

Catholic University Law Review

Volume 26
Issue 4 Summer 1977

Article 8

1977

Employment Testing and the Federal Executive Agency Guidelines on Employee Selection Procedures: One Step Forward and Two Steps Backward for Equal Employment Opportunity.

P. Michael Nugent Jr.

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

P. Michael Nugent Jr., *Employment Testing and the Federal Executive Agency Guidelines on Employee Selection Procedures: One Step Forward and Two Steps Backward for Equal Employment Opportunity.*, 26 Cath. U. L. Rev. 852 (1977).

Available at: <https://scholarship.law.edu/lawreview/vol26/iss4/8>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

EMPLOYMENT TESTING AND THE FEDERAL EXECUTIVE AGENCY GUIDELINES ON EMPLOYEE SELECTION PROCEDURES: ONE STEP FORWARD AND TWO STEPS BACKWARD FOR EQUAL EMPLOYMENT OPPORTUNITY.

Standardized employment tests¹ play a vital role in the modern employee selection process. Employers use the results of these testing devices, which purport to measure ability, aptitude, or achievement, to make decisions about hiring, promotion, transfer, and placement. Approximating the number of tests currently administered would be difficult, but it is safe to say that employment tests are pervasive in the American public and private job sectors.² Given the obvious importance of these tests to job applicants, it is cause for alarm that black and other minority group applicants consistently score lower as a class on standardized tests than do white, culturally mainstream test-takers.³ The lower test scores, in turn, have resulted in lower selection rates for minority job applicants. Reasons for the disproportionate racial impact⁴

1. "Any paper-and-pencil measure . . . used as a basis for any employment decision" that is a "formal, scored, quantified or standardized technique of assessing job suitability . . ." Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.2 (1976). It should be noted that employee selection procedures include techniques other than the standardized test to which this note is addressed.

2. See D. GOSLIN, *THE SEARCH FOR ABILITY* 54 (1963); S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971); H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971).

3. See generally J. KIRKPATRICK, R. EWEN, R. BARRETT, R. KATZELL, *TESTING AND FAIR EMPLOYMENT* (1968); Adler, *Intelligence Testing of the Culturally Disadvantaged: Some Pitfalls*, 37 J. NEGRO ED. 364 (1968); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1638-41 (1969). See also *Davis v. Washington*, 512 F.2d 956, 958-59 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976) (failure rate for blacks was 57%; for whites, 13%); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (black examinees failed at rate of 49%; whites failed at rate of 15%); *Bridgeport Guardians, Inc. v. Civil Serv. Comm'n*, 482 F.2d 1333, 1335 (2d Cir. 1973) (passing rate for whites was 58%; for blacks and Puerto Ricans, 17%); *Chance v. Board of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) (passing rate for whites was one and one-half times that for blacks and Puerto Ricans); *NAACP v. Civil Serv. Comm'n*, 371 F. Supp. 1328 (C.D. Cal. 1973) (white pass rate was 45% as compared to 4%, 15% and 32% respectively for blacks, Latinos and Asians).

4. The disparate effects of standardized employment tests on minority groups will be discussed in terms of racial impact on black test-takers. The reader should be aware, however, that the tests have a disparate impact on minorities generally.

of testing devices are uncertain. It is generally accepted, however, that the failure of blacks to master standardized testing techniques is largely a result of the cumulative, debilitating effects of past and present segregation, institutional racism, cultural separatism, and lesser educational and cultural opportunities.⁵ Because of this disparate racial impact and its traceable roots, many testing devices have been the targets of laws promoting fair employment.

Title VII of the Civil Rights Act of 1964⁶ was enacted as a concerted, comprehensive attempt to eliminate "all aspects of discrimination"⁷ in the employment arena.⁸ Initially predicated on the assumption that employment discrimination was the result of isolated instances of organizational or individual ill will,⁹ Title VII nonetheless was aimed at a wholesale dismantling of systems which effectively excluded minority groups.¹⁰ Although Title VII

5. It is generally recognized that standardized ability, achievement, and aptitude tests measure the accumulation of acquired knowledge in an attempt to predict future ability. See *Hobson v. Hanson*, 269 F. Supp. 401, 481 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). "[C]rucial factors in a person's score are the quality and extent of his past schooling and training and the degree of correlation between his cultural milieu and that which serves as the test's point of reference." *Cooper & Sobol*, *supra* note 3, at 1639.

6. Pub. L. No. 88-352, § VII, 78 Stat. 253, 42 U.S.C. § 2000e (1970), *as amended*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111, 42 U.S.C. § 2000e-16 (Supp. V 1975). Title VII applies to employers engaged in interstate commerce who have more than 25 employees, employment agencies, labor organizations engaged in an industry affecting interstate commerce, joint labor-management organizations, and state, local and federal governments.

7. S. REP. NO. 867, 88th Cong., 2d Sess. 10 (1964).

8. 42 U.S.C. § 2000e-2(a) (1970) provides in pertinent part: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire any individual . . . because of such individual's race, color, religion, sex, or national origin . . ."

9. SENATE COMM. ON LABOR AND PUB. WELFARE, S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).

10. See *Hicks v. Crown Zellerbach Corp.*, 319 F. Supp. 314, 321 (E.D. La. 1970) (overall legislative purpose of Title VII is elimination of all unjustified impediments to realization of full equal employment opportunity for blacks). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971):

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests neutral on their face, and *even neutral in terms of intent* cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices [or operate invidiously to discriminate on the basis of racial or other impermissible classifications].

Id. at 429-31 (emphasis added). It should be noted that Title VII eliminates the need for proof of discriminatory intent in establishing illegally discriminatory testing devices.

would arguably prohibit the use of testing devices that operate to exclude proportionately more blacks than whites as "failure . . . to hire" because of race,¹¹ the Act explicitly authorizes the use of "professionally developed ability tests" in employment decisions.¹² To the extent that the tests are "professionally developed" and are not designed, used or intended to discriminate, it would appear that Title VII on its face allows the use of tests with disproportionate racial impact.¹³ The Civil Rights Act left the practical interpretation of the Title VII testing standards to the courts and the Equal Employment Opportunity Commission (EEOC), which was created by Congress to administer and enforce the Act.¹⁴ In 1970¹⁵ EEOC published its "Guidelines on Employee Selection Procedures"¹⁶ which superseded and enlarged upon some earlier, sketchy testing guidelines.¹⁷ The EEOC guidelines are an extremely stringent interpretation of the testing provisions of Title VII and impose rigorous standards on test users.

The EEOC guidelines were adopted with several modifications from testing guidelines developed by the Office of Federal Contract Compliance Programs

11. See note 8 *supra*.

12. 42 U.S.C. § 2000e-2(h) (1970) provides in pertinent part:

Notwithstanding any other provision of this chapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . .

13. What Congress intended in its Title VII testing provisions has been the subject of much academic dispute. See, e.g., Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-75 (1972); Wilson, *A Second Look at Griggs v. Duke Power Co.: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 852-58 (1972).

14. 42 U.S.C. §§ 2000e-4, 5, 12(a) (1970 & Supp. V 1975). The EEOC is charged with administering and enforcing Title VII as to all employers subject to the Title with the exception of the federal government. *Id.* See note 6 *supra*. The EEOC has the authority to issue, amend, or rescind suitable procedural regulations to carry out the provisions of Title VII. 42 U.S.C. § 2000e-12(a) (Supp. V 1975). These regulations are rules of procedure and administrative interpretations, bounded by the standards and limitations of the Administrative Procedure Act, 5 U.S.C. § 553 (1970), and cannot be substantive rules or quasi-legislative proclamations. See Blumrosen, *supra* note 13, at 95 & n.143.

15. Prior to 1970, the EEOC carried out its implementation of Title VII responsibilities by encouraging voluntary modification of discriminatory tests, rendering administrative decisions on claims of discriminatory tests, and giving technical and remedial assistance. See generally Cooper & Sobol, *supra* note 3, at 1656-59.

16. 29 C.F.R. §§ 1607.1-14 (1976) [hereinafter cited as EEOC guidelines]. These guidelines apply to tests as well as to all employment selection procedures. 29 C.F.R. at § 1607.2.

17. 32 Fed. Reg. 7982 (1967).

(OFCCP) of the Department of Labor. The OFCCP guidelines,¹⁸ published in 1971, were interpretations of Executive Order 11246 of 1965,¹⁹ a document as important to fair employment law as Title VII. The Order provides that all government contractors having contracts above a specific dollar amount must agree, as a term of their contracts, to use affirmative action to secure the employment and advancement of minority group members.

Like the EEOC and the OFCCP, the Civil Service Commission (CSC) has important administrative and interpretative responsibilities in the enforcement of fair employment policy. Executive Order 11478 directs federal departments and agencies to maintain affirmative action programs that promote equal employment opportunity in all civilian employment in the federal government.²⁰ The CSC, charged with implementing these equal opportunity responsibilities,²¹ issued its general regulations on employment practices, including testing, in 1971.²² With the enactment of the Equal Employment Opportunities Act of 1972,²³ the CSC was given the authority to enforce the statute's prohibition against discrimination in the federal government. In 1972, the Commission issued instructions supplementing its general 1971 regulations on "Examining, Testing, Standards, and Employment Practices." These instructions are much less stringent and rigorous than the guidelines of the EEOC and the OFCCP.²⁴

18. 41 C.F.R. §§ 60-3.1-.18 (1976).

19. 32 Fed. Reg. 14,303 (Exec. Order No. 11,375) (1967), 34 Fed. Reg. 12,985 (Exec. Order, No. 11,478) (1969). The OFCCP guidelines are intended to impose the same standards as the EEOC guidelines. 41 C.F.R. § 60-3.1(c) n.1. Executive Order 11,246 designates the Secretary of Labor as the official responsible for the implementation of all facets of equal employment opportunity in the federal procurement area. These responsibilities have been delegated to and are administered by the Director of the OFCCP. The OFCCP guidelines on "Employee Testing and Other Selection Procedures" implement the fair employment responsibilities so delegated.

20. 34 Fed. Reg. 12,985 (1969), *amending* Exec. Order No. 11,246; *as amended by* Exec. Order No. 11,590, 36 Fed. Reg. 7831 (1971).

21. Executive Order No. 11478 gives CSC the power to issue regulations and orders, and instructions to carry out its provisions. The Commission responded with general guidelines.

22. 5 C.F.R. §§ 300.101-.104 (1976).

23. Pub. L. No. 92-261, 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e-15 (1970). The 1972 Act extended the provisions of Title VII to federal, state, and local governmental entities and increased the enforcement powers of the EEOC. 42 U.S.C. §§ 2000e-5, 16 (Supp. V 1975). The Act gives the CSC the power to issue rules, regulations, orders, and instructions to carry the enforcement of Title VII against the federal government. *Id.* § 2000e-16(b).

24. 37 Fed. Reg. 21,552 (1972). These instructions, as well as the 1971 regulations,

Thus, with respect to testing devices which produce a disparate racial impact, two sets of guidelines—those of the EEOC/OFCCP and the CSC—were in existence through 1976. Both sets of guidelines were criticized by courts and commentators²⁵ because of their content and the differing and unequal standards they imposed. Early in 1973, the Equal Employment Opportunity Coordinating Council (EEOCC),²⁶ charged by Title VII with eliminating inconsistency among the operations of the agencies and departments responsible for enforcement of federal equal employment opportunity law,²⁷ began work on “proposed uniform guidelines” for employee selection procedures.²⁸ Several drafts were prepared over a three-year period with a revised draft published for comment on July 14, 1976.²⁹ The EEOC dissented from this published draft,³⁰ thereby aborting the proposed issuance of uniform guidelines. The OFCCP and the CSC, however, scuttled their respective selection and testing guidelines and endorsed the proposed guidelines. Together with the Department of Justice (DOJ), the OFCCP and the CSC,

were issued under the authority and as interpretations of non-Title VII fair employment law. *See* *Washington v. Davis*, 426 U.S. 229, 259 n.4 (1976).

25. Generally, the EEOC guidelines have been criticized by commentators as being unworkable, overly strict, and dated. While courts have usually endorsed the idea of proving job-relatedness of suspect tests and have given great deference to the EEOC guidelines in principle, the majority of them have refused to require strict compliance with the EEOC guidelines in Title VII actions. At the same time, the CSC guidelines have been criticized as being lax and vague. *See, e.g.*, *Douglas v. Hampton*, 512 F.2d 976, 990 n.109 (D.C. Cir. 1976) (CSC guidelines vague); *Henderson v. First Nat'l Bank*, 360 F. Supp. 531, 545 (M.D. Ala. 1973) (no test exists that can comply with the EEOC guidelines); *Johnson, Albemarle Paper Co. v. Moody: The Aftermath of Griggs and the Death of Employment Testing*, 27 *HASTINGS L.J.* 1239, 1239-40, 1256-62 (1976) (EEOC guidelines unrealistic); Comment, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 *HARV. L. REV.* 1109, 1128-32 (1971) (EEOC guidelines overly strict).

26. The Council is composed of the Departments of Labor and Justice, the EEOC, the CSC, and the Civil Rights Commission. *See* 42 U.S.C. § 2000e-14 (Supp. V 1975).

27. *Id.*

28. Reasons for EEOCC initiation of the search for new guidelines apparently included the obvious need for consistency in federal guidelines, significant criticism of existing guidelines, issuance of updated industrial psychological studies on testing in 1974 and 1975. *See* *Washington v. Davis*, 426 U.S. 229, 238-39, 246-48, 263-70 (1976) (recent Supreme Court decision in which six members of the Court attacked EEOC principles and technical standards). *See also* note 44, *infra*.

29. 41 Fed. Reg. 29,016 (1976).

30. The EEOC stated that the proposed guidelines did not represent the view of that agency. 41 Fed. Reg. 51,734 (1976). Concurrence of the Civil Rights Commission was not solicited by the EEOC “because one of [its] roles . . . is to analyze critically the efforts of Federal agencies in the enforcement of civil rights law.” 41 Fed. Reg. 29,016 (1976).

on November 23, 1976, adopted the new "federal executive agency guidelines on employee selection procedures" as their respective guidelines.³¹ Henceforth, these DOJ guidelines will be applied to all government contractors subject to Executive Order No. 11246, to the federal government as employer, and by the Department of Justice exercising its responsibilities under federal law.³² State and local governments and other public and private employers subject to Title VII will remain bound by the EEOC guidelines.³³

The DOJ guidelines mark a break with previous fair employment law on the use of standardized testing devices having disproportionate racial impact. The change, manifested in the testing standards and requirements themselves, is a significant one in terms of equal employment opportunity policy and

31. 41 Fed. Reg. 51,734, 51,735, 51,744, 51,752 (1976). On November 24, 1976, the day after the three agencies published their new guidelines, the EEOC republished its guidelines of 1970. 41 Fed. Reg. 51,984 (1976).

32. The DOJ guidelines would be utilized by the Department of Justice primarily in three instances involving employee selection devices and tests. The first situation would arise when employment tests having disparate racial impact are administered under any program or activity funded in whole or in part with funds made available to states and instrumentalities by the Law Enforcement Assistance Administration (LEAA) under the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-35, 82 Stat. 197 (1968), *as amended*, Pub. L. 93-83, 87 Stat. 197, Pub. L. No. 93-415, 88 Stat. 1142, *codified*, 42 U.S.C. §§ 3701-3795 (1970 & Supp. V 1975). Under 42 U.S.C. § 3766(c) (Supp. V 1975), the LEAA and the Attorney General, as enforcement arms of the Department of Justice, would use the DOJ guidelines as a standard of legality in civil actions brought against states engaging in patterns and practices of discrimination by way of discriminatory testing devices. Secondly, under Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, *codified*, 42 U.S.C. § 2000d (1970), the Department of Justice would use the DOJ guidelines, again as standards for determining the legality of discriminatory testing devices, in civil actions brought against persons or governmental entities administering any federally financed program or activity that utilized racially discriminatory employment tests. Lastly, application of the DOJ guidelines by the Department of Justice may arise in enforcing Title VII itself. By provision of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107, *codified*, 42 U.S.C. § 2000e-6(c)-6(e) (Supp. V 1975), the initial Title VII enforcement authority of the Attorney General granted by the Civil Rights Act of 1964 was transferred to the EEOC effective for two years after March 24, 1972. Hence, application of the DOJ guidelines to suspect testing devices may well be the legal standard governing cases instituted by the Attorney General prior to March 24, 1974, and pending adoption of the DOJ guidelines by the Department of Justice. Whether the DOJ guidelines or those of the EEOC will be applied by the courts in such cases is a question subject to judicial discretion. *See* notes 33 and 116 *infra*.

33. *But see* United States v. Jefferson County, No. 75-P-0666-S (N.D. Ala., Jan. 10, 1977) where, in a Title VII action involving challenges to the testing practices, *inter alia*, of a state governmental agency, the court freely used the DOJ guidelines while noting conflicts between them and those of the EEOC. *Id.* at 10 n.12. The *Jefferson County* case is an example of the type of case instituted by the Attorney General prior to the effective date of transfer of Title VII enforcement authority to the EEOC and pending at the time the DOJ guidelines were adopted. *See* note 32 *supra*.

strategy. This note will assess the elements and the impact of this change in fair employment law with reference to the competing interests involved in the use of standardized employment tests.

I. EMPLOYMENT TESTING: COMPETING INTERESTS AND THEIR RECONCILIATION

Employment testing has decided advantages for both the employer/test-user and the job applicant. For the employer, the use of tests as a means of selecting applicants provides a quick, efficient, and reliable device for identifying those qualified for a job in terms of aptitude, achievement, intelligence, or skills. For the applicant, tests are an impartial means of selection, shielding the test-taker from the subjective whims and biases of employers. Furthermore, tests provide greater quantitative precision in measuring skills and aptitude than do job interviews or resume scans.³⁴ These advantages, however, must be measured against the disproportionate racial impact of testing devices, particularly as seen in tests which purport to measure an individual's general level of aptitude or intelligence.

The disparate and adverse racial impact of testing devices is the end product of numerous, complex factors.³⁵ Ability tests such as intelligence, aptitude, or achievement tests are generally recognized as measurements of the quality and extent of a test taker's cultural milieu, past learning experience and social and intellectual challenges, and psychological make-up.³⁶ In the case of black minority group members, this personal background is often dominated by educational segregation,³⁷ societal racism,³⁸ and cultural sepa-

34. For a general discussion of the benefits of employment testing over other subjective employment decision procedures, see E. GHISELLI, *VALIDITY OF OCCUPATIONAL APTITUDE TESTS* 5-6 (1966).

35. Simple lack of intelligence and inferior mental capacity of blacks has long been discarded on the basis of objective studies and research. See Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 692-95 (1968).

36. Northcross, *The Limits on Employment Testing*, 50 J. URBAN L. 349, 351-53 (1973); Wesman, *Intelligent Testing*, 23 AM. PSYCHOLOGIST 267, 269 (1968); *Hobson v. Hansen*, 269 F. Supp. 401, 478-85 (D.D.C. 1967).

37. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (because they are blacks, petitioners have long received inferior education in segregated schools). See also *Gaston County v. United States*, 395 U.S. 285 (1969) (literacy test for voter registration barred, because, as a result of the inferior education of blacks, the right to vote would be indirectly abridged on account of race); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (segregation sanctioned by law tends to retard the educational and mental development of black children and to deprive them of some benefits of a racially integrated school system).

38. See *Hobson v. Hansen*, 269 F. Supp. 401, 480-85 (D.D.C. 1967) (segregation

ratism.³⁹ As a result, standardized testing devices given to blacks reflect either the debilitating effects of segregation and racism or the difference between black experience and white mainstream culture. In either case, standardized tests do not ordinarily measure the natural ability, intelligence, achievements, or job suitability of black individuals.⁴⁰

Testing devices, then, are deemed necessary for business purposes and advantageous for the job applicant. Yet, at the same time, they operate to exclude proportionately more blacks than whites from available jobs. These competing interests of equal employment opportunity and general test usefulness had to be reconciled by Congress in drafting Title VII. Tests with disparate racial impact are now illegally discriminatory under Title VII unless "professionally developed" and not designed, intended, or used for discriminatory purposes.⁴¹ It is the general consensus among legal commentators and the courts that Congress intended to make illegal those tests with adverse racial impact that were not job-related; that is, tests that did not reliably measure the test-taker's ability for the job in question.⁴² Thus, reconciliation of the competing interests surrounding the use of testing devices resulted in congressional legitimation of tests that were job-related, regardless of racial impact.⁴³

in society has led to language barriers, to lack of self-confidence, and to a sense of racial inferiority and apathy on the part of blacks, resulting in handicaps to learning and thus comparatively poor test performance). See also J. CONANT, *SLUMS AND SUBURBS* 13 (1961); D. GOSLIN, *THE SEARCH FOR ABILITY* (1963); T. PETTIGREW, *A PROFILE OF THE NEGRO AMERICAN* 100-35 (1964).

39. Segregation has prompted cultural separatism resulting in a black subculture characterized by, among other aspects, different language and conceptual patterns. See Northcross, *supra* note 36, at 349, 352 and authorities cited at note 38 *supra*. When a test is constructed by the majority white culture with its own idioms and concepts or is constructed to be valid for the majority, the result is poor performance by members of the subcultures. *Id.* Some have suggested that the tests themselves are not racially biased but that the jobs and institutions for which the tests are utilized have been defined and molded in a discriminatory fashion over years of white domination, resulting in jobs that are exclusively and discriminatorily defined. See, e.g., Joyce, *The American Tragedy, Act IV*; Soc. PROGRESS 5 (May-June, 1968).

40. This principle is true as long as the adverse effects of past and present racial segregation and discrimination on the black minority continue, presuming that tests constructed with the idiom and concepts of mainstream culture are jettisoned. Just when the adverse effects that hamper black test performance will cease is uncertain and may largely depend on the success of equal employment opportunity law and affirmative action programs. See Blumrosen, *supra* note 13, at 102-07.

41. See notes 8 & 12 and accompanying text *supra*.

42. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 431 (1971); Blumrosen, *supra* note 13, at 81-83. But see Wilson, *supra* note 13, at 852-58 (Congress accepted the notion that general intelligence or aptitude tests were nearly always job-related without need for separate validation).

43. Likewise, the courts have reconciled the conflict between the benefits of stand-

By establishing the illegality of tests having disproportionate racial impact unless manifestly job-related and professionally developed, Congress and the courts drew professional psychology into the field of fair employment law. In response to increasing employer needs for tests that accurately measure the job suitability of job applicants, industrial psychologists have devised methods for developing job-related tests and for upgrading the job-relatedness of existing tests.⁴⁴ Equal employment opportunity law has come to rely on these methods of establishing job-relatedness in determining the legality of tests with adverse racial impact. The genuine capacity of a test to measure actual job suitability is established by professional psychological analysis of both the test itself and its construction and development. This process entails job analysis, analysis of test content, test validation, and documentation of the study and its processes. Job analysis involves examination of the job in question to ascertain the level of skills and work behaviors necessary for adequate job performance.⁴⁵ Next, the test content is studied to determine what ability, skills, and behaviors the test is attempting to measure. Third, there is a validation of the test, which, in essence, is a professional de-

ardized testing devices and equal employment opportunity by nearly universally requiring that tests with disproportionate racial impact be shown to be job-related under penalty of a finding of illegal racial discrimination. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . . More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). See also *Washington v. Davis*, 426 U.S. 229, 246-48 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.14 (1973). Similarly, tests with adverse racial impact have been deemed illegally discriminatory unless job-related in non-Title VII actions. See *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975) (42 U.S.C. § 2000(e) *et seq.* (1970) and fifth amendment); *Castro v. Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972) (42 U.S.C. § 2000e *et seq.* (1970)); *Chance v. Board of Examiners*, 458 F.2d 1167, 1176-77 (2d Cir. 1972) (42 U.S.C. §§ 1981, 1983 (1970) and fourteenth amendment). But see *Washington v. Davis*, 426 U.S. 229, 244-46 & n.12 (1976), wherein the Supreme Court disapproved of imposing job-relatedness requirements under non-Title VII actions unless proof of discriminatory racial purpose in the use of the employment practice in question has been shown.

44. See, e.g., *Principles for the Validation and Use of Personnel Selection Procedures of the American Psychological Association* (1975) [hereinafter cited as 1975 A.P.A. Standards]; *Standards for Educational and Psychological Tests of the American Psychological Association* (1974) [hereinafter cited as 1974 A.P.A. Standards]. This collection of principles and standards represents the most prominent and widely accepted of the psychological models for use of standardized ability tests.

45. E. GHISELLI, *supra* note 34, at 22-23 (1966): See also *Wilson*, *supra* note 13, at 859-60. Job analysis entails the isolation of the qualities necessary for adequate job performance and the determination of their relative importance and the level of competence required as to each of them.

termination of whether a test actually and reliably measures what has been defined as adequate job performance. A test is valid and job-related if it measures the person against important elements of the job necessary for successful job performance. Test validation is accomplished by one of three methods, occasionally used in combination: criterion-related validation, content validation, and construct validation.

Criterion-related validation is a process by which actual test performance or success and actual job performance or success are directly compared. This comparison of performances is made by means of statistical and empirical evaluation of the relationship between test scores and those external elements or criteria of the job in question established by job analysis as measures of successful job performance.⁴⁶ The relationship may be established predictively, concurrently, or synthetically⁴⁷ and must have practical and statistical significance.⁴⁸ Criterion-related test validation, though burdensome,⁴⁹ is the most reliable method of test validation because by virtue of its empirical nature, it clearly demonstrates the job-relatedness of a test.⁵⁰

46. Such elements or criteria are derived from thorough and documented analysis of the elements of adequate job performance and include work proficiency data, work behaviors, supervisory ratings, and regularity of attendance at work. Thus, criteria for an assembly line worker might include output, number of mistakes and the like.

47. Predictive and concurrent criterion-related validation are processes by which a test-user attempts validation of the test in question within the confines of his own place of employment. Each method entails use of test control groups whose job performance is compared with their test scores, whether tests are given prior to hiring (predictive) or afterwards (concurrent), to determine if a valid relationship exists between performance and scores. Synthetic validation involves the use of and reliance on validation studies done elsewhere than in the user's place of employment but in similar job situations. This method has been criticized in that job performance in apparently similar job situations may involve subtle but significant differences. For a general discussion of these methods of criterion-validated studies, see Comment, *supra* note 25, at 1121-23; *Vulcan Soc., Inc. v. Civil Serv. Comm'n*, 490 F.2d 387, 394 (2d Cir. 1973).

48. Practical significance is established by showing a relationship between test scores and job performance large enough to be practically significant as a measure. Statistical significance is a mathematical demonstration of the accuracy of the test as predictor of successful job performance, *i.e.*, a demonstration that the relationship between test scores and job criteria is high enough to have a probability of no more than 1 to 20 that it occurred by chance. See Wilson, *supra* note 13, at 860-61.

49. Criteria necessary for adequate job performance are often difficult to isolate and quantify, much less evaluate, in terms of importance. Often criteria are grouped together generally to construct "indices of job performance." Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 503, 518 (1973). Predictive and concurrent methods of criteria-related validation are burdensome for the employer, as is the necessity for demonstrating practical and statistical significance. See generally Wilson, *supra* note 13, at 860-63.

50. The 1966 A.P.A. Standards, *supra* note 44, gave professional preference to the

Content validation, or rational validation, is a subjective analysis and comparison of the actual content of a test with the actual and specific skills and knowledge which have been determined by job analysis to be necessary for successful job performance.⁵¹ If a test closely duplicates specific job duties, it is considered to have high content validity. Content validation, because of its provision for subjective comparison of test content with job content, has often been called "expert advice" validation.⁵² Finally, construct validation, another form of rational validation,⁵³ seeks to evaluate the degree to which a test reliably measures whether a test-taker possesses some hypothetical general and psychological trait or construct shown by job analysis to be necessary for successful job performance.⁵⁴ The construct or trait must have manifest predictive value with respect to future job performance, and actual comparison of job performance with test performance is necessary to determine the relationship of the hypothetical trait to a particular job.⁵⁵

If the necessary relationship between test performance or content and job performance is verified by criterion-related, content, or construct validation studies, then the test has been shown to be job-related under current standards of professional psychology.⁵⁶ But tests that have been shown to be gen-

use of criterion-related validation over content and construct validation procedures. *See also* Comment, *supra* note 25, at 1121-23; *Bridgeport Guardians, Inc. v. Civil Serv. Comm'n*, 482 F.2d 1333, 1337-38 (2d Cir. 1973).

51. Content validation is deemed the most appropriate method for tests which measure achievement and other present skills and knowledge, as distinct from those tests which predict future performance and are best validated by criterion-related validation methods. For example, typing, stenography, and spelling tests have high content validity for secretarial positions but low, if any, content or criterion-related validity for management positions. *See Wilson, supra* note 13, at 863; Note, *supra* note 49, at 517.

52. Content validation is highly dependent on opinions of psychologists and is therefore rational rather than empirical. Further, content validation is an attempt to discern a rational relationship between content of the test and job content. *Id.* It should be noted that content validity requires a factually based linkage of the testing device to job duties.

53. Construct validation is also highly dependent on opinions and rational relationships as determined by psychological analysis. *See* note 52 *supra*. It does, however, require empirical research data linking the testing device to the job construct or trait being measured.

54. Typical construct-validated tests are the general intelligence types of devices on which blacks and other minority group persons fare poorly. *See* notes 35-40 & accompanying text *supra*. A construct-validated test for typists would measure ability to concentrate, perseverance, and attention to detail if these traits or constructs are shown to be necessary for adequate job performance. *See Vulcan Soc. Inc. v. Civil Serv. Comm'n*, 490 F.2d 387, 395 (2d Cir. 1973).

55. *See* Note, *supra* note 49, at 518.

56. In contrast to the 1966 A.P.A. standards, *see* notes 44 & 50 *supra*, the 1974 and 1975 A.P.A. standards, *supra* note 44, are decidedly more relaxed in terms of setting

erally job-related may be differentially valid; that is, valid for one race or subculture taking the test, but not for another, and thus underpredictive or overpredictive of job success for a particular race or culture.⁵⁷ Differential validity, when established,⁵⁸ indicates that lower black test scores are not reflective of lesser job ability or lesser probability of job success.⁵⁹ Tests that are job-related for white test-takers may well be either nonpredictive or underpredictive of job success for blacks, as a result of the debilitating effects of past segregation that hamper articulation and conceptualization.⁶⁰ This phenomenon suggests that, once disproportionate racial impact is shown, separate empirical validation of tests for blacks as a group is appropriate, as are compensatory measures when differential validity is found.⁶¹ Some commentators, however, argue that overall test validity and job-relatedness suffice to legitimize tests in an imperfect world and in the name of business necessity and practicality.⁶² One thing is clear: a differentially valid test which excludes disproportionately more blacks than whites from available jobs on bases other than job suitability represents a significant impediment to the goal of truly equal employment opportunity.

Proper test validation studies indicate job-relatedness, and tests so vali-

preferences as to any one means of validation. Under the new A.P.A. standards, any means of validation is proper if appropriate and feasible. One commentator/psychologist has suggested that the new A.P.A. standards reflect an orientation "toward the practical and social problems that have been intertwined with the uses of psychological tests" whereas the old A.P.A. standards were efforts "to develop ethical standards among its professional members in developing, publishing and using tests with discriminatory racial impact." Hunt, *Civil Service Testing and Affirmative Action: A Psychologist's Perspective*, 44 U. CIN. L. REV. 690, 693-94 (1975) (emphasis added).

57. See generally, KIRKPATRICK, TESTING AND FAIR EMPLOYMENT 30-33 (1968); Wilson, *supra* note 13, at 869-72; Comment, *supra* note 25, at 1129; Note, *supra* note 35, at 704-06.

58. Differential validity can only be established empirically, by means of a separate statistical validation study showing disparate effect and the relationship between test scores and job performance. See Note, *supra* note 49, at 520.

59. Wilson, *supra* note 13, at 871-72; Note, *supra* note 35, at 704. The concept of differential validity and the means by which it is established have come under increasing attack as theoretically and empirically unsound and practically infeasible. The basis of the attacks on differential validity is that if tests are shown to be job-related by means of proper validation studies, they are job-related for all groups, and if certain groups register consistently poorer performance as a class it is due to job requirements rather than test invalidity. See generally *United States v. Georgia Power Co.*, 474 F.2d 906, 914 & n.8 (5th Cir. 1973); Boehm, *Negro-White Differences in Validity of Employment and Training Selection Procedures: Summary of Research Evidence*, 56 J. APPLIED PSYCH. 33 (1972); Johnson, *supra* note 25, at 1259 & n.107.

60. See notes 3, 5, 35-40 & accompanying text *supra*.

61. See authorities cited note 57 *supra*.

62. See note 59 & accompanying text *supra*.

dated are legitimized by Title VII and accepted by the courts despite any adverse racial impact. The concept of differential validity, however, shows that tests otherwise valid may be not job-related for racial and cultural minority groups. The job-relatedness standards for tests as established by psychological methods have been adopted in varying degrees by the EEOC guidelines⁶³ and the new DOJ guidelines.⁶⁴ Analysis of the double set of guidelines reveals not only technical differences but also a variance in the reconciliation of the competing interests of business necessity and full and fair employment opportunity.

II. THE CURRENT TESTING GUIDELINES: TO EACH AN INTEREST

The EEOC and DOJ guidelines for employee selection procedures are based on separate psychological testing standards promulgated by the American Psychological Association.⁶⁵ The variations tend to be policy-related. In sum, the EEOC guidelines allow only the most strictly proven job-related tests, while the DOJ guidelines give the employer great flexibility in the areas of test validation and use.

One major difference between the two sets of guidelines is in the finding that a test having adverse racial impact is illegally discriminatory. The EEOC guidelines deem such a test illegally discriminatory unless it is properly validated and evidences a high degree of utility,⁶⁶ and unless the test user can demonstrate that there are no alternative tests with a less drastic adverse impact.⁶⁷ The DOJ guidelines, on the other hand, find a test with adverse racial impact to be illegally discriminatory when it is not properly validated and when it does not evidence utility equivalent to that imposed on test users by the EEOC guidelines.⁶⁸ The distinction here lies in the EEOC's insistence

63. The EEOC guidelines, *supra* note 16, are the EEOC's interpretation of the testing provisions of Title VII.

64. The DOJ guidelines, entitled "Federal Executive Agency Guidelines on Employee Selection Procedures," [hereinafter cited as DOJ Guidelines] issued November 23, 1976, 41 Fed. Reg. 51,734, are the guidelines of the OFCCP, the Department of Justice and the CSC, used by those agencies in administering and enforcing Executive Orders No.'s 11,246, 11,478, and 42 U.S.C. § 2000e-16a (Supp. V, 1975) and other federal law. See notes 18-32 *supra*.

65. See note 56 *supra*.

66. Utility here is defined as practical and statistical significance by both sets of guidelines. See note 48 *supra*.

67. 29 C.F.R. § 1607.3 (1976).

68. 41 Fed. Reg. 51,736, §§ 3(a), 12(b)(5), 12(c)(4) (1976). An additional variance in the two sets of guidelines is found in different definitions of when a test registers adverse racial impact. A finding of adverse impact triggers required compliance with both sets of guidelines and thus its definition is vital. The DOJ guidelines, *supra*

that those using a test demonstrate the nonexistence of alternative testing devices with lesser impact in order to escape illegality.⁶⁹

A second important difference in the guidelines lies in methods of test validation studies required to demonstrate job-relatedness,⁷⁰ once adverse racial impact is shown. EEOC mandates that test validation be accomplished by criterion-related validation studies⁷¹ unless this method is demonstrated by the test user to be technically infeasible⁷² or unless content validity is clearly appropriate.⁷³ The guidelines contemplate that content validation will be deemed appropriate only if the tests are "well-developed" and consist of "suitable samples of the essential knowledge, skills or behaviors composing the job in question," as in the case of typing tests and other similar mechanical ability tests.⁷⁴ The DOJ guidelines, however, allow the test user to employ any one of the three current methods of test validation—criterion-related, content, or construct—whenever it is considered appropriate.⁷⁵ Con-

note 64, § 4(b), define adverse impact as a "selection rate for any racial, ethnic or sex group which is less than four-fifths ($\frac{4}{5}$) (or 80 percent) of the rate for the group with the highest rate." Smaller differences in selection rates, however, may be deemed to have adverse impact if they are practically and statistically significant. The EEOC guidelines give no definition of adverse racial impact. EEOC Guidelines *supra* note 16, § 1607.3. The courts have broadly interpreted adverse racial impact and thus have accorded great flexibility in triggering application of Title VII and EEOC guidelines. *See, e.g., Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1293-94 (8th Cir. 1975).

69. The Supreme Court, at least indirectly, endorsed this EEOC requirement in a Title VII action in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). But many commentators consider this requirement beyond the intent of Title VII. *See, e.g., Johnson, supra* note 25, at 260-61. The DOJ guidelines suggest only that an employer should use reasonable care to seek out alternative testing devices but do not require a demonstration of their nonexistence. *See Questions and Answers on the Federal Executive Agency Guidelines on Employee Selection Procedures*, 1 EMPL. PRAC. GUIDE (CCH) ¶ 4905, Q. 36 (Department of Justice, Jan. 19, 1977) [hereinafter cited as 1977 Questions & Answers].

70. These methods are criterion-related, content, and construct validation. *See notes 45-56 & accompanying text supra*.

71. *See notes 46-50 & accompanying text supra*.

72. Technical infeasibility is defined as the absence of a sufficient number of minority persons in either present work force or control sample necessary to demonstrate that test scores are significantly related with job elements. Without an adequate number of minority group persons, it would be extremely difficult to demonstrate reliability or practical/statistical significance of minority test performance as compared to other group scores. EEOC Guidelines, *supra* note 16, § 1607.4(b).

73. *See note 51 supra*.

74. EEOC Guidelines, *supra* note 16, § 1607.5(a). Content validation is not considered appropriate for tests measuring job skills expected to be learned on the job. *Id.*

75. DOJ Guidelines, *supra* note 64, §§ 5, 12(c)(1). Additionally, the DOJ guidelines detail proper use and documentation of standards for construct and content validity to a much greater degree than do the EEOC guidelines. *Compare* EEOC Guidelines, *supra* note 16, § 1607.5 with DOJ Guidelines §§ 12, 13.

tent validation is not considered appropriate under the DOJ guidelines for "intelligence, aptitude, personality or interest tests" or for tests measuring job skills expected to be learned on the job.⁷⁶ The effect of this difference in approved validation techniques cannot be clearly discerned until actual testing devices are subjected to litigation. But the policy difference is clear: the EEOC guidelines will deem a test illegally discriminatory unless criterion-related validation, the most reliable and most burdensome,⁷⁷ is either established or proven infeasible, whereas the DOJ guidelines will countenance any method if appropriate. Thus, under the DOJ guidelines, the burden of proving infeasibility of criterion-related validation is lifted from the employer.

The DOJ guidelines also differ significantly from those of the EEOC with respect to synthetic validation; that is, the use of validation studies conducted for job situations other than the actual test user's own.⁷⁸ The DOJ guidelines, as a matter of express policy, encourage and facilitate cooperative validation studies in place of internal validation by employers, without any priority given to individual internal test validation by employers in their own job situations.⁷⁹ The EEOC guidelines, on the other hand, allow use of outside validation studies only when the employer positively shows that an internal test validation is infeasible.⁸⁰

Both sets of guidelines allow an employer using a testing device which has not been fully validated to continue using the test, but only upon a showing of "substantial evidence of validity" and only where proper validation studies are in progress.⁸¹ The EEOC guidelines contemplate that the employer/test-user will "alter or suspend" any test cut-off scores lest test-takers be penalized without proper validation of the test and so that subsequent validity of the test can be related back.⁸² Where test validation is not technically feasible or appropriate,⁸³ the DOJ guidelines simply advise the test user to use pro-

76. DOJ Guidelines, *supra* note 64, § 12(c)(1).

77. See notes 49-50 & accompanying text *supra*.

78. See note 47 *supra*.

79. DOJ Guidelines, *supra* note 64, § 6.

80. EEOC Guidelines, *supra* note 16, § 1607.7. Further, an employer who seeks to use other test validation studies under the EEOC guidelines must substantiate in detail job comparability and absence of major contextual differences. *Id.* Although bound under the DOJ standards by the requirements of job comparability and lack of major contextual differences, the employer does not need to make any substantiation or showing of these similarities. DOJ Guidelines, *supra* note 64, § 6.

81. EEOC Guidelines, *supra* note 16, § 1607.9; DOJ Guidelines, *supra* note 64, § 5(h).

82. EEOC Guidelines, *supra* note 16, § 1607.9.

83. Technical infeasibility and appropriateness are defined substantially the same way as under the EEOC guidelines. DOJ Guidelines, *supra* note 64, § 14(j). See note 72 *supra*.

cedures "as job-related as possible" which will "minimize or eliminate adverse impact."⁸⁴ Alternatively, the DOJ guidelines allow the employer to utilize a nonvalidated test upon a showing that, even with its adverse impact, the test is necessary to business purposes, i.e., to the safety and efficiency of the business operation.⁸⁵ The EEOC guidelines take an entirely different tack. EEOC standards will find a test with adverse racial impact illegally discriminatory if validation studies are completely infeasible or inappropriate.⁸⁶ If the same employer then resorts to subjective interviews or scored application forms, the EEOC guidelines hold the employer to the same standards applicable to the use of standardized testing devices.⁸⁷

A final⁸⁸ difference between the two sets of guidelines falls in the area of differential validity, when a test is valid as an indicator of successful job performance for one group, race, or culture but not for another.⁸⁹ The EEOC guidelines set strict requirements and limitations for tests that are differentially valid. Initially, in the overall test validation study, the employer must generate and report all test data and results separately for each minority and nonminority group and must validate the test for each minority group.⁹⁰ If differential validity is indicated, that is, if lower minority selec-

84. DOJ Guidelines, *supra* note 64, § 3(b).

85. 1977 Questions & Answers, *supra* note 69, Q. 12.

86. EEOC Guidelines, *supra* note 16, § 1607.3.

87. *Id.* at § 1607.13.

88. This discussion of differences is by no means all-inclusive. First, in the area of documentation of the results and methods of validation procedures, the DOJ guidelines require the submission of more information and details, 24 items of "essential" information in all, as well as other revealing data. DOJ Guidelines, *supra* note 64, § 13. Second, the affirmative action posture and obligations of an employer using an unvalidated test with adverse racial impact will be considered in making any decisions initiating enforcement proceedings under the DOJ guidelines. *Id.* at § 4(c); 1977 Questions & Answers, *supra* note 69, Q. 9. It is ironic that past obligations to remedy the effects of segregation may excuse the effects of present discrimination in terms of tests with adverse racial impact, especially when the adverse impact itself is due to the effects of past segregation. Third, unlike the EEOC guidelines, which require job analyses for all job criteria necessary to job performance, the DOJ guidelines preclude the need for analysis of certain "job behavior," including over-all work performance. *See* note 45 & accompanying text *supra*. DOJ Guidelines, *supra* note 64, § 12(b)(3); 1977 Questions & Answers, *supra* note 69, Q. 29. Lastly, the DOJ guidelines, unlike those of the EEOC, include "properly measured success in job-related training" as a proper element of successful job performance allowable for testing and selection procedures. DOJ Guidelines, *supra* note 64, § 12(b)(3); 1977 Questions & Answers, *supra* note 69, Q. 30. This inclusion of the training element as a criterion of successful job performance is presumably intended to embrace the finding of the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976).

89. *See* notes 57-62 & accompanying text *supra*.

90. Such a report and separate validation study is required only where technically

tion rates do not reflect lesser job suitability, the EEOC guidelines prohibit use of the test in groups for which it is not valid. Further, when a test holds some validity for two groups, but one group scores consistently higher than another and that higher score is not linked to better job performance, the EEOC guidelines require that cutoff scores be established in such a manner as to predict the same probability of job success.⁹¹

The DOJ guidelines do not recognize the concept of differential validity per se. Instead, they acknowledge the notion that tests might be "unfair" if some groups receive lower scores than others and if such lower scores do not reflect lesser job suitability.⁹² When technically feasible,⁹³ the employer must keep a record of the test's impact on minority groups.⁹⁴ If impact information reveals adverse racial impact, the employer "generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so . . ."; the greater the adverse impact, the greater the need to investigate.⁹⁵ Investigation of unfairness under the DOJ guidelines entails analysis of the validity of the test for other groups and of the test's use in the overall employee selection procedure. When such an investigation reveals test unfairness, the employer may either revise or replace the testing device or revise his use thereof, to "assure compatibility between the probability of successful job performance and the probability of being selected."⁹⁶

The lesson here is that, under EEOC guidelines, the employer is required to conduct separate validity studies for each minority and nonminority group of test-takers in order to ascertain if the test is differentially valid. If it is, the test is invalid for the group for which the test is not job-related, and EEOC mandates forbid use of the test on this group. Under the DOJ guidelines, however, no such separate validation study is required for minority groups, and thus proof of job-relatedness for these groups is more attenuated

feasible; that is, when there is an adequate number of minority test-takers to assure the practical and statistical significance of the test scores' correlation with job performance. EEOC Guidelines, *supra* note 16, §§ 1607.4(a), 1607.5(b)(5).

91. Where differential validity is infeasible and a separate validation study for the affected minority group has not been made, provisional compliance with EEOC guidelines is accomplished by proof of acceptable validation for other groups pending separate validation for the affected group. EEOC Guidelines, *supra* note 16, § 1607.5(b)(5). It should be noted that the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), endorsed the differential validity requirements of the EEOC guidelines. *Id.* at 425.

92. DOJ Guidelines, *supra* note 64, § 12(b)(7)(i).

93. *Id.* at § 14(j); *see* note 90 *supra*.

94. DOJ Guidelines, *supra* note 64, § 4.

95. *Id.* at § 12(b)(7)(ii).

96. *Id.* at §§ 12(b)(7)(ii)-(iv). *See also* 1977 Questions & Answers, *supra* note 69, Q. 31-35.

and circumstantial than empirical. Furthermore, unfair tests are not banned under the DOJ guidelines; rather, the employer is accorded wide leeway. Consequently, the duty to ascertain the existence of differentially valid or unfair tests and the limitations on such tests are more restrictive in EEOC guidelines than in similar DOJ provisions.

From the foregoing discussion of the two existing sets of testing guidelines, it is clear that the DOJ guidelines impose lesser restrictions on the use of tests having adverse racial impact than do the EEOC guidelines. Less of a burden is placed on the employer as measured in terms of documentation of the test validation processes, use of alternative testing devices, and use of tests that are differentially valid or unfair. Additionally, the DOJ guidelines allow the test-user to continue the administration of suspect, nonvalidated tests having adverse racial impact with far greater leeway and impunity.

From a broader perspective, it is arguable that the DOJ guidelines, in deference to business needs and purposes in seeking a quality work force, put less emphasis on the equal employment opportunity mandate to eliminate those employment practices which continue to penalize blacks because of past segregation, racism, and cultural separatism.⁹⁷ The EEOC guidelines, conversely, may be viewed as an attempt to actualize this equal opportunity mandate to eliminate all "built-in headwinds" frustrating minority job applicants. They may even go further, in terms of policy, in attempting to remedy the present adverse testing impact attributable to past segregation by establishing standards so high and so technically demanding that they operate to preclude use of all but the most valid and expensively developed tests. Thus, the EEOC guidelines may serve as a mechanism that deliberately discourages "paper-and-pencil" testing devices in employment decisions because of their doubtful capacity to measure actual job performance, particularly in the case of blacks.⁹⁸ The issuance of the DOJ guidelines, however, marks a new phase in employment testing.

97. See notes 6-14, 41-43 & accompanying text *supra* for a discussion of the purposes of Title VII and its testing provisions.

98. "[W]hat tests measure is not ability; ability can only be determined by on-the-job performance. Tests measure something that seemingly correlates with ability." Note, *supra* note 35, at 704. The EEOC guidelines declare that professionally developed tests, *when used with other sound employee selection tools*, are valuable to the employee selection process. EEOC Guidelines, *supra* note 16, § 1607.1(a). Thus it is arguable that the EEOC guidelines are actually designed to discourage the sole use of tests in employee selection procedures. See Johnson, *supra* note 25, at 1261 ("the commission's validation procedures are . . . theoretical ideals . . . standards of perfection."); Comment, *supra* note 25, at 1131-32 ("The practical application of the Guidelines may reflect a goal more educative than coercive: to force an assessment by business of the usefulness of the tests they use.").

III. THE IMPACT OF THE DOJ GUIDELINES ON EMPLOYMENT TESTING AND EQUAL EMPLOYMENT OPPORTUNITY LAW

The DOJ guidelines contain several gains for fair employment law vis-a-vis standardized employment tests. First, the guidelines, which were fully adopted by the Civil Service Commission, replace the former testing regulations and instructions of the Commission which were vague and inadequate.⁹⁹ Secondly, they articulate more precise and detailed standards and requirements for job analysis, test validation, and documentation thereof than do the EEOC guidelines and are thus more helpful to test-users seeking to comply with testing requirements. The DOJ guidelines achieve a degree of uniformity in federal testing guidelines never before attained among the various federal agencies.¹⁰⁰ Thirdly, the new set of guidelines, based on 1974-75 standards, reflects current psychological views and strategies, whereas the EEOC guidelines still adhere to 1966 standards.¹⁰¹ Additionally, the DOJ guidelines are closely aligned with the position currently taken by the majority of courts and legal commentators concerning test validation, a position that concomitantly attacks EEOC principles and guidelines. This view holds that tests with adverse racial impact must be job-related as shown by reliable and documented test validation procedures that significantly correlate adequate job performance with test scores or performance. The predominant view recognizes criterion-related, content, and construct validation studies as proper techniques for showing job-relatedness—techniques which some consider to vary in their reliability. Further, there is a strong consensus that the test-user should not be forced to the extreme of foregoing tests or using subjective selection practices when objections to testing devices are based on professionally uncertain concepts of differential validity or on the asserted need to prove the nonexistence of test alternatives having lesser adverse impact. The approach shared by the DOJ guidelines and prevailing legal thinking thus gives the employer the prerogative of using reliable and rationally

99. 5 C.F.R. §§ 300.101-.104 (1976); 37 Fed. Reg. 21,552 (1972) (examination instructions). For criticisms of the former guidelines of the Civil Service Commission, see notes 24-25 & accompanying text *supra*.

100. EEOC dissent from the DOJ guidelines, however, leaves the bulk of those subject to Title VII and EEOC jurisdiction—all public and private employers other than the federal government—bound by stricter guidelines.

101. As was discussed earlier, however, these newer psychological standards and principles reflect more a change of policy and an increased practical orientation than a change in substantive accuracy and premises. See note 56 *supra*. The EEOC guidelines served to weed out many of the most egregiously discriminatory and unvalidated tests under the still theoretically valid 1966 A.P.A. standards that were reprioritized in 1974-75. *Id.*

developed and validated testing devices, unconstrained by overly stringent demands for empirical validation.¹⁰²

The DOJ guidelines represent the salvation of those testing devices, many of which could not pass muster under the extremely stringent EEOC guidelines.¹⁰³ It is conceivable that the issuance of the DOJ guidelines will encourage an increase in the use of testing devices since the guidelines facilitate the testing validation requirement and generally offer more relaxed and possibly more realistic standards. Increased use of neutral testing devices will at least obviate the need for subjective selection practices that may operate as a vehicle for intentional racism on the part of the employer.

The new testing standards, on the other hand, represent significant drawbacks for equal employment opportunity law and Title VII enforcement. One of the conceptual goals of both Title VII testing provisions and equal employment opportunity principles is the elimination of those tests which operate to exclude blacks from employment because of the present impact of past segregation and racism¹⁰⁴ and not because of the absence of job qualifications. Analysis of the nature of the changes made by the DOJ guidelines reveals two arguable premises underlying the DOJ standards: first, a belief that the adverse effects of past discrimination and segregation have dissipated to the extent that a modification of equal employment opportunity remedies is appropriate; or a determination that the business need for employment testing devices outweighs the fair employment mandate for tests that are strictly job-related for all test-takers. The DOJ guidelines' abandonment of the concept and strictures of differential validity and the substitution of moderately restrictive "fairness" standards¹⁰⁵ undermines the best available method by which illegally discriminatory tests may be uncovered and prohibited.¹⁰⁶ In light of the consistently lower scores still registered by blacks

102. See generally Johnson, *supra* note 25, at 1257-62; *Washington v. Davis*, 426 U.S. 229, 246-48 (1976); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975); *United States v. Georgia Power Co.*, 474 F.2d 906, 913-15 (5th Cir. 1973); *James v. Stockham Valves and Fittings Co.*, 394 F. Supp. 434, 498-99 (N.D. Ala. 1975).

103. See authorities cited note 25 *supra*.

104. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-33 (1971); Blumrosen, *supra* note 13, at 66-75. "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). See also note 97 *supra*.

105. For a discussion of differential validity and the approach of the EEOC and DOJ guidelines to the subject, see notes 57-62, 90-96 & accompanying text *supra*.

106. Although this notion of differential validity is presently disputed, see note 59 *supra*, the dispute rests on strategy and practicality and not on principle or theory.

on testing devices as compared to white test-takers, as well as the widespread recognition that generations of segregation and racism have seriously hampered black ability to grasp and master standardized testing devices,¹⁰⁷ the premises of the DOJ guidelines are untenable. Moreover, these premises ignore consistent congressional and judicial reaffirmance of the notion that fair employment principles require accommodation of business needs, not their ascendancy.¹⁰⁸ Whether the DOJ guidelines are a proper accommodation of business needs and equal employment opportunity principles is a question that will be answered as tests are developed and validated in accordance with the DOJ guidelines and as their racial impact is determined. It would appear in theory, however, that the DOJ guidelines are an overreaction to the failure of the EEOC guidelines to defer to the practical needs and purposes of the employer.

If Congress and the courts require that tests with adverse racial impact be reliable indicators of successful job performance in order to pass Title VII muster, and if tests are to be "professionally developed" and not designed or used to discriminate on account of race, then tests having adverse racial impact should be differentially validated. This would reveal whether tests are job-related for blacks and accordingly accurate measures of the true qualifications necessary for the job. If tests are job-related and correlate minority group ability with those skills and behaviors necessary for the job and its successful performance, this is the best that can be achieved in an imperfect world.¹⁰⁹

Besides the differential validity concern, the policy of equal opportunity in employment would seem to require that, if tests are to be used as employee selection devices, they should be validated by studies that are as empirically based and developed as possible. These tests should have the least drastic

107. See generally Blumrosen, *supra* note 13, at 103-07.

108. See Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 102-07 (1974); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability . . ."); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1181 n.30 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 163 (1976) ("the expense of [proving job-relatedness by job analysis and documented validation procedures] is a burden the employer must bear if it desires to use tests that operate discriminatorily or perpetuate the effects of past discrimination . . ."). See also notes 43, 97 & accompanying text *supra*.

109. Development and design of tests that are reliable indicators of black as well as white job performance would best promote "culture fair" selection; however, such tests have yet to be designed. Wilson, *supra* note 13, at 871-72. Another approach would be to give blacks those tests valid for blacks, and to give white, culturally mainstream applicants those tests valid for them.

adverse racial impact among those evaluation devices that are reasonably available to the test user in terms of expense, validation requirements, and employment circumstances, keeping in mind the affirmative mandates of equal employment opportunity law. The employer should be allowed to use nonvalidated tests only after a substantial showing that a positive, good faith search for validated tests or applicable validation techniques has failed to reveal any legitimate techniques or tests.¹¹⁰

The impact of the DOJ guidelines on Title VII itself would be less if the EEOC guidelines were other than interpretative standards for that section of the Civil Rights Act of 1964.¹¹¹ As such, the EEOC guidelines are not binding on the courts in Title VII litigation¹¹² but are only entitled to appropriate weight¹¹³ insofar as they are reasonable interpretations and reflect necessary interpretative expertise.¹¹⁴ Because the DOJ guidelines are arguably the more reasonable of the two sets of guidelines in terms of possibility of compliance,¹¹⁵ it is highly possible that courts may switch their previous deference from EEOC guidelines to those of the DOJ.¹¹⁶ Indeed, one court has already

110. See Note, *supra* note 108, at 113-19.

111. The EEOC was expressly given only interpretative, not substantive, power of administration. See 42 U.S.C. §§ 2000e-4, 5, 12(a) (1970 & Supp. V 1975). See also note 14 *supra*.

112. See *Grimm v. Westinghouse Elec. Corp.*, 300 F. Supp. 984, 988-90 (N.D. Cal. 1969).

113. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

114. Statutory and regulatory interpretations by agency administrators have been given great deference in a variety of situations. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (interpretation of statute by HUD administrator); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (interpretation of regulation by Secretary of Interior); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961) (interpretation of regulations by AEC).

115. See notes 25, 98 & accompanying text *supra*. The problem of reasonableness of the EEOC guidelines also arises out of their extensive stringency. Many commentators have argued that the EEOC guidelines go beyond the intent of Title VII in imposition of limitations and requirements for proper test use. See note 25 *supra* & authorities cited therein. If courts agree with this criticism of the EEOC guidelines, they will have an additional incentive to defer to the DOJ guidelines.

116. This switch of deference to the DOJ guidelines may arise in two situations. The first is where both the EEOC guidelines and the DOJ guidelines are arguably applicable to Title VII enforcement. See, e.g., 42 U.S.C. §§ 2000e-5, 6 (Supp. V 1975), provisions of which involve both the EEOC and the Department of Justice in litigation of claims alleging violation of the testing provisions of Title VII. It is in the court's discretion to choose between the guidelines. See note 32 *supra*. Second, deference may be given to the DOJ guidelines over the EEOC guidelines in situations where only the EEOC has jurisdiction that is, in the case of public and private employers subject to Title VII other than the federal government. Because the DOJ guidelines have been adopted by the Civil Service Commission in interpreting its Title VII responsi-

done this in Title VII litigation involving a state instrumentality, freely relying on both EEOC and DOJ guidelines in its memorandum opinion, even to the extent of applying DOJ standards to a differential validity issue.¹¹⁷ If other courts follow suit, the efficacy of the EEOC guidelines will be seriously undermined even within their own jurisdictional pale.

IV. CONCLUSION

By failing to require separate validation studies for each racial or cultural group of test-takers and by easing limitations on the use and validation of testing devices, the DOJ guidelines run contrary to the policy and principles of Title VII and equal opportunity law. While the EEOC guidelines are overly strict and may well thwart the benefits of testing devices, they are at least a positive attempt to establish the most valid tests for all groups of test-takers. Fair employment law has been aimed at eliminating employment practices which operate to exclude blacks for racial or cultural reasons rather than for insufficient job suitability. Restraints on employee selection procedures should be based or lifted only when the discriminatory fallout from past segregation and racism has ended. With the issuance of the DOJ guidelines on employee selection procedures, it would seem that governmental recognition of the cessation of the debilitating effects of segregation is at hand. Although the DOJ guidelines do not eliminate all restraints on use of testing devices, their grant of wide impunity and discretion to employers using tests having disproportionate racial impact signals a significant reduction of emphasis on affirmative action and equal employment opportunity mechanisms.

P. Michael Nugent, Jr.

bilities, 42 U.S.C. § 2000e-16 (Supp. V 1975), it is possible that courts may see both the DOJ and the EEOC guidelines as interpretations of Title VII and may well defer to the more practical DOJ provisions. Indeed, the DOJ guidelines claim all employers subject to Title VII as subject to its standards. DOJ Guidelines, *supra* note 64, § 14(c).

117. *United States v. Jefferson County*, No. 75-P-0666-S (N.D. Ala., Jan. 10, 1977). *See* note 33 *supra*. The DOJ guidelines are only applicable by the Civil Service Commission to the federal government under Executive Order No. 11,478 and 42 U.S.C. § 2000e-16 (Supp. V 1975), by the Office of Federal Contract Compliance Programs to employers under Executive Order No. 11,246, and by the Department of Justice in enforcing federal law. *See* notes 32 and 116 *supra*.