn only), Philadelphia, Pittsburgh, San Francisco, St. Louis, and Washington, D.C.); Edwards, *Skin Color as a Variable in Racial Attitudes of Black Urbanites*, 3 J. BLACK STUD. 473, 475-76 (1973). *But see* Udry, Bauman & Chase, *Skin Color, Status, and Mate Selection*, 76 AM. J. SOC. 722 (1971), for indications of recent changes in the relationship of skin color to social mobility.

88. *See* E. REUTER, THE MULATTO IN THE UNITED STATES 114-25 (1916); Bodmer, *Race*

where intelligence test scores are lower for all races[89] (and especially for blacks[90]). Thus, the bottom line approach to *Griggs* will have the tendency—to an indeterminate, though not negligible, degree—to favor lighter-skinned over darker-skinned blacks.[91]

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and I.Q.: The Genetic Background, in RACE AND INTELLIGENCE 110-11 (1972); Sowell, *Three Black Histories*, in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS 7, 11 (T. Sowell ed. 1978). The study described in Edwards, *supra* note 87, found 65% of "dark" blacks to be Southern born compared with 52% of the "light" blacks.

89. *See* PROFILE OF AMERICAN YOUTH, *supra* note 86, at 42-43; Bodmer, *supra* note 88, at 110-11.

90. *See* Bodmer, *supra* note 88, at 111.

91. While it has been recognized that these factors, along with the partly related factor of assortive mating, *see infra* note 102, should tend to give lighter-skinned blacks an advantage in intelligence testing, *see, e.g.*, L. TYLER, *supra* note 86, at 118; J. FLYNN, *supra* note 87, at 84; Bodmer, *supra* note 88, at 110-11; Witty & Jenkins, *Intra-race Testing and Negro Intelligence*, 1 J. PSYCH. (second half) 179, 181, 183 (1936), empirical data on the tendency are subject to interpretation. There have been a number of efforts to examine possible relationships between the proportion of white ancestry and intellectual skills in the context of the controversy over the cause (heredity or environment) of the differences in average I.Q. scores of black and white Americans. (Long before intelligence testing became so prominent an issue, it had been asserted that the greater relative success of lighter-skinned blacks was related to the supposed genetic superiority of the white races. *See* E. REUTER, *supra* note 88.) Witty & Jenkins, *supra*, review the earlier studies of racial admixture and intelligence as measured by standardized tests. The authors point out that the studies showing an apparent relationship between proportion of white ancestry and intelligence test scores could have been affected by a number of factors including higher socioeconomic status of lighter-skinned blacks. *Id.* at 187, 190-91. The authors also describe their own study of high I.Q. black children in Chicago, which (even though it did not take socioeconomic status into account) they concluded failed to show a relationship between proportion of white ancestry and I.Q. *Id.* at 188-89.

J. FLYNN, *supra* note 87, has reviewed Witty and Jenkins along with more recent studies. In this very balanced examination of the most important work on the I.Q. controversy, the author points out that almost all scholars agree that racial admixture studies prior to 1965 have little value, *id.* at 76; and he finds little promise in the more recent ones. *Id.* at 79. He finds an exception, however, in the study by Witty and Jenkins. *Id.* at 79-84. If the Witty and Jenkins study conclusively establishes the absence of any relationship between proportion of white ancestry and I.Q., including any relationship that could be attributed to socioeconomic status, the point made in the text is invalid.

That study, however, seems to have at least two major difficulties. First, it involved only 66 high I.Q. children, a rather restricted sample on which to base any conclusions so contrary to observable social phenomena. Second, Witty and Jenkins' study compared the racial admixture of high I.Q. black children from Chicago with a nationwide estimate of the proportion of white ancestry among American blacks found in M.J. HERSKOVITS, THE ANTHOPOMETRY OF THE AMERICAN NEGRO 15 (1930), which estimate appears to be around 29% (my calculations based on 0% white ancestry for Herskovits's all black group, 20% for more black than white, 50% for equal black and white, and 70% for mostly white). If the proportion of white ancestry among blacks in Chicago was appreciably lower than 29% (for example, the 13% estimate for Chicago in Bowman, Frischer, Ajmar, Carson, & Gower, *Population, Family and Biochemical Investigation of Human Adenylate Kinase Polymorphism*, 214 NATURE 1156 (1967)), an estimate that is consistent with the patterns of black migration to Chicago from Southern states where white admixture in the black population was very low, *see* M. HERSKOVITS, *supra*, at 8; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 116 (1967); E. REUTER,

Moreover, both of these considerably overlapping factors, as well as their connection with the tendency of lighter-skinned blacks to outperform darker-skinned blacks on standardized tests and in other areas of intellectual achievement, relate, in one manner or another, to differences in the degree of past discrimination experienced by the groups. Lighter-skinned blacks are to a disproportionate extent descendants of "free persons of color"—those blacks who either never became slaves during the period when the vague indentured servant status of blacks in early colonial times evolved to that of slavery as we commonly understand it,[92] or who, having been enslaved, were freed prior

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supra note 88, at 124), the evidence developed by Witty and Jenkins would more likely show a substantial correlation betweeen I.Q. and skin color (although, to be sure, based on a very small sample). This would support the thesis in the text: that the differences in socioeconomic status that relate to skin color naturally result in differences in intelligence test scores that relate to skin color.

One study has sought to examine the relationship of white ancestry and intellectual skill while taking into account skin color (to the extent that it varies from proportion of black ancestry) and socioeconomic status. *See* Scarr, Pakstis, Katz, & Barber, *Absence of a Relationship between Degree of White Ancestry and Intellectual Skills within a Black Population*, 39 HUM. GENETICS 69 (1977), *reprinted in* S. SCARR, RACE, SOCIAL CLASS, AND INDIVIDUAL DIFFERENCES IN I.Q. 161 (1981) [hereinafter cited as SCARR]. J. FLYNN, *supra* note 87, at 78-79, 264, finds the study inconclusive because of methodological problems. In any event, it focuses on the separate issue of whether intellectual skills relate to degree of white ancestry because of genetic factors, as distinguished from socioeconomic status. The reader may nevertheless wish to appraise the view expressed in this article that, irrespective of the genetic issue, it is to be expected that test scores and levels of education of American blacks will be related to skin color and degree of white ancestry in light of the Scarr study, as well as Arthur Jensen's comments on it. *See* Jensen, *Obstacles, Problems and Pitfalls in Differential Psychology*, in SCARR, *supra*, at 483, 511-14; Sandra Scarr's reply in SCARR, *supra*, at 519-22; and Flynn's appraisal of the study, J. FLYNN, *supra* note 87, at 78-79, and of the subsequent Jensen-Scarr debate, *id.* at 262-64. On the issue of whether lighter-skinned blacks may perform better on intelligence tests because of genetic differences between the races and how it bears on the I.Q. controversy, it would seem that the difficulties of taking into account socioeconomic status and the genetic elements of assortive mating, *see infra* note 102, as well as the numerous possibilities respecting the genetic make-up of the white ancestors, *see* Centerwall, *Comment: The Use of Racial Admixture as Evidence in Intelligence Research: A Critique*. 45 HUM. GENETICS 237 (1978), *reprinted in* SCARR, *supra*, at 179; Scarr, Pakstis, Katz, & Barber, *Reply to Centerwall*, 47 HUM. GENETICS 225 (1979), *reprinted in* SCARR, *supra*, at 181; J. FLYNN, *supra* note 87, at 81-83; H.L. MENCKEN, *The Sahara of the Bozart*, in PREJUDICES 69, 78-79 (J.T. Farrell ed. 1955), are too insurmountable for racial admixture studies to be of much value. In any case, nothing so far developed as persuasively counters the argument that the greater relative achievement of lighter-skinned blacks relates to a genetic difference between the races as the greater relative success of blacks of West Indian heritage, a group that has a smaller proportion of white ancestry than American blacks generally. *See* Sowell, *supra* note 88, at 44; *cf.* Traub, *You Can Get it if You Really Want*, HARPERS, June 1982, at 27.

92. For a thorough discussion of the evolution of the enslavement of blacks in colonial American, see A.L. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

to the Civil War.[93] It has been observed that descendants of these disproportionately urban and Northern groups,[94] many of whose members were given assistance in starting out as free by a white parent,[95] had a head start of generations over other blacks in the process of acculturation to urban industrialized America.[96] Much of what can be said of "free persons of color" can also be said of the disproportionately lighter-skinned blacks who occupied a quasi-free status, essentially hiring out their labor often as skilled workers in urban areas.[97] Even among blacks who were not free prior to the Civil War, there was a relationship between lightness of skin and the opportunity to acquire the skills and the knowledge of white culture necessary for blacks to succeed outside the plantation environment.[98] The relationship between these factors and past discrimination is evident.

In the more recent past, while it cannot be denied that throughout the United States all persons socially classified as black have been treated qualitatively differently from persons classified as white,[99] lighter-skinned blacks have usually been treated more favorably than darker-skinned blacks[100] and Northern (hence, lighter-skinned) blacks have been treated more favorably than Southern (hence, darker-skinned) blacks, particularly regarding education. Even today—though the matter is occasionally debated[101]—some employers, particularly if they regard compliance with the law primarily or solely in terms of selecting a number of persons somehow identified as members of a particular race, may consciously or unconsciously tend to find those numbers of blacks among lighter-skinned persons. Yet, even apart from the considerations of how past discrimination may be involved in the reasons that lighter-skinned blacks probably perform better on intelligence tests than darker-skinned blacks,[102] the undesirability of the tendency of the bottom line

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93. *See* Sowell, *supra* note 88, at 8-9, 14-15; G. MYRDAL, *supra* note 87, at 696-97.

94. *See* Sowell, *supra* note 88, at 10-11, 16; E. REUTER, *supra*, note 88, at 114-25.

95. *See* Sowell, *supra* note 88, at 13-14; Edwards, *supra* note 87, at 477.

96. *See* Sowell, *supra* note 88, at 11-23; T. SOWELL, *supra* note 87, at 212; G. MYRDAL, *supra* note 87, at 696-97.

97. *See* Sowell, *supra* note 88, at 8-9.

98. *See* S. KRONUS, *supra* note 87, at 3-4; G. MYRDAL, *supra* note 87, at 696.

99. *See* G. MYRDAL, *supra* note 87, at 698.

100. *See id.* at 697; Edwards, *supra* note 87, at 477.

101. *See* Allen, *It Ain't Easy Being Pinky*, in *In the Matter of Color*, ESSENCE, July 1982, at 67, 68.

102. One possible reason for the correlation between the socioeconomic status of American blacks and skin color that is (arguably) not related to discrimination is assortive mating between high achieving black men and lighter-skinned black women. *See* J. FLYNN, *supra* note 87, at 76; G. MYRDAL, *supra* note 87, at 697-98; M. HERSKOVITS, *supra*

theory to cause one group to be favored over the other[103] appears self-evident.

Interestingly, the most notable pro-bottom line court of appeals decision, that on which the *Teal* dissent most relied,[104] involved an issue that, while having nothing to do with past discrimination, probably had much to do with skin color and proportion of black ancestry. In *EEOC v. Greyhound Lines, Inc.*,[105] the Third Circuit applied the bottom line theory to reject a challenge to a policy of prohibiting the wearing of beards by employees in public contact positions. The EEOC had argued that the policy was unlawful under *Griggs* because blacks are frequently subject to a condition called pseudofolliculitis barbae (PFB) that in some cases makes shaving so painful as virtually to require the wearing of a beard. The condition, however, rarely seriously affects whites. The court upheld the policy without inquiry into its job-relatedness because the defendant employed blacks at a rate in excess of their representation in the local labor force.[106] It is difficult to estimate the consequences of the application of the bottom line rule to no-beard policies even with respect to the affected individuals, because such policies will occur with much less frequency than policies involving tests and educational credentials. Nevertheless, it is worth noting that one's susceptibility to PFB may likely relate directly to the proportion of one's ancestors who are black. Hence, it is but another reason, if only a minor one, to expect the permanent underclass that the bottom line limitation to *Griggs* would help to make

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note 87, at 62-63; S. DRAKE & H.R. CAYTON, BLACK METROPOLIS 506 (1975). This factor may have genetic as well as environmental implications, although such implications are functions of within-group, not between-group, genetic advantage.

103. Of course, there does not really exist a well-defined lighter-skinned black middle class and darker-skinned black working/lower class. There exists a continuum of socioeconomic strata within which it is difficult to draw well-defined boundaries. Also, the correlation of a particular individual's skin color and his socioeconomic status, however denominated, will vary from person to person. *Cf.* G. MYRDAL, *supra* note 87, at 700. These considerations do not seem, however, to importantly mitigate the color-related impact of the bottom line aproach to *Griggs* nor the objectionable implications of that impact. Rather, these considerations merely counter any suggestion that the bottom line theory will have no such impact because there is no competition betwen lighter- and darker-skinned blacks for the same types of jobs.

104. 457 U.S. at 460.

105. 635 F.2d 188 (1980).

106. Although the *Teal* dissent treated *Greyhound* as a bottom line case, *see* 457 U.S. at 460 n.5, it could be argued that it was not really a bottom line case because the plaintiff failed to prove that, even apart from bottom line considerations, the policy had a disparate impact on blacks. See the discussion of *Greyhound* in EEOC v. Trailways, Inc. 530 F. Supp. 54, 57 (D. Colo. 1981). It would appear, however, that the bottom line limitation on *Griggs* was at least an alternative basis for the decision.

possible, to a disproportionate degree, to be comprised not simply of black people, but darker-skinned black people.[107]

The foregoing discussion in this subsection pertained essentially to blacks. The failing of the bottom line theory's assumption of fungibility of members of the group manifests itself just as succinctly among Hispanics (even when the Hispanic group represents only one national origin). Among Hispanics there is little doubt that the bottom line approach to *Griggs* would permit persons to be disadvantaged by certain selection practices precisely in proportion to (it might be termed) how Hispanic they happen to be. That English is the second language of many Hispanics plays a large role in their lower (than Anglo) average test scores.[108] The bottom line approach would allow non-job-related tests to disproportionately disqualify persons closer to their Hispanic heritage, while more Anglicized Hispanics receive special treatment.[109]

In the case of women, application of the bottom line approach does not have the same undesirable social implications as in the case of minorities (although shorter women might think otherwise). But another factor renders the application of the bottom line theory to issues of sex discrimination the most inappropriate of all. The bottom line approach may serve certain socially useful purposes in the case of minority groups that it does not serve in the case of women. Members of minority groups are socially and familially related in ways whereby the economic circumstances of each person are more affected by the economic circumstances of other members of the group than by those of persons outside the group. Hence, discrimination, by concentrating unemployment and low-paying jobs within a minority group, makes the poverty associated with those conditions more serious than if those conditions were equally distributed among all groups. Not only is the deprivation of each low-paid or unem-

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107. Title VII prohibits discrimination on the basis of color as well as race. *E.g.*, 42 U.S.C. § 2000e-2(a)(1) (1982). While Congress gave little indication of what it meant beyond race discrimination by including the prohibition of discrimination on the basis of color, it is clear enough that an employer's favoring of lighter-skinned blacks over darker-skinned blacks would be found unlawful as color, or color and race, discrimination. Where a neutral practice achieves that effect, there is no reason *Griggs* should not apply. The nondiscriminatory bottom line would not enter into the matter at all, because a nondiscriminatory bottom line is not being met for the disadvantaged subgroup. While such a theory is sound, because there are enough considerations militating against the bottom line approach already treated in the text, it is unnecessary to pursue it here.

108. *See* A. JENSEN, BIAS IN MENTAL TESTING 604-05 (1980).

109. Consider also the probability that a person designated as an Hispanic who has one Hispanic parent will more likely have English as his first language than a person who has two Hispanic parents.

ployed individual exacerbated because those persons whose economic circumstances touch him in some way, being from the same group, tend to be similarly disadvantaged, but there also tends to be a general demoralization of the minority community.

Although the bottom line approach to *Griggs* subordinates individual fairness to convenience, nondiscrimination laws continue to serve socially useful purposes. The employers' acceptable bottom line performance abates the concentration of economic disadvantage within an economically interrelated (minority) group. This ultimately benefits even those members of the group who are disadvantaged by the discriminatory practices. Still, because, as discussed above, the bottom line limitation, as a practical matter, achieves these purposes in an exceedingly unsatisfactory manner, these theoretical benefits remain insufficient to justify the rule.

For women, the bottom line theory lacks even a theoretical foundation. Women do not comprise a group in which the members are more affected by the economic circumstances of other members of the group than by those of persons outside the group; in fact, women engage in considerably greater sharing of economic circumstances with men than with other women. Hence, the poverty associated with unemployment and low-paying jobs is not more severe when those conditions are concentrated among women than when they are borne equally by both sexes. So when under the bottom line approach to *Griggs* individual women are disadvantaged because of sex-related characteristics, the selection of other women in their places serves no socially useful purpose whatever. Unlike minorities, women disadvantaged by the discriminatory practices do not even receive a remote economic benefit from the fact that other members of their group are selected in their places. Whatever may be said for the advantages of treating minorities as groups, nothing can be said for treating women as a group; women can only be treated fairly as individuals.[110]

III. THE WEIGHTED FACTOR ISSUE

The *Teal* dissent observed that under the majority's reasoning nondiscriminatory bottom line performance would preclude a

110. For a more extensive discussion of the differences in the nature of racial and gender groups and how they should affect approaches to equal employment opportunity, see Scanlan, *Employment Quotas for Women?*, PUB. INTEREST., Fall 1983, at 106.

challenge to a test that had a disparate impact where the test comprised merely one weighted factor considered along with other factors in a multi-component selection process.[111] The dissent apparently based that view on the majority's emphasis on the word "opportunity" in its *prima facie* analysis.[112] As stated above,[113] the majority found the disparate impact upon the group in the pass-fail test's disproportionate reduction of the pool of black candidates who would have the opportunity to compete further. The dissent seems to have interpreted this reasoning to mean that a single weighted factor in a multi-component selection process would not have a disparate impact upon the group because it would not disproportionately reduce the number of persons who would have the opportunity to compete further; hence, if the selection process as a whole produces no disparate impact, a plaintiff could not challenge the single weighted factor despite race-related performance differences on the factor.

It would seem, however, that whatever merit the dissent's interpretations of the majority's subtle focusing on the group impact at the time the pass-fail test restricted the eligible pool has, it overlooks the majority's very explicit statement of what the statute requires. In concluding its analysis of whether the plaintiff established a *prima facie* case, the majority stated: "The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."[114] That guarantee is no less abrogated when the non-job-related criterion on which a minority or woman must compete is a single weighted factor in the selection process than when it is a pass-fail barrier.

When the Second Circuit originally drew the distinction between the pass-fail device before it and a single weighted factor, it was responding to arguments based on Judge Newman's decision in *Brown v. New Haven Civil Service Board.*[115] In *Brown* the court rejected a challenge to a written examination that had a substantial disparate impact on blacks on the grounds that there was no significant disparate impact in overall hiring rates. In that decision Judge Newman raised the specter of individual challenges to "subtests, sub-subtests and even individual ques-

111. 457 U.S. at 463 n.8.
112. *Id.* at 445-51.
113. *See supra* text accompanying notes 46-48.
114. 457 U.S. at 451 (emphasis in original).
115. 474 F. Supp. 1256 (D. Conn. 1979).

tions within test segments," should substantially equal overall selection rates not provide a defense.[116]

Examining this specter, the Second Circuit observed that a burdensome evaluation of sub-tests need only take place when a nondisparate, cumulative, overall score subsumed a disparate subscore.[117] The court noted that in such a case some internal mechanism, probably affirmative action, would have to offset the disparate impact caused by the discriminatory component. Because "*all* of the candidates in such a process would have been afforded the opportunity to receive the benefit of the offsetting mechanism, however, [the court reasoned that] the overall results of the process should be deemed a fair barometer of the fairness of the process."[118]

In an *amicus curiae* brief filed by the Department of Justice in *Teal* in the Supreme Court (arguing in favor of the bottom line approach) the Government disparaged the Second Circuit's efforts to distinguish the two situations. It pointed out that under the Second Circuit's analysis, if the employer simply allowed all persons who did poorly on an exam that had a disparate impact to compete further in the process, it would remain free to consider the results of the exam and on the basis of those results to select the same individuals it would choose if it had used the exam as a pass-fail barrier. In many cases it could still be shown that the same persons who would have been eliminated by the test if it were a pass-fail barrier would effectively be denied any real chance of selection when the test is used as a single weighted factor. The result, the Government concluded, is the same.[119]

The Government's attack on the Second Circuit's analysis has considerable merit. As a practical matter a single weighted factor can play at least as determinative a role in the process as a pass-fail barrier. As the Second Circuit suggested, in the great majority of cases the nondiscriminatory bottom line selection rate will result from affirmative action, not from the subject group's superior performance on other components in the process.[120] In such cases, it is reasonable to expect a person's chance

116. *Id.* at 1262.

117. 645 F.2d at 139.

118. *Id.* (emphasis in original).

119. Brief for the United States as *Amicus Curiae* at 15-16.

120. Because it is difficult to conceive of situations where the groups disadvantaged by selection devices commonly used by employers outperform other groups on other elements in the selection processes, it is reasonable to assume that such cases will infrequently arise.

of selection will precisely inversely relate to how much the discriminatory device disadvantaged him. An employer that uses a discriminatory selection device presumably does so because it believes the device has some value in predicting job performance; therefore it will probably follow the rankings influenced or controlled by that device in making its affirmative action selections. Thus, the low scorer's continued eligibility to benefit from the employer's affirmative action will not amount to the "opportunity to compete equally with white workers on the basis of job- related criteria" envisioned by the *Teal* majority,[121] and, in fact, it may provide no opportunity whatever.

Even in the infrequent cases where the subject group's superior performance on other components of the selection process achieves the nondiscriminatory bottom line result, there is no reason to expect that the superior performance will materially alter the within-group rankings. Here too, then, the discriminatory selection device may essentially dictate the employment decision. In fact, a weighted factor in a multi-component selection process will usually play a more significant role in determining job selections than a pass-fail device that plays no other role in the selection process beyond restricting the eligible pool.[122] In the pass-fail case, the discriminatory device disadvantages only those who fail. In the weighted factor case, all members of the disadvantaged group continue to have their chance of selection affected by a device that has a race-related impact. Thus, whether affirmative action or the group's superior performance on other elements in the selection process achieves the nondiscriminatory bottom line selection rate, no member of the group actually enjoys the "opportunity to compete equally with white

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121. 457 U.S. at 451 (emphasis omitted).

122. The Uniform Guidelines on Employee Selection Procedures have recognized that the tests frequently have a greater adverse impact when used for ranking than when used as pass-fail devices, and they require greater evidence of validity when this greater impact occurs. 29 C.F.R. § 1607.5(G) (1984); *see also* Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 100-05 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), where the court discussed the fact that a device is much less likely to predict relative abilities to perform a job than it is to determine who may perform the job at all. *Cf.* Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 357 (8th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981). These considerations are relevant here in two respects. First, as noted in the text, using a device that has an adverse impact as a weighted factor will cause it to disadvantage more persons in their competition with whites on the basis of race-related factors. Second, the assumption that tests and other devices that may not withstand an actual test of validity nevertheless have a certain usefulness in predicting job performance no doubt colors the approach of many to the bottom line issue and to testing issues generally; this assumption has an even weaker foundation where the employer uses the device for ranking.

workers on the basis of job-related criteria."

Many who would generally distinguish the single weighted factor context from the pass-fail context in applying the bottom line defense would probably concede that at some point a weighted factor assumes so determinative a role in the selection process that courts should treat it like a pass-fail barrier.[123] Yet, even evaluating the role of the discriminatory weighted factor presents problems. The evaluation cannot be based simply on the weight which the rating system used in the selection process purports to accord the factor. Even where the the employer gives the results of a particular component relatively little weight, if candidates' performance on the other components tend to equalize, the results on the discriminatory component may be determinative most of the time.[124] Hence, appraisal of the significance of the component must turn on the correlation of rankings on that component with the likelihood of selection. This does not present a simple inquiry either for a court or for an employer that desires to order its practices to comply with the law. Moreover, ultimately the law's decision as to the level of correlation below which it would distinguish a weighted factor from a pass-fail barrier could only be arbitrary. In any event, in almost all

123. The one reported post-*Teal* case to consider *Teal*'s implications with respect to devices that do not constitute absolute pass-fail barriers held, with little analysis, that *Teal* required that the impact of a written test in a promotion process must be evaluated separately because "it could have had a major impact on an individual's opportunity to be favorably considered for promotion." Williams v. City of San Francisco, 31 Fair Empl. Prac. Cas. (BNA) 885, 887 (N.D. Cal. 1983). It should be noted, however, that the court reached this conclusion in the context of an unwarranted holding that the individual elements of the selection process (a written test and an interview) could *only* be evaluated for disparate impact separately. The court had apparently ruled earlier that it would determine disparate impact on the basis of the 80% relative success rate ratio rule of Department of Justice Guidelines for Employee Selection, 28 C.F.R. § 50.14(4)(D) (1984). The plaintiff then sought to apply the 80% rule to the combined results of both elements of the process. (There are circumstances where, under the 80% rule, there would be a disparate impact for both elements combined but not for either element evaluated separately. Consider, for example, a two-tier process in which 100 whites and 100 blacks compete: 90 whites and 73 blacks pass the first tier, an 81% black/white relative success rate ratio, and of those who passed the first tier 80 whites and 55 blacks pass the second tier, an 85% black/white relative success rate ratio. Although no disparate impact exists on either element under the 80% rule, for the two elements combined the black success rate is only 69% of the white.) *Williams* seems an obviously perverse reading of *Teal*. Yet given the superficial appeal of all arguments that "plaintiffs are having it both ways," *see supra* note 18, it would not be surprising to see the same argument pursued elsewhere.

124. For example, a component of an exam may be given only 10 points in a 100-point selection process. Nevertheless, if the results of the other components tend to equalize around 75, while the scores on the single 10-point component range between 2 and 8, as a practical matter, the single component will almost always dictate the selections.

cases where the factor has any significance, some score will operate as the minimum which a candidate must achieve in order to have any chance of selection; for those who fail to achieve that score the device will have acted precisely as a pass-fail barrier.

When employers use specific neutral criteria other than tests as weighted factors, the virtual identity of such factors with pass-fail barriers may be most evident. Suppose, for example, that an employer does not absolutely refuse to hire persons without high school diplomas or with arrest or conviction records, but merely gives these factors a certain weight, let us even say, only when all other things are equal. When the employer selects from a large pool of similarly qualified candidates, giving these factors any weight at all can have the same effect as using them as absolute bars.[125] Thus, whether one deems a device with a disparate impact a pass-fail barrier or merely a single weighted factor, the only way to guarantee that it does not improperly deny individuals opportunities on the basis of race-related characteristics is to prohibit entirely its consideration unless the employer can show its job- relatedness. There exists no analytically plausible basis for a different rule where the selection process as a whole yields a nondiscriminatory bottom line result.

Judge Newman, in *Brown v. New Haven Civil Service Board*,[126] raises the main countervailing consideration. He maintains that courts will have to sort out and evaluate the minute components of a theoretically infinitely fragmentable selection process if they cannot apply a bottom line limitation. This concern has little legitimate basis. As the Second Circuit pointed out,[127] in the great majority of cases affirmative action, not superior performance by the subject group on other elements in the process, will achieve the nondiscriminatory bottom line result.[128]

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125. In Green v. Missouri P. R.R. Co., 523 F.2d 1290, 1296-99 (8th Cir. 1975), the court examined whether an employer could use conviction records as absolute bars to selection and enjoined the practice. In context, the ruling that the employer merely could not use conviction records as absolute bars would seem appropriate. The court intended to permit the employer to consider those records on an individual basis and, where warranted by considerations such as the nature of the conviction and the type of job, to allow the employer to base employment decisions on those records. A rule, however, allowing an employer, without business justification, to consider that one of two candidates for a position had a conviction record as a reason to select the other would conflict with *Griggs*, if that case is to have any real meaning, even though the employer would not consider the conviction an absolute bar.

126. *See supra* text accompanying notes 115-16.

127. *See supra* text accompanying notes 117-18.

128. It is even less likely that the nondiscriminatory bottom line selection rates will result from factors other than affirmative action in the weighted factor context than in

Hence, the inquiry rarely will entail the examination of numerous elements of a fragmented system to determine which elements favor what group and of the elements favoring each group which relate to job performance; rather, the result of the selection process as a whole, up to the point where the employer imposes affirmative action considerations, will show a discriminatory impact.[129]

Even if there exist cases where courts must examine the impact and job-relatedness of numerous elements, one must weigh the burden that this concededly complicated inquiry will impose upon the court against the range of deleterious consequences of the bottom line theory. These consist not only of all the aspects of individual and group unfairness associated with the bottom line rule discussed above,[130] but also the burdens imposed on the judicial system. These judicial burdens include evaluating the actual weight of the element in the selection process,[131] determining whether an acceptable bottom line was reached, and performing these analyses not once and for all, but each time a person disadvantaged by the element chooses to challenge it.

Moreover, it must be kept in mind that the situations where the court must inquire into the impact and job-relatedness of numerous elements in a selection process also constitute those situations where the group's superior performance on other elements in the process achieves the nondiscriminatory bottom line. As discussed above,[132] if those elements on which the subject group's performance exceeds that of other groups relate to job skills while the challenged element does not, the assertedly nondiscriminatory bottom line result really does not reflect nondiscrimination at all. Too often do job-related selection criteria

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the pass-fail context. In the latter situation, there is at least the possibility that, while excluding a disproportionate number of members of a certain group from further consideration, it will not affect the overall selection rates, since all groups perform equally on other factors and no person who would otherwise be selected is eliminated because of the device; that is, the racial composition of the top-ranked candidates may be unaffected by the device. But in the case of the weighted factor, as the Second Circuit observed, "it is difficult to conceive of how the dry scores of a multi-component selection could discriminate in part, but not in the aggregate, without the influence of some affirmative action effort designed to achieve the non-discriminatory overall result." 645 F.2d at 139.

129. Of course, cases may arise where courts find it difficult to determine whether the nondiscriminatory bottom line selection rates resulted from affirmative action. In such cases, however, it is reasonable to assume that affirmative action produced the result, at least where there exists no reason to believe otherwise. In cases where the selection process produces rankings of candidates, there will be no question at all.

130. *See supra* text accompanying notes 81-110.

131. *See supra* text accompanying notes 123-24.

132. *See supra* text accompanying note 80.

disadvantage minorities for courts to exalt the cause of convenience in order to deny them a greater proportion of the opportunities when job-related criteria favor them.

CONCLUSION

In *Connecticut v. Teal*, the Supreme Court wisely rejected a limitation to the rule of *Griggs v. Duke Power Co.* that would permit employers to use non-job-related selection criteria where the success rate for black candidates equals or exceeds that for white candidates notwithstanding the operation of a pass-fail exam that disproportionately disqualifies black candidates from further consideration. The Court, however, failed to address many of the reasons supporting the result; these reasons include not only considerations of fairness to individuals and groups protected by Title VII, but also considerations which suggest the illusory nature of the primary rationale for the limitation—convenience. Although the *Teal* majority did not purport to address the bottom line issue where the element in the selection process comprises merely a weighted factor in a multi-component selection process, significant language in the opinion offers strong support for rejection of the bottom line theory in such a context. Whether the opinion can or cannot be so read, no legitimate basis exists under the bottom line theory for treating such an element differently from a pass-fail barrier. For the same reasons that the Court properly rejected the bottom line theory in the pass-fail context of the *Teal* case, the theory should also be rejected where the element in question comprises only a weighted factor in a multi-component selection process.