Law & Inequality: A Journal of Theory and Practice

Volume 7 | Issue 3 Article 5

1989

The Law Review Selection Process: An Analysis of Its Disparate Impact on Minority Students

Dorene Roberts Sarnoski

The Law Review Selection Process: An Analysis of Its Disparate Impact on Minority Students

Dorene Roberts Sarnoski*

Introduction

As first year law students complete their last exams, they should experience a feeling of relief, even euphoria, that the dreaded "1L" year has come to an end. Instead, they exhibit characteristics such as agitation, nervousness, and stress. Why? After completing what may have been the worst year of their lives, these new "2Ls" are faced with a distressing choice. They must decide whether to enter the writing competition for membership on law review.[1] Many law students choose to compete. There are over two hundred[2] law schools in the United States and almost all publish at least one law review.[3] This means an impressive number of students put themselves through the grueling process of legal analysis and writing required by the competition. Students submit to the process knowing that only a small percentage[4] of those who apply will be selected. Law students endure the competition because the benefits of law review far outweigh the costs of competing. The law review competition is part of law school culture and has been for over one hundred years.[5] The benefits and prestige of law review membership have been recognized and passed on from law professor to student, from employer to law graduate, and from law partner to associate. "When students arrive at law school, they . . . no longer hear such common expressions as 'She is a top student,' or 'He is a good student.' [S]uch status is described only

* B.S., Northern Illinois University (1986); J.D., University of Minnesota (1990).

1. In some cases they may not yet be "2Ls," as the law review competition at some law schools takes place after mid-terms rather than after finals.

2. Ronald D. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 Ind. L.J. 1, 8 (1986) (adapted from a speech given at the annual Indiana Law Journal banquet on April 11, 1986).

3. *Id.*

4. *See generally* Howard C. Westwood, *Law Review Should Become the Law School*, 31 Va. L. Rev. 913 (1945).

5. Rotunda, *supra* note 2, at 5 (reference to first Harvard Law Review in 1887).

with the words 'law review': as in 'He is law review.' "[6]

All law students, however, have not had access to the benefits and prestige of law review membership. This article suggests that the typical selection process has resulted in a significant underrepresentation of minority students on law reviews. This is not to suggest that the selection procedures have purposely discriminated against minority students, but only that, purposeful or not, the result has been disproportionate. This underrepresentation has denied benefits to minority students that have been widely available to non-minority students. The purpose of this article is to document the result of the present law review selection process as it relates to minority students, and to analyze this result under the disparate impact[7] theory of discrimination.

Part I provides a broad overview of the benefits derived from law review membership and the consequences suffered by minority students as a result of their underrepresentation. Part II outlines the survey format and procedures used to gather and test the statistical data. Part III analyzes Supreme Court opinions applying the disparate impact theory. Although these opinions deal with employment discrimination, the author proposes that law reviews should be guided by the overall purpose of the decisions. Finally, Part IV suggests some changes that should be instituted to correct the disproportionate absence of minority students from law review membership.

Part I: Benefits of Law Review Membership

The inequality of the law review selection process carries no significance unless minority students are somehow disadvantaged by *not* being members. The United States Supreme Court has recognized that discrimination is unlawful only if it results in a "significant deprivation of a benefit . . . ."[8] The benefits of law review membership include: (1) direct educational achievement; (2) indirect educational gains; and (3) advantages beyond academia.

Direct educational achievement through law review membership is undeniable. Most students, faculty, practicing lawyers[9] and

6. Frank Kubler, *Confusion, obfuscation, humiliation, and hardship: Is this really the only way to learn the law?*, Student Lawyer, Nov. 1985, at 10, 11.

7. The Supreme Court has found that discrimination can sometimes be established by focusing on the consequences of a neutral selection process rather than the intent to discriminate. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

8. Califano v. Boles, 443 U.S. 282, 295 (1979).

9. For a discussion on educational benefits of law reviews, see Richard Friedman, *Making Law Review: What Price Glory?*, Student Lawyer, Dec. 1976, at 34; Francis L. Kenney, Jr., *The Law Review Priesthood*, Learning and the Law, Winter

judges[10] would agree that law review functions as a teaching tool within the law school. During the first year of law school, students are systematically fed the same information, given identical reading assignments, and exposed to the socratic method—all as a means of learning the law. First year legal writing instruction attempts to provide a measure of private tutorial assistance. A student can thus take advantage of some individual attention to improve writing style, research methods, and critical analysis. Once second year begins, the intensive and individualized training in applied legal analysis is severely curtailed for those who are not on law review.[11] Law review members are challenged and exposed to an "independent, intensified learning experience."[12] The law review experience gives members an additional learning experience, not available to anyone the first year. Members select topics of personal interest, research the area thoroughly, write an article, and receive extensive feedback from editors on each submitted draft of the article. In general, the other law students, particularly minority students, continue along much the same course as in the first year. Non-members experience fewer opportunities outside the classroom to apply the law and techniques they are learning.[13] Non-members continue to learn the law, but the benefits of improved writing, research, and editing[14] that they receive are "insignificant"[15] when compared to those for law review members.

In addition to the direct educational opportunities, there are also indirect benefits from law review membership. One such intangible benefit is increased status in the law school community. In a recent study, members listed status second only to employment benefits as the reason they sought to be on law review.[16] This elevated status often results in more attention from faculty

---

1975, at 61 (results of a survey of law review editors and deans at forty-eight law schools); Robert E. Riggs, *The Law Review Experience: The Participant View*, 31 J. Legal Ed. 646 (1982) (study of past and present law review members at Brigham Young University asking their opinions on the law review experience).

10. Rotunda, *supra* note 2, at 4 (quoting Chief Justice Hughes about the influence of law review articles on the Court).

11. Westwood, *supra* note 4, at 913.

12. Kenney, *supra* note 9, at 62 (quoting the questionnaire response of the Southern Methodist Law School dean).

13. Westwood, *supra* note 4, at 913. Even with curriculum changes in many law schools, such as clinics and moot courts, non-members are not exposed to the intensive research training and editing attention that members receive.

14. Riggs, *supra* note 9, at 650. Riggs found these three skills to be the educational benefits most valued by law review participants.

15. Kenney, *supra* note 9, at 64 (quoting the questionnaire response of the Southern Methodist Law School dean).

16. Riggs, *supra* note 9, at 649-50. See *infra* pp. 463-64 for a discussion of employment benefits.

members[17] and exemption from classroom participation.[18] Law review students are viewed as special by deans, faculty, and other students, and are treated as such.[19] If minority students are consistently denied membership on law review, they are also consistently denied this special treatment in law school. For example, during the first year, status in the classroom may be a result of preparation for class, expression of opinions, or even willingness to debate with the professor. Students are approaching the task on equally unsure footing. Beginning the second year, those students on law review have the advantage of formal recognition of their scholastic and/or writing prowess. The new membership list is prominently displayed, so everyone knows who they are. It is human nature for individuals to internalize others' judgment of themselves. Accordingly, those who are recognized as superior will perform as such.[20] This is particularly true for minority students, who have the constant burden of proving themselves.[21] Thus, this recognition becomes a very important opportunity for them. As minority students continue to be denied law review membership, they may judge themselves and be judged by others as inferior students. This "inferiority" will in turn become a "self-fulfilling prophecy"[22] for both individual minority students and minorities as a group.

A second strand of the indirect educational benefits flowing from membership is the opportunity to publish.[23] Though all students may submit articles to law review, only members are likely to do so. Members tend to take advantage of their status as such

17. Kubler, *supra* note 6, at 12.

18. Kenney, *supra* note 9, at 64 (concluding that law review members are "permitted a more relaxed attitude to class work").

19. Kenney, *supra* note 9, at 64. In contrast, students not on law review are "consigned to second class citizenship." *Id.* at 61. *See generally* Westwood, *supra* note 4.

20. For a general discussion of the effects of internalization on an individual's performance, see H.C. Kelman, *Compliance, Identification and Internalization: Three Processes of Attitude Change*, 2 J. of Conflict Resolution 51 (1958).

21. Roy L. Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 Law & Inequality 1, 6-7 (1987).

22. Kenney, *supra* note 9, at 64. Kenney explains the "Pygmalion" effect and how it functions in educational institutions. He believes law faculties have not yet learned nor accepted that expectations of a student's behavior will reinforce that behavior (quoting from Pygmalion in the Classroom by Robert Rosenthal and Lenore Jacobson). The scholastic performance differences between law review members and non-members may be minimal. However, if minorities continue to be the perpetual non-members, they will be viewed as having poorer scholastic abilities than the non-minority students. *See also* R. Merton, Social Theory and Social Structure (1957) (discussion of self-fulfilling prophecy).

23. *See* Riggs, *supra* note 9.

and submit for publication.[24] Students who have already been rejected in the writing competition may tend to accept their status as inferior writers and be discouraged from writing and submitting articles for publication. Publication alone carries with it certain benefits, such as prestige, job opportunities, and a chance to express viewpoints that may affect the law. A publication system that systematically neglects minority viewpoints reduces, in turn, opportunities for minorities to effect changes in the law. A discriminatory selection process thus denies minority students the opportunity to influence[25] the direction of law[26] because their viewpoints are not published.

Finally, advantages exist beyond academia. Law review membership confers undeniable benefits in employment opportunities. Employers "woo"[27] law review members, lavishing special attention[28] on those with such a credential. In a recent survey, law review members ranked "employment asset" by far the number one benefit of membership both before and after their law review terms.[29] There is no proof that the law review member will be a better lawyer, but it is difficult, if not impossible, to overcome the "general agreement among practicing lawyers that the Review man [or woman] is much better prepared than the non-Review man [or woman] for the practice of law . . . ."[30] Law students who have taken part in the employment search are aware of the impact of the law review label. The employment benefit has become so obvious that it is possible to receive job offers by removing from one's résumé the typical student credential of G.P.A. and by replacing it with the honored title of "law review editor."[31]

Students who are denied admission to law review by the selection process are denied the educational benefits that accrue to members. They are also denied prestige within their class and em-

24. Not every student article is chosen for publication, but submission of an article is usually required for each member.

25. *See* Rotunda, *supra* note 2, at 3-4.

26. Friedman, *supra* note 9, at 35.

27. Rotunda, *supra* note 2, at 5.

28. *Id.*

29. Riggs, *supra* note 9, at 649-50. Respondents rated benefits from "very important" to "not important." A wide margin existed between respondents' ratings of the employment benefit and any other benefit.

30. Westwood, *supra* note 4, at 914.

31. Friedman, *supra* note 9, at 36. Mr. Friedman had fair success searching for a job while his G.P.A. was on his résumé. After being chosen as a Harvard Law Review editor, he replaced the G.P.A. with his new title and was "offered a job by every firm that saw him." *See also* David Eaves, I.P.L. Png & Mark Ramseyer, *Gender, Ethnicity and Grades: Empirical Evidence of Discrimination in Law-Firm Interviews*, 7 Law & Inequality 189 (1989).

ployment opportunities. Membership has been characterized as a "merry-go-round on which everyone gets a brass ring . . . ."[32] Minority students are repeatedly denied the brass ring. The following sections of this article show that the present selection process for membership on law reviews has resulted in a disparate impact on minority law students.

Part II: Explanation of Author's Research

In 1988, students at George Washington National Law Center proposed an affirmative action plan for the law school's two journals.[33] The purpose of the plan was to increase the "disproportionately low"[34] minority membership. This research considers whether George Washington National Law Center's journals are alone in their disproportionately low minority membership or whether the same disproportion is true of other schools' law reviews.

Twenty law schools were surveyed. Table 1 presents an alphabetical listing of these schools. These particular law schools were chosen for several reasons. First, they are spread geographically across the nation. This means that the sample reflects varying regional minority populations. The schools sampled have minority populations ranging from seven percent to thirty-six percent. Also, these schools are among the top law schools in the United States.[35] It is more probable that other law schools emulate the top schools than vice versa.[36] Finally, the benefits[37] derived from membership on law review at one of the top law schools are most readily recognized and accepted. For testing, the schools were assigned random letters which appear on Table 2. In order to protect the confidentiality of the law schools that took part in the survey, the alphabetical listing on Table 1 is *not* cross-referenced with the test results on Table 2. It is therefore not pos-

32. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 Va. L. Rev. 279, 287 (1962).

33. Edward A. Adams, *Affirmative Action Plan for Journal Stirs Debate at George Washington*, 10 Nat'l L. J., March 7, 1988, at 4.

34. *Id.*

35. *See* John Metaxes, *U.S. Court Clerkships Still Luring Editors-in-Chief of Law Reviews*, 8 Nat'l L. J., July 14, 1986, at 4; *America's best professional schools: An exclusive survey of law, medicine, business and engineering school deans*, U.S. News & World Report, Nov. 2, 1987, at 70; University of Rochester Law School Locator 1988-1989; Jack Gourman, The Gourman Report: A Rating of Graduate and Professional Programs in American and International Universities (1983).

36. *See* Rodell, *supra* note 32, at 285. Professor Rodell calls it a "game of follow the leader with Harvard Law Review setting the pace."

37. *See supra* notes 8-32 and accompanying text.

sible for the reader to determine which particular schools show a disparity.

The research covered the three year period from 1985 through 1987. For each of these years, the minority population in each school and on each law review was compiled.[38] The law review information was gathered by contacting law review offices directly.[39] Of the twenty law review offices contacted, only one did not provide the data necessary for the survey.[40] The majority was willing to acquire the needed figures, and most law reviews were even anxious to know how their schools placed in the tests.[41] Some respondents were concerned with "how to define minorities." They were instructed to follow their respective admissions office definitions[42] so that the numbers could be fairly compared. Some respondents also expressed concern that their figures were inexact, because no one was responsible for keeping track of diverse representation.[43] All precautions have been taken to assure accurate numbers.[44]

Once the statistics were collected, the data were tested for the presence of a disparate impact on minority students.[45] There

38. American Bar Association and the Association of American Law Schools, The Official Guide to U.S. Law Schools (1986-87, 1987-88, 1988-89). Law schools provide percentages to this pre-law handbook for the preceding year. When numbers were not available, the researcher contacted admissions offices for the information.

39. The information was provided by editors-in-chief and sometimes by business managers. Obviously, they had to spend some time verifying their membership lists. It took approximately two months to obtain accurate numbers from the law reviews.

40. The editor of the University of Pennsylvania Law Review at the University of Pennsylvania declined to take part in the survey.

41. Several of the editors contacted requested a copy of the research results when completed.

42. Minority group members included Asians, Blacks, Hispanics and Native Americans.

43. Because many schools did not previously keep records of minority representation on their law reviews, the survey was limited to a three year period. Accuracy would have been virtually unattainable had the survey included data from years prior to 1985.

44. In some cases, editors had been involved with the respective law reviews for a few years and were able to collect data regarding past and present members on their own. In other cases, editors enlisted the help of past editors or of someone involved in tracking minority membership. At some law schools, the business director had the responsibility of matching membership lists with minority law students. Minority student associations were also able to provide detailed lists of minority law students who had been members of law review during the period tested.

45. While this article was in the process of publication, the United States Supreme Court decided Wards Cove Packing Co. v. Atonio, 57 U.S.L.W. 4583 (1989). The *Wards Cove Packing* case will have an effect on the way courts interpret disparate impact claims. Some believe the decision takes "three major strides back-

is no single clear guideline on how to test statistics for evidence of disparate impact. In *Castaneda v. Partida*,[46] a case addressing discrimination in the jury selection process, the Supreme Court approved a test which uses a binomial distribution model.[47] The Equal Employment Opportunity Commission (EEOC) Uniform Guidelines on Employee Selection Procedures[48] have also met with the Court's approval in the employment context.[49] Under these guidelines, adverse impact is presumed if and only if the minority selection rate is less than 80% of the non-minority selection rate.[50] Both of the above tests were employed in this study. Results of the tests are discussed in the following section.[51]

In some cases, the Court may be willing to move away from the above two complicated tests in favor of more easily understood statistical tests. In a recent opinion,[52] Justice O'Connor indicates the Court's acquiescence to a case-by-case approach to show "significance"[53] or "substantiality"[54] of disparities. A trend toward

---

wards" in the area of racial discrimination by ignoring the law as it has been in effect for eighteen years. *Wards Cove Packing*, 57 U.S.L.W. at 4593 (Blackmun, J., dissenting).

The *Wards Cove Packing* case involved a Title VII claim by a group of non-white cannery workers who alleged that a variety of the employer's hiring/promotion practices had a disparate impact on the non-white workers. The three major changes in the disparate impact analysis made by the Court included: (1) the claimant must show that the statistical disparity complained of is the result of one or more *specific* employment practices under attack, 57 U.S.L.W. at 4591; (2) once claimant proves a prima facie case of disparate impact, the burden of *production* shifts to defendant, but the burden of persuasion always remains with claimant, *id.* at 4588; and (3) the employer's evidence for the business necessity defense need not show that the challenged practice be essential or indispensable. *Id.* at 4588.

The *Wards Cove Packing* decision does not have a major effect on the analogy presented in this article. However, in light of the Court's digression from the *Griggs* standard of business necessity, the author has incorporated *Wards Cove Packing* into the article where appropriate.

46. 430 U.S. 482, 496-97 (1977).

47. For a description of the test, see D.H. Kaye, *Statistical Evidence of Discrimination in Jury Selection*, in Statistical Methods in Discrimination Litigation 17-18 (D. Kaye & M. Aickin eds. 1986).

48. Hereinafter referred to as EEOC Guidelines.

49. Connecticut v. Teal, 457 U.S. 440, 443 (1982) (referred to as the "eighty percent rule").

50. Kaye refers to this test as the relative chance (RC) test. For an explanation of the test, see Kaye, *supra* note 47, at 19.

51. The complicated binomial distribution test under *Castaneda* was performed on a computer program designed by Professor Suzanna Sherry of the University of Minnesota Law School. Professor Sherry's program calculated and measured standard deviations in each population, and identified results that were statistically significant at the .05 level. Her program, not available for publication, was designed to test for statistical significance in employment discrimination contexts, using the *Castaneda* standard.

52. Watson v. Fort Worth Bank & Trust, 108 S.Ct. 2777 (1988).

53. *Id.* at 2789 n.3.

54. *Id.*

Table 1

The following law schools were contacted for this survey. This list has not been cross-referenced with the results on Tables 2, 3, or 4 in order to protect confidentiality.

University of California, Berkeley
University of California, Los Angeles
University of Chicago
Columbia
Cornell
Duke
Emory
George Washington National Law Center
Georgetown
Harvard
University of Minnesota
New York University
Northwestern
University of Pennsylvania
Stanford
Texas University
Vanderbilt
University of Virginia
University of Wisconsin
Yale

more explainable and easily understood statistics will be heralded by some. Statisticians have urged lawyers to adopt and use more understandable, common-sense techniques that present statistical differences.[55] Two techniques which have been suggested by statistical experts are: (1) relative difference in proportions (RD);[56] and (2) relative chance (RC).[57] The RD test would show the probability by which membership on law review is reduced for minorities.[58] The RC test would indicate the relative chance a minority student would have of serving on law review.[59] The RC test is another way of expressing the testing technique recommended by the EEOC Guidelines.[60] Both of these tests are described in detail and analyzed in Part III.

Two concerns arose repeatedly during the statistics-gathering

55. *See* Kaye, *supra* note 47, at 18-21.
56. *Id.* at 18-19.
57. *Id.* at 19.
58. *Id.* at 18.
59. *Id.* at 19.
60. *See supra* notes 48-50 and accompanying text.

stage of this study. The first concern involved the use of minority students in the law school population as the comparison sample, rather than minorities in the general population. The law school population was the proper comparison sample because it constituted the "relevant labor market."[61] This analysis was made by analogy to employment discrimination[62] as further explained in Part III. In the employment discrimination context, the Court approves the use of a "smaller group of individuals who possess the necessary qualifications."[63] The Supreme Court's most recent decision on employment discrimination stressed the importance of comparing a "qualified" pool.[64] The minority population at large would not have the special qualifications needed to apply to law review.

The second concern was the fact that the minority percentage in the law school was used for comparison instead of applicant flow data. An analysis using applicant flow data would have involved using only those minorities who applied to law review as the comparison sample. A common response to the author's initial inquiries was "if minorities don't apply, we can't select them." Applicant flow data have to be "sufficiently reliable"[65] to be part of the statistical analysis. For this research, they were not. Most respondents had no way of knowing who among the actual applicants were minority students and who were not. Even if they did, the applicant population does not include students who are deterred from applying because of their perception of discrimination in the application process itself.[66] Courts have approved the concept that applicant flow does not always represent the relevant population. Some qualified minority students may be discouraged

---

61. Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).

62. Employment discrimination is proscribed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982). See *infra* note 70 for language of Act.

63. *Hazelwood*, 433 U.S. at 308 n.13.

64. Although statistical proof alone is sufficient to establish a prima facie case, the prima facie case cannot stand if statistical results are based on an improper comparison. In *Wards Cove Packing*, the Court of Appeals had relied on a comparison between the racial composition of the cannery work force and that of the non-cannery work force, with no question of skill or ability. However, the Supreme Court found that the proper comparison should have been between the *qualified* persons in the labor market and the persons holding the jobs at issue. *Wards Cove Packing*, 57 U.S.L.W. at 4586.

65. *Hazelwood*, 433 U.S. at 313 n.21.

66. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 365-67 (1977). For an explanation of the inaccuracy of using applicant flow as the expected population, see Elaine Shoben, *Defining the Relevant Population in Employment Discrimination Cases*, in Statistical Methods in Discrimination Litigation 57-58 (D. Kaye & M. Aickin eds. 1986) (citing federal cases which approve of *not* using applicant flow).

from applying due to a "self-recognized inability to meet the very standards challenged as being discriminatory."[67] A potential applicant could look at the present and past membership of the law review and "conclude that [it] would be futile [to apply]."[68] In this research the law school student body at large was used because it would include those potential applicants.

One caveat is necessary. The research documented in this article is not an empirical study of all law schools in the United States, nor does it purport to test a random sample. The law schools were deliberately chosen because of their prestige and the caliber of their law reviews. Nevertheless, this article is not meant as an attack on these most prestigious law reviews, but rather as an examination of the problem of minority underrepresentation. It should be viewed as a challenge to law schools and law reviews to re-examine the selection process and to focus on the dilemma of disparate impact.

PART III: Analysis

A law review is not an employer in the narrow sense of the word. The student on law review is analogous to an employee, however, if one considers such things as hours of work required and benefits derived from the student's position. There is also a testing system[69] for selection, as there would be with many job situations. For these reasons, this author has chosen to analyze the law review process as if it were covered by Title VII of the Civil Rights Act of 1964.[70] A plaintiff under Title VII challenging a sta-

67. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (explaining *Teamsters*, 431 U.S. at 365-67).

68. *Id.*

69. This "testing system" can involve both grade evaluation and writing evaluation. Some students "grade-on" to law review. Their test takes place with the subjective evaluation of the law professor. Most students "write-on." Their test takes place with the subjective evaluation of a law review selection committee. Both methods involve a system that judges the student's writing abilities.

70. Title VII makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of . . . race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2 (1982).

Since the most recent Supreme Court decision has stressed that disparate impact claims must focus "on the impact of *particular* hiring practices . . . ," the author has identified the particular practice in the law review analogy. *Wards Cove Packing*, 57 U.S.L.W. at 4587. But see *Wards Cove Packing*, 57 U.S.L.W. at 4591 (Stevens, J., dissenting), for the problems with the Court's new demand for a particular focus.

tistical disparity in the workplace must first identify the practice that is being challenged.[71] The specific practice challenged here is the law review selection process.

The law review selection process could be challenged as discriminatory in either of two ways.[72] One might argue that law review editors intentionally discriminate against minority students. In a standard employment context, such an argument would give rise to a disparate treatment claim.[73] Alternatively, one could suggest that while the editors do not intentionally deny minority students admission to the review, a racially neutral selection process nevertheless results in a disproportionately low selection of minorities. In a standard employment context, this might give rise to a disparate impact claim.[74] The most significant difference between the two types of claims is that discriminatory intent must be shown only in a cause of action based on disparate treatment.[75] A disparate impact claim would focus on the result as opposed to the intent.[76]

Historically, the Court has applied a disparate impact analysis primarily when judging objective testing.[77] Subjective criteria have usually been seen as raising only disparate treatment claims.[78] In a recent opinion, *Watson v. Fort Worth Bank & Trust*,[79] the Court makes disparate impact analysis equally applicable to both subjective and objective criteria. The law review selection process involves elements of both objective and subjective criteria. Judging proper Blue Book[80] footnoting and deciding whether or not students correctly followed the selection committee's mandatory format involve objective decisions. Judging the quality of an applicant's writing style is a subjective decision.

For purposes of this research, the assumption is that underrepresentation of minorities on law reviews is not the result of intentional discrimination in the selection process.[81] The lack of

71. *Watson*, 108 S.Ct. at 2788.
72. *Id.* at 2784.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. This would involve such tests as: written aptitude tests, height and weight requirements, or written tests of verbal skills. *Id.* at 2785.
78. *Id.*
79. 108 S.Ct. 2777 (1988). The Court subsequently affirmed the *Watson* plurality holding that disparate impact analysis could be applied to hiring practices that involved subjective criteria. *Wards Cove Packing*, 57 U.S.L.W. at 4585.
80. A Uniform System of Citation (14th ed. 1986).
81. This assumption is based on the fact that both petitions and law school exams are "blind graded."

discriminatory intent, however, does not end the matter. The selection process may be facially neutral, but might still result in a disparate impact on minority students. Under Title VII, such an impact would create a prima facie case of discrimination.[82] The "thrust" of Title VII was to the "consequence" not the "motivation" of the selection process.[83] Therefore, in this article, the consequences of the law review selection process will be analyzed under the disparate impact theory. The Supreme Court has articulated a three-step disparate impact analysis.[84] This analysis includes: (1) establishing a prima facie case of disparate impact; (2) showing business necessity; and (3) demonstrating that a less discriminatory alternative means of selection is available.

A. Prima Facie Case

The Court first articulated the disparate impact theory in *Griggs v. Duke Power Co.*[85] In *Griggs*, however, the Court did not specify *how* disparate the impact had to be to state a valid claim under Title VII. It left open the question, "[H]ow disproportionate is disproportionate enough?"[86] In addressing that question, the Court subsequently has suggested various measures of disparity, including "substantially higher" selection rates of one group,[87] "sufficiently large" disparity,[88] and "gross statistical disparities."[89] The Court has also referred approvingly to statistical evidence that is considered merely "sufficient to show" a prima facie case of disparate impact.[90]

The first evidentiary test presented here is the *Castaneda* test.[91] This test was first used by the Court to decide whether the disparity that resulted from a jury selection process involving Mexican-Americans was sufficient to state a disparate impact claim. The Court used a binomial distribution model to test the sample that was selected. This model measures how closely a chosen sample matches an expected value. If the sample is truly randomly chosen (without discrimination), the binomial distribution

82. Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971).

83. *Id.* at 432.

84. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

85. 401 U.S. 424 (1971).

86. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 560 n.103 (1977).

87. *Griggs*, 401 U.S. at 426.

88. *Castaneda*, 430 U.S. at 494.

89. *Hazelwood*, 433 U.S. at 307.

90. *Watson*, 108 S.Ct. at 2789.

91. *Castaneda*, 430 U.S. at 496 n.17.

will fall within the vicinity of the expected value.[92] As applied in *Castaneda*, this test involved a comparison between the proportion of Mexican-Americans in the population to the proportion of Mexican-Americans on grand juries.[93] The comparison, when plotted on a binomial distribution scale, revealed a significant variation between the number of Mexican-Americans jurors expected to be chosen and the number actually chosen. The resulting standard deviation score was the deviation from the number which was expected.[94]

As applied to the law review case, the *Castaneda* test would require a comparison between the expected number[95] of minority law students on law review and the observed number[96] of minority students on law review. If there are 10% minority students in the law school, minorities are "expected" to comprise 10% of all students on law review in the absence of discrimination. If the expected and observed values show a difference of "greater than two or three standard deviations,"[97] there is a sufficient disparity for a prima facie case of discrimination under the *Castaneda* test.[98] It should be noted that *Castaneda* is a disparate treatment case. The plaintiffs in *Castaneda* used the statistics as evidence of the defendant's discriminatory *intent*. Meeting the *Castaneda* test should automatically give rise to a disparate impact claim, as a disparate impact claim does not require the heavier burden of proving intent.

Applying the *Castaneda* test in this research, sixteen of the nineteen sampled law schools were found to show statistical disparities above two standard deviations. These results are listed on Table 2. The disparities ranged from -.68[99] to 6.76 standard deviations. According to the results of these calculations, only three of the nineteen schools "passed" the *Castaneda* test, showing no significant disparate impact. The law review selection processes of

92. *Id.*

93. *Id.* at 495-96.

94. *Id.* at 497 n.17.

95. "Expected" minority students as law review members would be the same percentage as minority students in the law school class.

96. "Observed" number would be those minority students actually on law review, as reported by the editor-in-chief or business manager for each year surveyed.

97. *Castaneda*, 430 U.S. at 497 n.17.

98. *Id.* at 496.

99. The negative score means that school "S" not only had no showing of disparate impact, but that minority students actually were better represented on law review than in the general law school population. School "S" had an expected value of 17% in the student body, but an observed value of 18.5% minorities on law review.

the remaining sixteen schools had a demonstrated disparate impact on minority students.

The numbers for individual years[100] were combined for the results on Table 2. This aggregate testing was necessary due to the difficulty in using the *Castaneda* test for a small sample size.[101] Combined data is more likely to exclude chance as the cause of disparities when the sample size is small.[102]

Under the *Castaneda* test, minority law students at all but three of the schools could make a sufficient prima facie showing of disparate impact. This prima facie showing would render the selection process presumedly unlawful if Title VII were applied to the law review selection process.

The courts[103] have also used the EEOC's Uniform Guidelines on Employment Selection Procedures[104] as a standard for testing discrimination. According to the "eighty percent rule"[105] articulated in the Guidelines,[106] "a selection rate for any race, sex, or ethnic group which is less than [80%] of the rate for the group with the highest [selection] rate will generally be regarded . . . as evidence of adverse impact."[107] The eighty percent rule can also be expressed as a "relative chance"[108] measurement. This test was performed for this article by comparing the probability of selection for any given minority student[109] with the probability of selection for any given non-minority student.[110] If the relative chance[111] of selection for minority students is less than 80% of that of the non-

100. The individual years tested were 1986, 1987, and 1988.

101. For a discussion of the problems with testing a small sample size such a law review membership, see Kaye, *supra* note 47, at 18-24. *See also* Barbara Schlei & Paul Grossman, Employment Discrimination Law (2d ed. 1983).

102. Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 336 n.17 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984).

103. *Watson*, 108 S.Ct. at 2789 n.3 (explanation of various tests applied by lower courts).

104. 29 C.F.R. § 1607.4(D) (1988).

105. Connecticut v. Teal, 457 U.S. 440, 443 n.3 (1982).

106. 29 C.F.R. § 1607.4(D) (1988).

107. *Id.*

108. Kaye, *supra* note 47, at 19.

109. Mathematically, the probability of selection for minority students could be described as follows:

p(s for m) =
% on law review ÷ % in law school

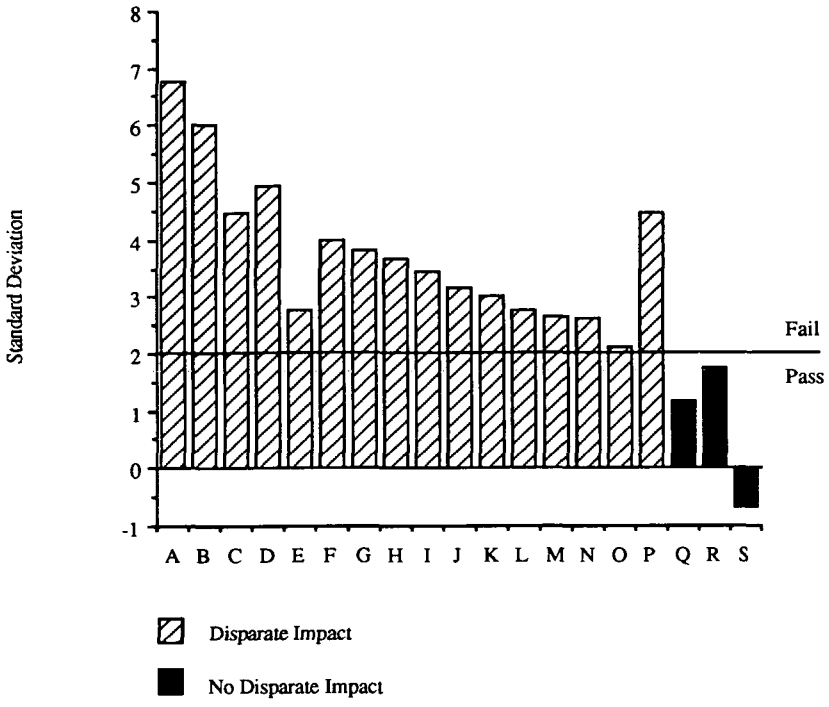
110. Mathematically, this would be the same test as in note 109, *supra*, except with the non-minority population:

p(s for non-m) =
% on law review ÷ % in law school

111. Mathematically, the relative chance of selection would be determined by dividing the result of the test in note 109, *supra*, by the result of the test in note 110, *supra*:

p(s for m) ÷ p(s for non-m)

Table 2 - Castaneda Test



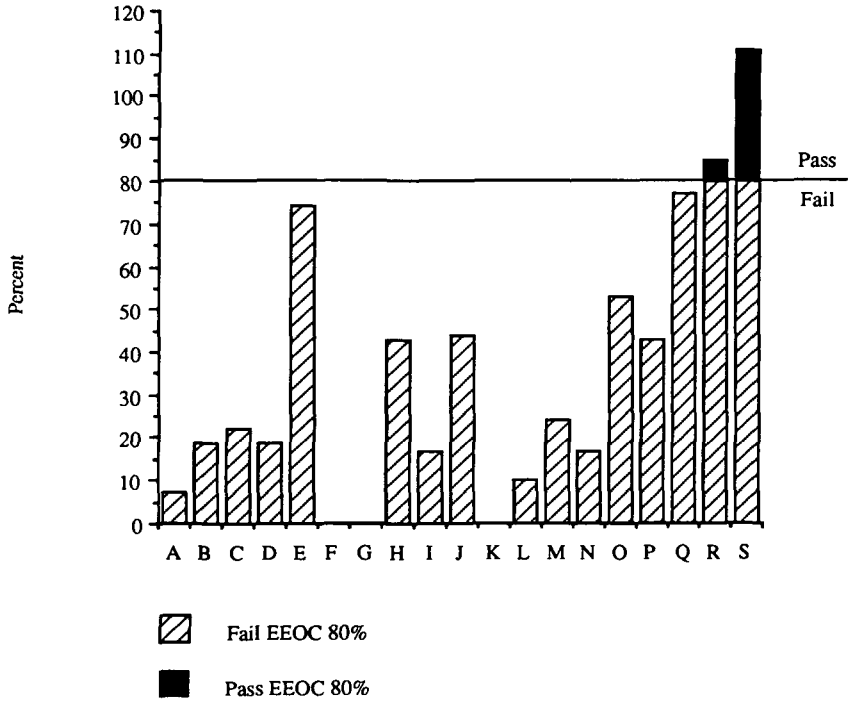
minority students, there is a significant disparity according to the EEOC Guidelines. This test may not be as statistically reliable[112] as the *Castaneda* test, but it is more useful where the sample size is small, as it was in this study.[113]

Applying the EEOC Guidelines test to the data, the study found that only two of the sampled law reviews had a minority selection rate of at least 80% of the non-minority selection rate. Thus, only two law reviews would have "passed" the Guidelines test. As Table 3 illustrates, the selection rate for minority students went from a low of 0% to a high of 111%. The low of 0% means that in three of the sampled schools, the minority student's chance of being selected was 0% that of the non-minority student's chance of being selected. The three law reviews selected *no* minority students as members for 1986, 1987 or 1988. These three schools had minority populations ranging from 7% to 13%. However, in school

112. *Watson*, 108 S.Ct. 2789 n.3 (commenting that the test has been criticized on "technical" grounds).

113. Kaye, *supra* note 47, at 19-20.

Table 3 - EEOC Guidelines



"S," which had a minority selection rate of 111%, the minority student's chance of selection for law review was better than that of non-minority students.

Law school "Q" on Table 3, with a selection rate of 77%, failed the EEOC Guidelines test, although it passed the *Castaneda* test.[114] This conflict suggested that further analysis was necessary. This further analysis revealed that school "Q" may be in flux. Breaking down the results of the Guidelines test on an individual-year basis shows that:

1986 = Failed (minority rate only 71% of non-minority)

1987 = Failed (minority rate only 70% of non-minority)

1988 = Passed (minority rate 90% of non-minority)

The 1988 rate was responsible for bringing the school within three percentage points of passing the EEOC Guidelines test on an aggregrate basis.

114. This is an example of why the *Castaneda* test is not always useful when testing small sample sizes and, at the same time, an example of the statistical unreliability of the eighty percent rule (not statistically significant for this school).

Schools "R" and "S" are the only schools that passed under both the *Castaneda* test and the EEOC Guidelines test. School "R," with 1.74 standard deviations under the *Castaneda* test (Table 2), scored an 84% selection rate under the EEOC Guidelines test (Table 3). On an individual-year basis, the results for school "R" under the EEOC eighty percent rule were:

1986 = Failed (minority rate only 27% of non-minority)
1987 = Failed (minority rate only 72% of non-minority)
1988 = Passed (minority rate 150%)

As with school "Q," described above, the 1988 year was also responsible for a passing rate on an aggregate basis for school "R."

As with the *Castaneda* test, the evidence from this second test also shows a pervasive disparity resulting from the selection process. The EEOC Guidelines test has shown "evidence of adverse impact"[115] in the majority of the schools surveyed.

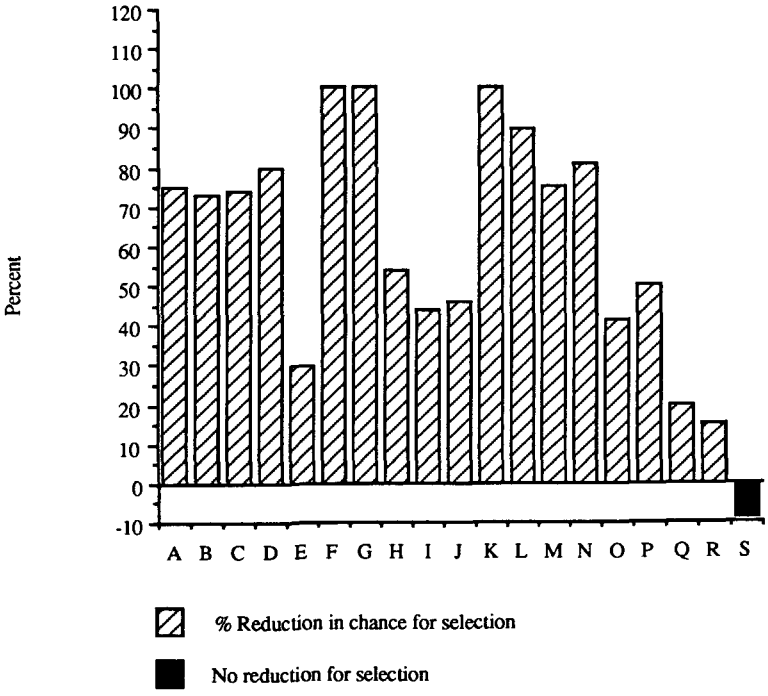
The final test used in this study is the relative difference test,[116] the results of which are documented on Table 4. The Court has given general recognition to this type of testing, reflecting that decisions are developing on a "case-by-case approach."[117] Thus, the Court is willing to consider and examine various types of statistical analyses and explanations in any given case. "[S]tatistics . . . come in infinite variety . . . . [T]heir usefulness depends on all of the surrounding facts and circumstances."[118] The relative difference test is a variety of test that may prove helpful for non-statisticians.

The test results found on Table 4 are introduced in response to requests for understandable, common-sense statistics. Courts have expressed concern that discrimination cases have become nothing more than "contests between college professor statisticians who revel in discoursing about advanced statistical theory."[119] The relative difference test meets no particular statistical significance standard, but rather should be considered along with other facts and evidence in a disparate impact case. It may prove helpful to the "statistically unsophisticated" judge.[120]

The "relative difference in proportions"[121] test is used to de-

115. 29 C.F.R. § 1607.4(D) (1988).
116. Kaye, *supra* note 47, at 18.
117. *Watson*, 108 S.Ct. at 2789 n.3.
118. *Hazelwood*, 433 U.S. 299, 312 (quoting Teamsters v. United States, 431 U.S. 324, 340 (1977)).
119. Otero v. Mesa County Valley School Dist., 470 F. Supp. 326, 331 (D. Colo. 1979), *aff'd*, 628 F.2d 1271 (10th Cir. 1980).
120. Garrett v. R.J. Reynolds Industries, Inc., 81 F.R.D. 25, 32-34 (M.D.N.C. 1978).
121. Kaye, *supra* note 47, at 18.

Table 4 - Relative Difference Test



termine the "proportion by which the probability of [being selected] is reduced"[122] for minority students. If a minority student has the same chance of being selected for law review as the non-minority student, then the relative difference (RD)[123] would be zero. The expected chance of a minority student being selected is the proportion by which minorities are represented in the law school. If a minority student's chance of selection is lower than what it should be, then the relative difference (RD) would be somewhere between zero and one.[124] As the score increases from zero to one, the disparate impact also increases.

Table 4 lists the results of this test.[125] The scores range from one to -.09. A relative difference of "1" means that the minority

122. *Id.*

123. *Id.*

124. *Id.*

125. Mathematically, this test was performed by subtracting the observed value from the expected value and then dividing the result by the observed value. *See id.*

minority student's chance of selection =
(% minor. in school − % minor. on l.r.) ÷ % minor. in school

student's chance of membership is reduced by 100%. This is as great a reduction as possible. A score of "1" only occurred in the schools where no minorities were selected as members of law review for the three year period of testing. Three of the schools surveyed selected no minorities. The negative score of "−.09" indicates that the chance of membership was not reduced for minority students but was, in fact, increased.

Using this test, minority students' chances of being selected for law review were considerably less than they should have been in all but one law school. Only school "S" showed no reduction in the selection chance for minority students. At best, a minority student's expected chance of selection was reduced by 20%. At worst, a minority student's expected chance of selection was reduced by 100%.

The above analysis has presented several different methods of testing disparate impact. The Supreme Court, the federal government, and leading statisticians have recognized and accepted the reliability of these tests. The tests, as applied to the data gathered from twenty top law schools, show that the law review selection process has a disparate impact on minority law students. Differences in the results of the three tests were only minuscule. At best, three schools showed no discrimination; at worst, only one showed none. Under current Title VII standards, these statistics meet the burden of showing a prima facie case of disparate impact.

B. Business Necessity

Once the plaintiff has established a prima facie case of discrimination, the burden then shifts to the defendant.[126] The defendant must show that the procedure at issue is justified by business necessity.[127] What constitutes an adequate business necessity defense is still being debated in the courts.

The Supreme Court first set up the parameters of the defend-

126. *See Albemarle*, 422 U.S. at 425; and *Dothard*, 433 U.S. at 329. In her plurality opinion in *Watson*, Justice O'Connor suggested that the burden of proof always remained with the plaintiff. Three concurring justices disagreed with this interpretation of the burdens under disparate impact. *Watson*, 108 S.Ct. 2777. In *Wards Cove Packing*, the Court clearly states that the "burden of producing evidence of a business justification" shifts to defendant, while the "burden of persuasion . . . remains with the disparate-impact plaintiff." The Court recognizes that this is not the interpretation given by earlier decisions. *Wards Cove Packing*, 57 U.S.L.W. at 4588. It should be noted that for the new interpretation of burden shifting, "[t]he majority's only basis for this proposition is the plurality opinion in *Watson v. Fort Worth Bank & Trust* . . . which in turn cites no authority." *Wards Cove Packing*, 57 U.S.L.W. at 4591 n.18 (Stevens, J., dissenting).

127. *Albemarle*, 422 U.S. at 425.

ant's burden in *Griggs* by requiring "business necessity"[128] as the acceptable defense to a prima facie disparate impact claim. However, the Court did not define the specifics of what would constitute "necessity." The *Griggs* opinion confused the burden of proof by interchanging the standard to be met as a significant relationship to successful job performance,[129] a business necessity,[130] or a manifest relationship to employment.[131] Thus, the lower courts have had to grapple with the problem of defining a business necessity.

Many of the United States Courts of Appeals have applied the *Griggs* standard narrowly. Their decisions have interpreted the Court's intent in *Griggs* as making the employer's burden a difficult one.

The Court of Appeals for the Fourth Circuit requires that a defendant show an "overriding legitimate business purpose" that is "sufficiently compelling to override any racial impact . . . ."[132] It has been suggested that the court here is applying a balancing test to the business necessity defense.[133] However, the court makes clear that it is not balancing the disparate impact against "merely [the existence of] a business purpose . . . ."[134] Rather, there must be a "compelling" business necessity, with a validated correlation and no alternative policies with less racial impact.[135] This is not a balance, but a tolerance level below which the court is unwilling to go.

In *United States v. Bethlehem Steel Corp.*,[136] the Court of Appeals for the Second Circuit also maintained a narrow business necessity defense application. This court defined the necessity as "an irresistible demand" that was essential to safety and efficiency.[137] The Court of Appeals for the Eighth Circuit characterized the business necessity defense as a "heavy burden"[138] that could only be met by a "compelling need."[139] The strict business necessity in-

128. *Griggs*, 401 U.S. at 431.
129. *Id.* at 426.
130. *Id.* at 431.
131. *Id.* at 432.
132. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1007 (1971).
133. Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. Chi. L. Rev. 911, 919 (1979).
134. *Robinson v. Lorillard*, 444 F.2d at 798.
135. *Id.*
136. 446 F.2d 652, 662 (2d Cir. 1971).
137. *Id.* at 662.
138. Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983).
139. *Id.* (quoting Kirby v. Colony Furniture Co., 613 F.2d 696, 706 n.6 (8th Cir. 1980)).

terpretations by these lower courts[140] have established that a mere legitimate business purpose is an unacceptable defense.

Other courts have interpreted the *Griggs* necessity test more broadly. In *Contreras v. City of Los Angeles*,[141] the Court of Appeals for the Ninth Circuit held that an employer could satisfy the burden of proof without showing an absolute business necessity. In so doing, the court attempted to "harmonize" its earlier cases, which presented a dichotomy in the application of the business necessity standard.

In two earlier cases, *Craig v. County of Los Angeles*[142] and *deLaurier v. San Diego Unified School District*,[143] the Ninth Circuit applied a broad standard to the employer's burden of business necessity.[144] In these two decisions, the court "treated 'job relatedness' and 'business necessity' as interchangeable terms, neither of which required proof that the challenged policy was absolutely necessary . . . ."[145] Yet, in *Blake v. City of Los Angeles*,[146] this same court applied a narrow reading of business necessity. The court distinguished its restrictive application of business necessity in *Blake* by explaining that it had incorrectly interpreted Congress' intent regarding the employer's burden of proof under Title VII.[147] The proper interpretation in *Blake*, according to the court, would have followed the Supreme Court's decision in *New York Transit Authority v. Beazer*.[148]

The Court of Appeals for the Ninth Circuit reads *Beazer* as "implicitly [approving] employment practices that *significantly serve*, but are neither *required* by nor *necessary* to, the employer's legitimate business interests."[149] This interpretation is overly

140. *See also*, Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979); Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983); Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv., 625 F. Supp. 527 (D.N.J. 1985); Black Law Enforcement Officers Ass'n v. City of Akron, 824 F.2d 475 (6th Cir. 1987).

141. 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

142. 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

143. 588 F.2d 674 (9th Cir. 1978).

144. *Contreras*, 656 F.2d at 1276 (explaining earlier decisions in *Craig* and *deLaurier*).

145. *Id.*

146. 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980).

147. *Contreras*, 656 F.2d at 1278.

148. *Id.* at 1279-80 (interpreting New York Transit Authority v. Beazer, 440 U.S. 568 (1979)). *Beazer* involved a claim that the Transit Authority's rule denying employment to persons in methadone maintenance programs violated Title VII by excluding a disproportionate number of Hispanics and Blacks. In reversing a finding of a prima facie case of discrimination by the Court of Appeals for the Second Circuit, the Supreme Court focused on the statistical proof and public safety issues.

149. *Contreras*, 656 F.2d at 1280 (emphasis added).

broad considering that the Court in *Beazer* focused on the safety component[150] of business necessity and the problem of using the proper statistical pool. If the Ninth Circuit is correct, *Beazer* would effectively overrule *Griggs*.[151]

The Supreme Court would not leave to implication the overruling of a precedent as pervasive as *Griggs*. Recently, the Court was presented with an opportunity, in *Wards Cove Packing Co. v. Atonio*,[152] to overrule *Griggs* and declined to do so. It is certain that the *Wards Cove Packing* decision somewhat diminishes the business necessity requirement of *Griggs*. It is less certain that this latest decision will do anything to help the courts to define the specifics of what constitutes an acceptable justification.

In *Wards Cove Packing*, the Court begins its discussion of the employer's burden by reference to a "business justification," leading one to believe that this is a decrease in the *Griggs* standard. The Court then reverts to the term "business necessity defense" only two paragraphs later, seemingly reinstating the *Griggs* standard, whatever it may be.[153]

In *Wards Cove Packing*, the Court tries to set a standard for the divergent United States Courts of Appeals decisions by clearly stating that "the challenged practice need not be 'essential' or 'indispensable' to the employer's business . . . ."[154] This may offer guidance to the courts that specifically used those terms in their deliberations and decisions, but will prove of little aid to the courts still grappling with the substantive issue of the level of necessity. This is especially true in light of the fact that the Court in *Wards Cove Packing* further states that the challenged practice must "in a significant way" serve the goals of the employer.[155] If the Court had intended to wipe out the disparate impact standard set forth in *Griggs*, it could have ruled that the employer need only come forward with any reasonable business justification, as is the employer's burden in a disparate treatment case. Rather, the Court

150. Some courts have interpreted *Griggs* as requiring a lighter burden for job necessity when safety of the public is involved. *See* Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972).

151. *Griggs*, 401 U.S. at 431, set up a more difficult burden (necessity) for the employer to meet in disparate impact claims. If this burden is lessened by the Ninth Circuit holdings, it becomes merely the same as that for disparate treatment cases, which requires the employer only to articulate a reason for the selection.

152. 57 U.S.L.W. 4584 (1989).

153. It is also confusing in that the Court cites *Griggs* when referring to a "significant" business justification, but blatantly misquotes *Griggs* by saying, "The touchstone . . . is a reasoned review . . . ." *Id.* at 4588. *Griggs* said, "The touchstone is business necessity." 401 U.S. at 431.

154. 57 U.S.L.W. at 4588.

155. *Id.*

chose to explain that a "mere insubstantial justification . . . will not suffice, because . . . [it] would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices."[156] Thus, while seeming to lessen the employer's burden, the most recent Court decision can only be read as still demanding a substantial justification for the defense of business necessity.

Griggs established an arduous task by demanding that a defendant show a significant relationship to job performance. *Wards Cove Packing* has affirmed that requirement by demanding a substantial justification. This standard has been watered down by some courts simply to mean *any* relationship to the job. If the broad application of business necessity is accepted, it blurs seriously the distinction between disparate impact and disparate treatment cases.[157] The Court has not to date articulated a desire completely to mesh these two. Employers should, therefore, continue to be held to a narrow application of business justification. Under this narrow interpretation, law reviews must provide evidence that their present selection process has a substantial relationship to job performance.

Once a law review offers the business necessity defense, how does it show a manifest relationship or correlation to performance? Again, court decisions have not provided clear mandates. There is no specific formula with which to validate business necessity, but the selection process "must bear more than an indirect or minimal relationship to job performance."[158] It should be noted that the defendant in *Contreras* presented impressive validation testimony from several job analysis experts and auditors.[159] Thus, though the Ninth Circuit appears to apply "a seemingly less burdensome test,"[160] the *Contreras* decision could be interpreted as giving deference to the extensive validation studies presented in that case.

The Court has allowed some selection tests with a disparate impact on minorities to stand even though the tests' relationships to actual job "performance" could not be demonstrated.[161] In

156. *Id.*

157. *Watson*, 108 S.Ct. at 2791-93 (Blackmun, J., concurring) (explaining the difference between the employer's difficult burden in disparate impact cases and easier burden in disparate treatment cases).

158. *Watson*, 108 S.Ct. at 2794 (Blackmun, J., concurring).

159. *Contreras*, 656 F.2d at 1281-82.

160. Liberles v. County of Cook, 709 F.2d 1122, 1132 (7th Cir. 1983).

161. Washington v. Davis, 426 U.S. 229 (1976) (holding that test did not violate equal protection even though it had a disparate impact on minorities because de-

Washington v. Davis,[162] plaintiffs challenged a test used to select police recruits for a training program because the test excluded a disproportionate number of minorities. The Court held that the test was permitted for its narrow "purpose of predicting ability to master a training program."[163] The test did not predict "ability to perform"[164] the job. As explained by the Court of Appeals for the Fifth Circuit, the Court in *Washington* approved a narrow use of the test "to measure *trainability* irrespective of the test's possible relationship to actual performance on the job . . . ."[165] This particular type of test is limited strictly to demonstrating whether "an employee had the rudimentary skills necessary to be put into a training program."[166] The law review selection process measures neither trainability nor rudimentary skills. Thus, the *Washington* defense would not be applicable to law reviews because the only measurement being correlated here is the ability to perform the actual job.

In *Albemarle*, the Court clarified the appropriate standard to validate job relatedness.[167] In so doing, the Court relied on the EEOC Guidelines as providing the professionally acceptable methods of correlation.[168] Under this method of validation, law reviews would have to offer statistical proof that their selection method of judging writing style and content shows a direct relationship to the way members actually perform on law review. Regardless of which way the cases have been decided, courts have consistently relied on validation studies to prove job relatedness.[169]

The EEOC Guidelines allow three methods of validation: criterion, content, and construct.[170] Validation "involves issues and problems which are outside the experience of most lay[people]."[171]

---

fendants were able to justify the test as it applied to completion of a training program).

162. *Id.*

163. *Watson*, 108 S.Ct. at 2790-91 (explaining *Washington v. Davis*).

164. Washington v. Davis, 426 U.S. at 250.

165. Bernard v. Gulf Oil Corp., 643 F. Supp. 1494, 1503 (5th Cir. 1986) (emphasis added).

166. *Id.*

167. *Albemarle*, 422 U.S. at 431-35.

168. *Id.* at 431.

169. *Id.*; *see also* cases cited *supra* note 140; *but see* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 816 (8th Cir. 1983) ("We cannot say . . . that validation studies are always required . . . .").

170. 29 C.F.R. § 1607.5 (1988), 28 C.F.R. § 50.14 (1988). For a description and explanation of the validating tests, see Joel W. Friedman & George M. Strickler, Jr., The Law of Employment Discrimination 253-54 (2d ed. 1987).

171. Guardians Ass'n of New York City Police Dep't v. Civil Serv. Comm'n of New York, 633 F.2d 232, 241 (2d Cir. 1980), *aff'd*, 463 U.S. 582 (1983) (quoting Vulcan Society of the New York City Fire Dep't v. Civil Serv. Comm'n of New York,

Experts are engaged to evaluate whether an objective test is doing what it was designed to do. Applying these same expert methods to a subjective test may prove an impossible task. Though the Court has said that these Guidelines are "entitled to great deference,"[172] this method of validation to test subjective criteria is an impossible burden.[173]

Since the law review selection process involves a subjective test, it is doubtful that a court would hold law reviews to the impossible burden of validation studies. In order for law reviews to present the necessary empirical evidence, they would literally have to choose members who fail their selection criteria and then unbiasedly measure the job performance of these members. Validation studies are appropriate for some criteria used in the law review selection process. However, no technical or mathematical standard of proof is possible. This does not suggest that the defendant's burden is lessened, but rather that the correlation must be shown by other means. As Justice Blackmun explains, the absence of "mathematical certainty does not free an employer from its burden . . . ," but rather demands that the employer use another method.[174]

Thus, a law review carries the burden of providing substantial evidence that its subjective testing method is job related, although no mathematical standard of proof is possible. It is doubtful that the law reviews will be able to meet their burden in compliance with *Griggs*.

C. Alternative Means

The final strand of a disparate impact action shifts the burden back to the plaintiff. Even if a law review met the requirements for business necessity, the plaintiff could still "show that other . . . selection devices, without [an] . . . undesirable racial effect, would also [accomplish the goal]."[175] A discussion of various

360 F. Supp. 1265, 1272-73 (S.D.N.Y.), *aff'd in part, remanded in part*, 490 F.2d 387 (2d Cir. 1973)).

172. *Griggs*, 401 U.S. at 434.

173. The Court recognized the difficulty of applying validation standards to subjective selection processes in *Watson*, 108 S.Ct. at 2795 (Blackmun, J., concurring). "[P]ersonal qualities . . . have never been considered amenable to standardized testing." *Watson*, 108 S.Ct. at 2791. "[F]ormal validation techniques . . . may sometimes not be effective in measuring the job-relatedness of subjective-selection processes . . . ." *Watson* at 2795 (Blackmun, J., concurring).

174. *Watson*, 108 S.Ct. at 2796 (Blackmun, J. concurring). In his concurring opinion in *Watson*, Justice Blackmun suggests a "variety of methods" that an employer can use to validate the job relatedness of a subjective test. *Id.* at 2796.

175. *Albemarle*, 422 U.S. at 425.

courts' application of this segment of disparate impact actions is beyond the scope of this article. The following section, however, suggests some alternative options for law reviews.

PART VI: Remedies

Based on the statistical evidence, the disparate impact of the law review selection process must be recognized. Law reviews are faced with several choices.

One option is that of making no change in the present selection process. Law review editors might discuss their selection process[176] and decide that the system is working satisfactorily. The affirmative defense of job relatedness is always available with this option.[177] Law reviews could argue that the selection process is an accurate measure of how well students will perform the law review tasks. Objectively, competitors must be able to footnote properly. Subjectively, competitors must be able to write well. This justification, however, is not without problems.

The subjective part of the test raises important issues. Several scholars have debated whether law review editors should be the ones to judge what is or is not good writing.[178] The writing style of articles published in law reviews regularly comes under attack.[179] Furthermore, those who are invited to join law review on the basis of their grades are not judged by the same people nor, perhaps, by the same standards as those who submit petitions; yet, both seem to be performing their jobs satisfactorily.[180] This is the same problem faced in establishing job relatedness in *Albemarle*.[181] In light of the clear disparate impact and the unlikelihood of establishing job relatedness, law reviews should consider further options.

A second option involves instituting an aggressive affirmative action plan. For instance, a law review could set a goal for a certain number of slots for minority members based upon the minor-

176. Professor Rotunda believes that law reviews debate their selection procedures about every five years. Rotunda, *supra* note 2, at 11.

177. *Washington v. Davis*, 426 U.S. 229.

178. *See generally* Rodell, *supra* note 32; Rotunda, *supra* note 2; Perry, *supra* note 86; *see also* Paul M. Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, Wall St. J., May 10, 1988, at 1, col. 4.

179. Barrett, *supra* note 178.

180. *See generally* Riggs, *supra* note 9.

181. *Albemarle*, 422 U.S. at 432-33. The Court was concerned because no one could tell "precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind."

ity population in the law school. It could then select the minority students with the top scores in the subjective/objective writing competition. Both of the law reviews that showed no disparate impact in testing for this article (schools "R" and "S" on the Tables)[182] have affirmative action programs in place. Interestingly, minority representation on the law reviews in these schools increased each successive year of the survey span. School "R" reserves the right to add a number of law review positions per year exclusively for minority students. These positions are in addition to those available to students through the regular competition process. While some law schools embrace affirmative action plans to end discriminatory selection results, others resist the idea.[183] Therefore, this option may work for some law reviews but not for others.

A final option is one that allows a law review to take positive steps toward ending discrimination without instituting extensive immediate changes. This third option balances those discussed above with a less aggressive program for achieving racial balance. It may begin by openly discussing the whole application process with minority students. School "S," which scored highest in minority representation on all tests, undertook such a plan by employing "intensive recruitment of minority students."[184] This recruitment involved discussions with minority students which both criticized past selection processes and developed techniques for increasing participation on future law reviews.

This option could also involve changing the petition process from the standard law review writing style competition to a more individualized process. One commentator suggests examining two or three short discussions prepared as part of a student's course work and submitted during the year.[185] With this plan, a law review would have the benefit of reading several short works from each student on diverse legal subjects, giving varying viewpoints. The students would have the benefit of expressing themselves on different areas of the law and at different times during the school year.

Law reviews might also want to consider a process that solicits essays on personal issues. School "R" went from a minority representation of 3% in 1986 to 16% in 1988[186] after introducing a

182. These two schools "passed" both the *Castaneda* test and the EEOC test. *See* Table 2, *supra* p. 474 and Table 3, *supra* p. 475.

183. Adams, *supra* note 33.

184. Interview with the Editor-in-Chief of school "S" law review.

185. Westwood, *supra* note 4, at 915.

186. Percentages reported by Editor-in-Chief in interview.

petitioning process which required a personal essay on racial diversification along with submission of a standard legal writing sample. Law reviews would thus give recognition to the advantages of cultural diversity on a legal journal.[187]

This option has the further advantage of taking into account the differences between minority and non-minority writing styles due to different cultural and social backgrounds. Many minority students approach the law review writing competition from a totally different institutional perspective than their white counterparts.[188] Writing programs in colleges traditionally attended by minorities have been shown to differ from writing programs in traditionally white colleges.[189] These differences range from the adequacy of library facilities to the availability of specialized courses oriented toward the legal profession.[190] Discrimination through "societal defects" may systematically be built into the Case Comment or Note format traditionally used for law review applications.

This option in no way suggests *lowering* standards for membership on law review, but rather *changing* the present standards that merely maintain past discriminatory practices. Considering the influence race has had on legal doctrine,[191] minority viewpoints and life experiences must be taken into account when law reviews formulate their selection processes.

Conclusion

When the Supreme Court decided *Brown v. Board of Education*,[192] it intended to provide minority students with equal access to our educational system. The Court did not intend equality of opportunity to stop once inside the classroom door, but instead intended that it extend to all aspects of education. This has not been the case in law school. This article has shown that one of the primary tools of learning in law school has been denied to minority law students. The legal research and writing techniques attained through membership on law review are not accessible to minorities in the top law schools. In all three legally recognized statistical

187. Brooks, *supra* note 21, at 13 n.40.

188. *See* United States Commission on Civil Rights, The Black/White Colleges: Dismantling the Dual System of Higher Education (1981); United States Commission on Civil Rights, Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law & Medical Schools (1978).

189. *See* The Black/White Colleges: *supra* note 188; Toward Equal Educational Opportunity, *supra* note 188.

190. The Black/White Colleges, *supra* note 188, at 19.

191. Brooks, *supra* note 21, at 14 n.41.

192. 347 U.S. 483 (1954).

tests, the law review selection process resulted in a disparate impact on racial minorities.

In the past fifteen years, the minority population in law school has quadrupled.[193] Yet, discrimination continues to exist within the "best technique of education which our schools have devised . . . ."[194] Law reviews may be blameless in intent, but they cannot maintain a selection process that "operate[s] to 'freeze' the status quo of prior discriminatory . . . practices."[195] The "straitjacket"[196] style of law reviews may be in line with the way white establishments have taught writing and thinking. Minority educational, familial, and social backgrounds, however, may not mesh with the writing style judged as "good" by the subjective standards used in law school.[197] If this is the case, the disparate impact will continue in our nation's law schools and within the legal profession. As the pinnacle of legal education, a law review has an obligation to improve its selection process to eliminate discrimination. The current process perpetuates bias. It is time for law reviews to change their selection processes and guarantee minority students the same access to benefits as that enjoyed by their white counterparts.

---

193. Law School Admission Council/Law School Admission Services, Minority Applicants and the Law (1988) (brochure).

194. Westwood, *supra* note 4, at 915.

195. *Griggs*, 401 U.S. at 430.

196. Rodell, *supra* note 32, at 282.

197. Perry argues that the "motivation and cognitive development" of minorities has been impeded by poverty, "two centuries of slavery and discrimination," and "racially isolated environments." Perry, *supra* note 86, at 557-59. *See also* The Black/White Colleges, *supra* note 188.