Costs, Profits, and Equal Employment Opportunity

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Title VII of the Civil Rights Act of 1964[1] is in its third decade and yet there remain several fundamental questions concerning its application that are unresolved by the courts.[2] This article deals with one such issue—the extent to which employers can legally justify discriminatory practices on the basis of cost containment and profit maximization. Put another way, what financial costs can courts properly impose upon business in the effort to enforce the equal opportunity principle?

It is now widely recognized that the obstacles to achievement of real equality in the workplace lie not so much in the remnants of overt bigotry, but rather in the ostensibly neutral practices of employers which operate subtly (often times unintentionally) to limit opportunities for minorities and women.[3] An employer that adopts a college degree prerequisite for appointment to a particular position may be motivated solely by the desire to minimize the administrative costs of its selection process (i.e., by utilizing an inexpensive screening device). The selection process will, however, exclude minorities to the extent that they are underrepresented in the group of applicants with college degrees. Similarly, a hospital that pays its nurses the going wage may be motivated solely by the desire to contain its labor costs. If the market rate is depressed because of gender segregation in that profession, the practice will result in female employees being paid less than the inherent worth their work might otherwise command. The chemical manufacturer whose fetal vulnerability program excludes women from positions which involve exposure to potentially hazardous substances may be acting out of a desire to

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1 42 U.S.C. §§ 2000e-1 to e-17 (1982) (hereinafter "Title VII").

2 Professor Owen Fiss observed in 1970 that there is "a growing uncertainty as to the limits of the obligation imposed by [antidiscrimination] laws, and this uncertainty often creates a dilemma for employers and enforcement agencies." Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1970).

3 Prior to the adoption of the 1972 amendments to Title VII, the Senate Committee observed:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effect' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

S. REP. No. 92-415, 92nd Cong., 1st Sess., at 5 (1971).

Similarly, investigation of the problem of age discrimination indicates that its primary cause is the employer's desire to reduce labor costs, and not animus against older workers. *See Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess., at 6, 34.

avoid wide ranging tort liability to yet unborn persons; the effect nevertheless will be to restrict employment opportunities for women at the plant.

The seminal principle of *Griggs v. Duke Power Co.*[4] subjects such practices to scrutiny under Title VII without regard to their non-discriminatory motivation. Chief Justice Burger, writing for the Court in 1971, declared that the congressional purpose behind that Act requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[5] The unanimous Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"; it is "the *consequences* of employment practices, not simply the motivation," that Congress intended to address.[6]

The *Griggs* decision does permit an employer to use a selection device notwithstanding its discriminatory effect if it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[7] At another point the Court states that Title VII's "touchstone is business necessity."[8] The decision left definition and development of these concepts for a future day, with basic questions unaddressed. Are job relation and business necessity separate defenses, the former focusing on job performance and the latter on some other business concern like cost avoidance? Or is job relation the only form of business necessity that can justify disparate impact? If business necessity is an independent defense, how necessary must the challenged practice be to the business? Are efficiency and profitability sufficient to establish business necessity or must the practice be necessary to avoid bankruptcy? Is there an absolute standard of necessity, or is it a cost-benefit analysis in which the harm to equal employment opportunities is weighed against the employer's benefit in continuing the practice? Although courts must resolve these questions to enforce Title VII in the workplace,[9] they have yet to render definitive responses to them. This Article explores the central issue, whether wealth maximization can constitute business necessity?

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4 401 U.S. 424 (1971).

5 *Id.* at 431.

6 *Id.* at 431-32. Thus disparate treatment cases involve action that is deliberately motivated by racial or other impermissible grounds, while dispatate impact cases involve facially neutral practices which, whatever their motivation, adversely affect identifiable protected groups. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

7 401 U.S. at 431.

8 *Id.*

9 As one writer has asserted, "the rigor with which the business necessity defense is applied is the clearest benchmark of the continuing national commitment to the principle of equal opportunity in employment." Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 379 (1981). "In evaluating the enforcement of a particular piece of legislation, the most telling feature of the statute to scrutinize is the legislative or judicial exceptions to liability under it. In the context of Title VII, the focus of such an inquiry necessarily falls on the business necessity defense. As the broadest exception under Title VII, the business necessity defense defines the outer limits of the Act's potential effectiveness." *Id.* at 378.

When the *Griggs* court recognized that the problem of discrimination must be addressed from an institutional perspective, rather than one searching for culpable bigots,[10] Title VII emerged as a regulatory scheme with the potential to effect thorough-going change in the operation of American business.[11] As has been observed, however, "remedying inequality normally costs money."[12] If cost avoidance can constitute justification for practices that fall disproportionately upon minorities and women, Title VII may be swept back in time to the pre-*Griggs* days when the motivation behind (rather than the effect of) an employment practice was the litmus test for measuring compliance.

The Supreme Court has asserted that "neither Congress nor the courts have recognized [a cost justification] defense under Title VII."[13] While this is substantially accurate in disparate treatment cases, it is not so with regard to impact cases. In fact, courts have frequently accepted a cost defense[14] in impact cases, although the decisions do not denominate it as such.[15] This phenomenon has attracted little attention, though its implications for equal employment law are momentus.

It is the thrust of this Article that allowing cost justification as a defense in *either* impact or treatment cases is inconsistent with the goals of the Act. These goals dictate that the only legitimate reason for discriminating against persons in the workplace is their inability to perform the job, not the expense of accommodating their special needs. Moreover it is submitted that judicial acceptance of a cost based defense in impact cases but not in cases alleging intentional discrimination reflects a lingering fault consciousness which has no proper basis in employment law.[16]

The Article begins with an overview of the manner in which equal opportunity goals may conflict with the employer's interest in wealth

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10 *See generally* Freeman, *Legitimizing Race Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

11 Shortly after *Griggs* one writer described the statute as "regulatory social legislation designed to change conduct and eradicate discriminatory social practices." Note, *Facially Neutral Criteria and Discrimination Under Title VII: "Built-in Headwinds" or Permissible Practices?*, 6 U. MICH. J.L. REF. 97, 100 (1973).

12 EEOC Decision No. 72-1292, 1973 EEOC Dec. 464.

13 *See* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 717 (1978); *infra* notes 35-47 and accompanying text.

14 As used in this Article, the term "cost defense" refers to justification offered by an employer *other than* that related to the ability of persons to efficiently perform the particular job in question. Such justification includes containment of costs in the areas of personnel administration, training, salaries and fringe benefits, and avoidance of the risk of tort liability arising from workplace hazards.

15 The Equal Employment Opportunity Commission has considered giving formal recognition to a cost defense in Title VII litigation. *See Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures: Hearings Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong., 1st Sess. 81-208 (1985) (Statement of William Robinson, exec. dir. Lawyer's Comm. for Civil Rights under Law). This appears to be part of a broader picture: "Cost-benefit analysis has been elevated to the top of the administrative agenda by the Reagan Administration's program for regulatory reform. The Administration came to power assailing the costs created by governmental intervention in the economy, and it has tried to make comparison of costs and benefits a central element of federal regulation." *See* Schwartz, *The Court and Cost-benefit Analysis: An Administrative Law Idea Whose Time Has Come—Or Gone?*, 1981 SUP. CT. REV. 291 (1981), (citing Executive Order 12,291 (February 17, 1981), which requires agencies to prepare "regulatory impact analysis" of proposed regulations).

16 *See generally* Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. REV. 943 (1984).

maximization. It then contrasts the rejection of cost justification in disparate treatment cases with the increasing acceptance of such justification, under the rubric of business necessity, in impact cases. Lastly it critiques this nonuniform approach to the cost defense and discusses its implications.

I. The Clash Between the Antidiscrimination Principle and Employer Self-Interest

Common to all fair employment legislation is the prohibition against making decisions based on enumerated characteristics which are unrelated to productivity on the job. As Owen Fiss has observed, such legislation "does no more than prohibit businessmen from making employment decisions on the basis of race or color—a criterion whose use would in any event impair rather than advance productivity and wealth maximization for the individual businessman and for society as a whole."[17] It would appear, then, that the antidiscrimination principle should be virtually self-enforcing, either by the employer in its own interest or by the competitive market.[18]

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17 Fiss, *supra* note 2, at 237. In a recent essay, Professor Donahue argues that Title VII does indeed enhance economic efficiency. Donahue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986).

18 An employer that discriminates, after all, must pay a price: it has artificially contracted its supply of available labor and therefore has tended to raise the price of labor it purchases. If many employers do this, the price (wages) of their work force will climb. Competitors will be able to exploit the pool of excluded black workers at lower wages, thus gaining a competitive advantage. If competition worked in that way, discrimination would be corrected by the market, without the need for legal intervention.

M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION 116 (1982) [hereinafter cited as MATERIALS ON EMPLOYMENT DISCRIMINATION]. *See also* Donahue, *supra* note 17; Johnson, *The Stagnant South*, NEW YORK REVIEW OF BOOKS, May 8, 1986, at 40, observing that "[n]eoclassical economic theory holds that such racial discrimination is inefficient and will cause firms that practice it to slip behind in the competitive struggle." Richard Posner has asserted that in a competitive market,

> there are economic forces working to minimize discrimination . . . . In a market of many sellers one can expect the intensity of the prejudice against blacks to vary considerably. Some sellers will have only a mild prejudice against them. These sellers will not forego as many advantageous transactions with blacks as their more prejudiced competitors (unless the law interferes). Their costs will therefore be lower and this will enable them to increase their share of the market. The least prejudiced sellers will come to dominate the market in much the same way as people who are least afraid of heights come to dominate occupations that require working at heights: They demand a smaller premium.

R. POSNER, ECONOMIC ANALYSIS OF THE LAW § 27.1 (3d ed. 1986). *See also* American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986), in which Judge Posner discusses market equilibrium in the context of comparable worth theory.

The Supreme Court has at times pointed out the harmony between equal opportunity and employer self-interest. In holding that the Nashville Gas Co. was in violation of Title VII because of its pregnancy leave policy, for example, the Court observed:

> Indeed, petitioner's policy of denying accumulated seniority to employees returning from pregnancy leave might easily conflict with its own economic and efficiency interests. In particular, as a result of petitioner's policy, inexperienced employees are favored over experienced employees; employees who have spent lengthy periods with petitioner and might be expected to be more loyal to the company are displaced by relatively new employees. Female employees may also be less motivated to perform efficiently in their jobs because of the greater difficulty of advancing through the firm.

Nashville Gas Co. v. Satty, 434 U.S. 136, 143 n.5 (1977). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("The broad overriding interest, shared by employer, employee, and consumer, is the efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.").

Yet discrimination has not been driven out of the marketplace by internal forces. Indeed, "the passage of Title VII demonstrates that Congress believed that prevailing market forces would not eliminate discrimination in employment."[19] Economists have posited several theories to explain this phenomenon.[20] Some, like Richard Posner, blame government interference in the normal operation of the market.[21] Others like Gary Becker allude to the "taste for discrimination", suggesting that some employers may be willing to forego increased earnings in order to maintain associational, social or political preferences.[22] Owen Fiss has enumerated several situations in which the antidiscrimination/merit principle is not self-enforcing. These include instances where the employer has several candidates for a position and each is of equal productive potential, thus permitting the employer to base its decision on race without sacrificing economic advantage; where the employer has delegated personnel decisions to a bureaucracy or labor union not sharing in the incentive to maximize wealth; and where the employer acts on the basis of inadequate or erroneous information regarding prospective productivity.[23]

But an insight into the phenomenon of continuing discrimination that should not be overlooked is that some forms of discrimination are *not* irrational economically. Put another way, the fair employment principle at times conflicts with the employer's pursuit of profit maximization, at least in the short run. In these situations, the market will not discourage discrimination; rather, the law must supply its own constraints.

Using race or gender as a selection criterion, for example, can be an inexpensive method of personnel administration compared to alternatives like testing or interviewing.[24] In a similar manner, imposing educa-

19 *See* Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, 839 (1981).

20 *See generally* G. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); R. POSNER, *supra* note 18; WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR (1986); Demsetz, *Minorities in the Market Place*, 43 N.C.L. REV. 271 (1965).

21 R. POSNER, *supra* note 18.

22 G. BECKER, *supra* note 20, at 14.

23 Fiss, *supra* note 2, at 250-51.

24 "Practical economic pressures produce a climate in which employers may forego expensive, sophisticated testing devices for less accurate measures that they can apply quickly and inexpensively." *See* McGarity & Schroeder, *Risk-oriented Employment Screening*, 59 TEX. L. REV. 999, 1015 (1981). As Professor Fiss has noted,

> race is an easy criterion to apply, and the good businessman may decide accurately that the savings derived from applying this easy criterion (administrative costs) will offset the costs of occasional mistakes, that is, the loss of increased productivity that might result from excluding Negroes from his work force or from using them only for nonskilled jobs.

Fiss, *supra* note 2, at 257.

> Professor Blumrosen has referred to the theory of "statistical discrimination," in which employers seek to minimize risk of uncertainty inherent in the hiring process. If employers believe women or blacks are less productive than the majority of men, they will hire blacks or women only if their wage rate is lower than that of white men. An employer has no idea if any particular worker is qualified for the job but believes that the probability that a random white male worker is qualified is greater than the probability that a woman or black is qualified. To avoid costs involved in estimating the potential employee's productivity, the employer assesses the applicant on the basis of preconceptions and sterotypes about the group to which the applicant belongs rather than on the basis of an individualized judgment. Thus, if the employer believes that women or blacks have a looser attachment to the

tion or experience requirements can keep selection and training costs low. An unintended by-product may be disproportionate exclusion of minorities or women.[25]

Race or gender may also be an economically beneficial basis for excluding groups of applicants where there is a strong customer preference for employees of a particular group,[26] such as the apparent passenger preference for female flight attendants.[27] The desire to avoid the costs (or the risk of costs) of personnel conflicts is another reason the rational employer may seek to maintain a homogeneous workforce.[28] In another context, a cost conscious company might decide to "screen out weaker workers rather than make the improvements necessary to reduce lifting requirements for all employees, or exclude fertile women from a workplace that exposes them to chemicals rather than implement technological changes to decrease the exposure of all employees."[29] And, of course, an employer seeking to limit labor costs might be wise to discharge its older workers whose salaries and benefits are more costly than their younger colleagues.[30]

In sum, even though race and gender are unrelated to productivity, they can nevertheless serve as the basis for cost conscious decision making.[31] It is in these situations that Title VII is most critically needed to enforce the equality principle.[32] Such enforcement will necessarily require the imposition of costs on the offending employer. Aside from the actual expense of litigation, such costs will include: increased expense of personnel administration (e.g., where an employer is compelled to adopt a nondiscriminatory selection process, or a training program to increase access to the workforce); loss of business (e.g. where customer preference is frustrated by the departure from discriminatory practices); increased costs of maintaining a heterogeneous instead of homogeneous

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labor market, are likely to be more casual about the job, are more likely to be late or absent, that their turnover will be higher, or that women with preschool children are unreliable employees, they will act on those perceptions regardless of their accuracy.

Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399, 447-48 (1979). As has been noted, the " 'rationality' [of the employer's conduct] will obviously vary depending on the relationship between stereotype and statistical reality." MATERIALS ON EMPLOYMENT DISCRIMINATION, *supra* note 18, at 118.

25 *See Griggs*, 401 U.S. 424; Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972).

26 *See* Fiss, *supra* note 2, at 257.

27 *See* Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981); Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

28 *See* Fiss, *supra* note 2, at 258:

> The costs in productivity due to the exclusion or limitation of blacks are offset by the decrease in costs that might otherwise arise because of the personnel conflicts or because it would be necessary to employ more supervisors to minimize the personnel conflicts generated by higher levels of black employment.

See, e.g., Parson v. Kaiser Aluminum & Chem. Co., 727 F.2d 473, 477 (5th Cir. 1984) (employer's refusal to promote black employee was based on realistic fear of violent reaction on part of white employees).

29 McGarity & Schroeder, *supra* note 24, at 1020. *See infra* text accompanying notes 185-96.

30 *See infra* text accompanying notes 232-41.

31 *See* Fiss, *supra* note 2, at 257.

32 *See* Fiss, *supra* note 2, at 252; McGarity & Schroeder, *supra* note 24, at 1013. Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 102 (1974).

workforce (e.g., where the employer must install new facilities to accommodate women or handicapped persons); increased labor costs (e.g., where the employer must undo disparate wage structures); increased costs of health care (e.g., where the employer is ordered to maintain older workers on the payroll).

At a time when Title VII jurisprudence was in its infancy, Owen Fiss observed:

> Conceivably, fair employment laws could be written or construed to permit the businessman to [engage in cost-cutting measures that are racially based or race related]. The theory could be that the employer's decision was not based on the individual's race, but on the employer's interest in wealth maximization. Or it might be said that in these instances the general assumption that race is irrelevant to productivity is wrong. However, that option has not traditionally been chosen. Instead, fair employment laws have been understood to prohibit the use of race as a symptom, to prohibit limiting the number of blacks in deference to customers' taste for discrimination or as a means of avoiding personnel conflicts, and to prohibit the institution of the differential-wage structure. They have been understood to prohibit these practices without regard to whether they are instituted by the good businessman, the one who has no interest but to maximize wealth.[33]

As will be seen below, however, the federal courts have not always placed the fair employment principle above the employer's goal of wealth maximization. They have not consistently imposed the costs of compliance with Title VII on employers. As a result, in significant instances minorities and females have had to continue to bear the burdens of practices which adversely affect them.[34]

II. The Cost Defense Under Title VII: The Differing Approaches in Treatment and Impact Litigation

A. Manhart

Los Angeles Department of Water and Power v. Manhart [35] involved a challenge to the employer's practice of requiring female employees to contribute approximately 15% more of their salary into the retirement program than their male counterparts (meaning that women took home 15% less pay than men at the same salary level). Since the monthly benefits after retirement were equal for men and women of the same age, seniority and salary, it was alleged that this practice of exacting greater contributions from women constituted gender discrimination in violation of Title VII. There was no dispute that the employer was determining

33 Fiss, *supra* note 2, at 259. Fiss stated in the same piece, however, with some apparent contradiction: "The employer's interest in wealth maximization and the rigors of the marketplace are generally acknowledged in fair employment laws. A fair employment law is a limited corrective strategy and the societal interest in efficiency is a major limitation." *Id.* at 303.

34 It has been noted that the effect of discrimination is to redistribute wealth from the victim group to the dominant group of workers. *See* Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 8 (Ashenfelter & Rees eds. 1973).

35 435 U.S. 702 (1978).

the level of contribution on the basis of sex. The only question before the court was whether such practice was justified under the statute.

The Department's defense relied on mortality tables indicating that female employees on average would live several years longer than males. The employer's cost of a pension for the average woman would thus be greater than for the average man, since more monthly payments would be made.

While "the reality of differences in human mortality" was not questioned,[36] the Court held that the challenged practice violated Title VII because it amounted to "treatment of a person in a manner which but for that person's sex would be different."[37] The statute, the Court held, mandates that employers treat their employees as individuals, and not simply as components of a group. Thus even though the generalization that women as a class live longer than men is "unquestionably true",[38] the employer could not base its contribution scheme on gender distinction. "If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[39]

In response to the employer's contention that the differential contribution scheme was justified by the "difference in the cost of providing benefits for the respective classes,"[40] the Court wrote: "That argument might prevail if Title VII contained a cost-justification defense comparable to the affirmative defense available in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII."[41] The Court noted that a "broad cost-differential defense was proposed and rejected when the Equal Pay Act became law,"[42] and im-

36 *See Id.* at 726 (Burger, C.J., concurring in part and dissenting in part).

37 *See Id.* at 711.

38 *Id.* at 707.

39 *Id.* at 708.

40 *Id.* at 716.

41 *Id.* at 716-17 (footnotes omitted). The Court elaborated:

> Under the Robinson-Patman Act, proof of cost differences justifies otherwise illegal price discrimination; it does not negate the existence of the discrimination itself. So here, even if the contribution differential were based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.

Id. at 717 n.31 (citation omitted).

Compare Geduldig v. Aiello, 417 U.S. 484 (1974) *and* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), suggesting that cost containment is an acceptable rationale for excluding pregnancy benefits from disability plans. These cases were legislatively overruled by the Pregnancy Discrimination Act of 1978. 42 U.S.C. § 701 (1982).

42 435 U.S. at 717 n.32.

> Representative Findley offered an amendment to the Equal Pay Act that would have expressly authorized a wage differential tied to the "ascertainable and specific added cost resulting from employment of the opposite sex." He pointed out that the employment of women might be more costly because of such matters as higher turnover and state laws restricting women's hours. The Equal Pay Act's supporters responded that any cost differences could be handled by focusing on the factors other than sex which actually caused the differences, such as absenteeism or number of hours worked. The amendment was rejected as largely redundant for that reason. The Senate Report, on the other hand, does seem to assume that the statute may recognize a very limited cost defense, based on 'all of the elements of the employment costs of both men and women.' It is difficult to find language in

plied that a similar rejection should be read into Title VII in wage equity cases.[43]

The Court further rejected the assertion that the Department's discriminatory contribution scheme was justified by business necessity, *i.e.*, that male employees would withdraw from the plan or the Department itself if they were forced to subsidize the larger benefits paid to female employees. Noting that there was no evidence of such withdrawals, the Court concluded that "there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan."[44]

The Supreme Court therefore read Title VII to preclude an employer from justifying a discriminatory compensation scheme on cost grounds.[45] It is important to note, however, that even as the Court repudiated cost justification, it vacated the lower court's award of back pay to the plaintiff class, instructing the court to reconsider it in light of the Department's good faith reliance on the longstanding practice of using gender based actuarial tables, and the potentially devastating impact of a back pay award on the pension plan.[46] This clear suggestion of a cost defense on the question of remedy foreshadows subsequent judicial ambivalence towards imposing the financial burdens of compliance with Title VII upon employers.

In any event, a reader of *Manhart* would come away thinking that cost containment does not constitute adequate legal justification for any practice which is violative of Title VII. Although *Manhart* itself was a disparate treatment case (involving *deliberately* different treatment of men and women), nothing in the Court's opinion limits its rejection of cost defense to disparate treatment cases.[47] Nevertheless, a distinction has

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the statute supporting even this limited defense; in any event, no defense based on the *total* cost of employing men and women was attempted in this case.

Id. (citations omitted).

43 *See infra* note 205.

44 435 U.S. at 716 n.30.

45 *See also* Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), holding that Title VII is violated when an employer offers its employees life annuities from a private insurance company that pay women lower monthly retirement benefits than similarly situated men. The Court acted over the dissenters' objection that the cost of providing unisex annuities "may become prohibitive" (citing estimates for prospective benefit equalization of at least $85 million annually). *Id.* at 1095 n.1 (Powell, J., dissenting); Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (striking down under Title VII a health insurance benefit plan which, by limiting pregnancy benefits available to the wives of male employees, provided the latter with less dependent coverage than was provided to female employees (whose husbands were covered for all conditions)). The Court reaffirmed that the cost of providing a complete package for all employees is not a justification "recognized under Title VII once discrimination has been shown." *Id.* at 685 n.26.

46 *Manhart*, 435 U.S. at 721-22. Thus the "presumption in favor of retroactive [backpay, which] can seldom be overcome," may be so overcome here. *Id.* at 716 n.30.

47 One treatise concludes: "Although it would be possible to argue that *Manhart* is a disparate treatment case, and that the Court's rejection of a cost defense is relevant only to that theory, the breadth of the language instead suggests a more general rejection of such an argument." C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, 56 (1980) [hereinafter FEDERAL LAW OF EMPLOYMENT DISCRIMINATION]. The *Manhart* Court did allude to the potential application of disparate impact analysis to fringe benefits when it dismissed the Department's argument that a pension plan with gender neutral contributions would adversely impact males, who will statistically receive less total benefits. The Court observed: "Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs*

evolved in the case law: cost justification has generally not upheld practices which are overtly discriminatory, but has with increasing frequency succeeded where the challenged practice is neutral on its face but discriminatory in its operation. The following sections will trace this development.

B. *Disparate Treatment Cases: The Bona Fide Occupational Qualification (BFOQ) Defense*

An employer who engages in overt discrimination against a protected group (such as a refusal to consider females for a particular position) is in violation of Title VII unless it can persuade the court that a particular "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[48] The decisional law has given this affirmative defense a very narrow reading.[49]

Aside from the cases involving authenticity and privacy concerns,[50] the courts have generally required employers who seek to discriminate against an entire group to demonstrate that the practice is necessary to avoid a substantial loss in productivity, efficiency, or safety with regard to a core function of the operation.[51] Under the prevailing standard the employer must establish that "all or substantially all [group members] would be unable to perform safely and efficiently the duties of the job involved,"[52] and that there are no "less discriminatory alternatives" to

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does not imply, and this Court has never held, that discrimination must always be inferred from such circumstances." 435 U.S. at 711 n.20.

48 Section 703(e), 42 U.S.C. § 2000e-2 (1982). The BFOQ thus permits an employer to engage in selection on the basis of group rather than individual attributes, and to discriminate on the grounds of otherwise prohibited criteria. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 340-60 (2d ed. 1983); FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at 137-49; Sirota, *Sex Discrimination: Title VII and the BFOQ*, 55 TEX. L. REV. 1025 (1977). It should be noted that race and color are conspicuously absent from the BFOQ definition. Attempts in the House and the Senate to amend this proposed section to include race were defeated. *See* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 82-83 (1972) (and legislative history citations contained therein).

49 As has been observed, "the legislative history indicates that this exception was intended to be narrowly construed." Weeks v. Southern Bell Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969). In this regard, it is important to note the unsuccessful attempt by Senator McClellan to amend the BFOQ provision to permit racial considerations in employment "when the employer believes, on the basis of substantial evidence, that the hiring of such an individual of a particular race . . . would be more beneficial to the normal operations of his particular business or to its good will than the hiring of an individual of another particular race." 110 CONG. REC. 13825 (1964) (discussed in Blumrosen, *supra* note 48, at 83, and Sirota, *supra* note 48, at 1030). The amendment was defeated 30 to 61.

The major source of legislative intent is the Interpretive Memorandum submitted by the Bill's Floor Managers. 110 CONG. REC. 7212 (1964). This Memorandum referred to the BFOQ as a "limited exception," citing as examples "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion."

50 The classic uses of the BFOQ would permit a theatrical producer to exclude females from consideration for the role of Macbeth, or a tennis club to exclude males from the job of women's locker room attendant.

51 *See* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 342-58.

52 *See Weeks*, 408 F.2d at 235. Some courts have adopted an even more stringent standard, holding that the BFOQ only applies to situations where the job requires a particular unique sex characteristic, such as the position of wet nurse. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

the group exclusion.[53]

Many of the successful invocations of the BFOQ defense have occurred in the context of jobs in public transportation. Courts recognize the defense in this context because of the safety risks raised by unsatisfactory performance and their direct relationship to the employer's business.[54] The courts have rejected BFOQ defenses, however, where the asserted loss of productivity was in an area tangential to the essential operations of the employer's business, such as the ability of flight cabin attendants to perform the cosmetic functions of their job.[55]

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53 *See* Levin v. Delta Air Lines, Inc. 730 F.2d 994, 1000-01 (5th Cir. 1984). Thus an employer could not exclude women from the position of switchman on the mere assertion that the lifting tasks were "too strenuous;" a strength test could be administered to determine qualified persons. *Weeks*, 408 F.2d 228. But Alabama prison authorities could bar females from contact positions in male maximum security prisons where "the likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would then directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977). *Compare* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085-86 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (The BFOQ could not be applied to exclude females from prison guard positions where the conditions were not like the "jungle atmosphere" in Alabama's institutions.).

54 Thus airlines have defended policies grounding pregnant flight attendants on a showing that the ability to perform emergency functions and protect passenger safety would be impaired (even early in pregnancy) by the attendant's fatigue, nausea or possible miscarriage. *See* Levin v. Delta Air Lines, 730 F.2d 994 (5th Cir. 1984); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981) (reaching a similar result under business necessity analysis); Harris v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980).

The courts have been similarly sympathetic to passenger safety arguments in Age Discrimination in Employment Act ("ADEA") cases challenging age restrictions on initial employment of intercity bus drivers. (The ADEA borrows its BFOQ language from Title VII. 29 U.S.C. § 623(f)(1) (1982)). In both Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) and Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) the courts upheld BFOQ defenses permitting the exclusion of all applicants above age 35 (over age 40 in *Tamiami*), accepting the employers' evidence of the degenerative effects of aging beginning in the late 30's and affecting driver safety. *Compare* Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982), striking down defendant's policy of excluding pilot applicants over age 35 because the evidence "failed to show a relationship between a maximum age-at-hire limitation and airline safety" and "failed to show the impossibility or impracticality of dealing with applicants individually." 661 F.2d at 309.

Mandatory retirement age BFOQ's have not fared as well in the courts, even where public safety is involved. In Western Air Lines v. Criswell, 472 U.S. 400 (1985), plaintiffs were pilots disqualified by the FAA's age 60 rule; they did not challenge their exclusion from the pilot position, but rather the refusal of the airline to reassign them as flight engineers. The employer claimed an age BFOQ for the latter position as well as pilot, emphasizing that engineers are required to pilot the plane in the event the pilot and copilot become incapacitated. The Supreme Court affirmed a jury verdict and judgment for plaintiffs, putting aside the airline's evidence supporting a BFOQ with the observation that "[e]ven in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision." 472 U.S. at 423. *See also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), holding that age disqualified pilots were entitled to full "bumping down" privileges to flight engineer jobs; Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985), reversing and remanding a decision approving a mandatory retirement at age 55 for firefighters.

55 [T]he use of the word "necessary" in § 703(e) requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.

The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well, according to the finding of the trial court, their apparent ability to perform the nonmechanical functions of the job in a more effective manner than most men, may all be important,

Customer preference has generally been rejected as a justification for group discrimination. In *Diaz v. Pan American Airways, Inc.*,[56] the airline argued that a survey of its customers indicating a seventy-nine percent preference for female flight attendants supported its exclusion of males from that position. In dismissing that contention, the Fifth Circuit observed that "it would be totally anomalous if we were to allow the preference and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."[57] To the extent that disappointment of the customer results in a loss of business volume, the employer must swallow this loss (unless it impairs its ability "to perform the primary function or service it offers"[58]).

Perhaps the best example of the rejection of wealth maximization (by catering to customer preference) as justification for overt discrimination is *Wilson v. Southwest Airlines Co.*.[59] Southwest Airlines excluded males from the positions of flight attendant and ticket agent. When this practice was challenged in a Title VII class action, the airline claimed that the BFOQ exception applied. The defense was that the females only hiring policy was crucial to the airline's continued financial success, and there was substantial evidence to support that assertion. Southwest had begun operations with $143 in the bank and over $100,000 in debt. In order to make it in a very competitive market the company retained an advertising agency, which developed a marketing strategy that portrayed Southwest as "the love airline." As the district court found:

> Unabashed allusions to love and sex pervade all aspects of Southwest's public image. Its T.V. commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love. On board, attendants in hotpants . . . serve "love bites" (toasted almonds) and "love potions" (cocktails). Even Southwest's ticketing system features a "quickie machine" to provide "instant gratification."[60]

In conformity with this image, Southwest employed only females in the high customer contact positions, and their sex appeal was used to attract male customers. "The evidence was undisputed that Southwest's unique, feminized image played and continues to play an important role in the airline's success."[61] While the district court was "less certain" that

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they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.

Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

56 *Id.*

57 *Id.* at 389.

58 *Id.* Thus it has been suggested that *Diaz* leaves open the possibility that an employer could establish a BFOQ by showing that the exclusion of males (or females) was necessary to avoid "complete business failure." *See* Sirota, *supra* note 48, at 1052-53. For a general discussion of the lack of success of customer preference justifications, see *id.* at 1055-56.

59 517 F. Supp. 292 (N.D. Tex. 1981).

60 *Id.* at 294 n.4.

61 *Id.* at 295. "From 1979 to 1980, the company's earnings rose from $17 million to $28 million when most other airlines suffered heavy losses. As a percentage of revenues, Southwest's return is considered to be one of the highest in the industry." *Id.* at n.6.

the females only hiring policy was essential to the continuation of this image,[62] it did find it "proper to infer from the airline's competitive successes that Southwest's overall 'love image' has enhanced its ability to attract passengers" and that "femininity and sex appeal are qualities related to successful job performance by Southwest's flight attendants and ticket agents."[63]

Despite this showing the court held that the airline's discriminatory hiring policy could not be justified by the BFOQ exception. Since males were able to perform all the mechanical functions of the positions safely and efficiently and since to hire them would not jeopardize the primary function of the business, which is transportation, no BFOQ was appropriate.[64] To Southwest's argument that its primary function is to make a profit, the court responded:

> Without doubt the goal of every business is to make a profit. For purposes of BFOQ analysis, however, the business "essence" inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.[65]
>
> [A] potential loss of profits or possible loss of competitive advantage following a shift to non-discriminatory hiring does not establish business necessity . . . .[66] A rule prohibiting only financially successful enterprises from discriminating under Title VII, while allowing their less successful competitors to ignore the law, has no merit.[67]

62 *Id.* at 295.

63 *Id.* at 296.

64 *Id.* at 302. The court distinguished the situation of a business "where vicarious sex entertainment is the primary service provided" or where "an established customer preference for one sex is so strong that the business would be undermined if employees of the opposite sex were hired," *Id.* at 302-03. To support this latter proposition the court cited Fernandez v. Wynn Oil Co., 20 FEP Cases 1162 (C.D. Cal. 1979), upholding a males-only policy for the job of international marketing director on the grounds that the foreign clients would not deal with a female in that job. *Fernandez* was subsequently affirmed by the Ninth Circuit on grounds other than BFOQ, holding that foreign prejudice against females in business cannot justify nonenforcement of Title VII. 653 F.2d 1273 (9th Cir. 1981). *Compare* Avigliano v. Sumitomo Shoji Am., Inc. 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds* 457 U.S. 176 (1982) ("acceptability to those persons with whom the company or branch does business" is one factor to consider in determining whether executive position in American branch of Japanese company can be restricted to Japanese national).

65 517 F. Supp. at 302 n.25.

66 *Id.* at 304. The court added that "Southwest, however, has failed to establish by competent proof that revenue loss would result directly from hiring males. . . . [A]n employer's mere 'beforehand belief' that sex discrimination is a financial imperative, alone, does not establish a BFOQ for sex." *Id.* (citation omitted).

67 *Id.* The district court also expressed concern about the slippery slope problem:

> Southwest's position knows no principled limit. Recognition of a sex BFOQ for Southwest's public contact personnel based on the airline's "love" campaign opens the door for other employers freely to discriminate by tacking on sex or sex appeal as a qualification for any public contact position where customers preferred employees of a particular sex. In order not to undermine Congress' purpose to prevent employers from "refusing to hire an individual based on stereotyped characterizations of the sexes," a BFOQ for sex must be denied where sex is merely useful for attracting customers of the opposite sex, but where hiring both sexes will not alter or undermine the essential function of the employer's business.

Id. at 304. *See also* Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), *cert. dismissed*, 460 U.S. 1074 (1983) (rejecting a BFOQ defense in a case challenging the employer's weight restrictions for flight attendants); Witt v. Secretary of Labor, 397 F. Supp. 673 (D. Me. 1975) (rejecting the

Cost containment, like profit maximization, has been deemed an inadequate justification for exclusionary practices. Arguments relating to the expenses necessary to provide facilities or housing for female workers have thus been uniformly rejected as the basis for a males-only BFOQ.[68] Cost efficiency claims have met a similar fate. In *Smallwood v. United Air Lines, Inc.*,[69] for example, the employer sought to justify a maximum thirty-five age-at-hire policy by asserting that "there are substantial costs involved in maintaining its pilot progression system, including a significant investment in training" and "by insisting that new pilots be under 35 years of age, the 'period of peak productivity' would be extended."[70] The Fourth Circuit, while "impressed with United's overriding theme that hiring older pilots threatens it with burdensome economic effects," nevertheless responded that "[e]conomic considerations, however, cannot be the basis for a BFOQ . . . ."[71]

In only one area of BFOQ doctrine does cost containment potentially play some role, and that involves the feasibility of individualized (as opposed to group) screening. In *Weeks v. Southern Bell Telephone Co.*, the Fifth Circuit suggested that an alternative method for establishing a BFOQ exists "where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis . . . ."[72] Although the *Weeks* court concluded that Southern Bell had failed to carry this burden,[73] the concept was later applied

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beauty salon owner's assertion that it was entitled to exclude females from consideration for the position of hairdresser because of customer preference and the increased business a male operator would generate). Where an individual employee's appearance and dress are directly related to the employer's business success, reasonable gender neutral requirements may be imposed. *See, e.g.*, Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983), *aff'd in part and rev'd in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986). Defendant television station's

> standards of appearance for its on-air personnel can in a no way be considered discriminatory per se. Both men and women were required to maintain a professional, business-like appearance consistent with community standards. Since television is a visual medium. . . such a reasonable requirement is obviously critical to defendant's economic well-being.

572 F. Supp. at 877.

68 *See* Sirota, *supra* note 48, at 1052-54 and cases collected therein. While the original EEOC Guidelines permitted an employer to qualify for a BFOQ if the expenses of providing separate facilities was "clearly unreasonable", 29 C.F.R. § 1604.1 (1965), this exception has been removed and employer is now required to provide such facilities without regard to expense, and is no longer entitled to a BFOQ based on expense. 29 C.F.R. § 1604.2 (1980). A. LARSON, EMPLOYMENT DISCRIMINATION § 17.00 (noting the "truism that a personal statutory right like that of freedom from job discrimination is not ordinarily to be frustrated by an argument that granting that right will cause the employer expense or inconvenience."). *See* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 341 n.5.

69 661 F.2d 303 (4th Cir. 1981).

70 *Id.* at 307.

71 *Id. See also* Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) which upheld a maximum age-at-hire practice for pilots but eschewed any reliance on the employer's argument "that the economy of the situation favors the hiring of younger Flight Officers who ultimately will serve more years as Captains on American's airplanes.", *id.* at 101 n.6; Clanton v. Orleans Parish School Bd., 649 F.2d 1084, 1098 (5th Cir. 1981), rejecting the employer's argument that its discriminatory reinstatement policy for teachers returning from maternity leave was justified because the district "could not afford to bear the cost of keeping teachers on relief status."

72 408 F.2d 228, 235 n.5 (5th Cir. 1969).

73 A strength test to determine lifting ability was an obvious alternative to blanket exclusion of women. *See also* Bowe v. Colgate-Palmolive Co. 272 F. Supp. 332 (S.D. Ind. 1967), *aff'd in part and rev'd in part*, 416 F.2d 711 (7th Cir. 1969), where a specific finding was made by the district court that it "is not practical or pragmatically possible for Colgate, in the operation of its plant, to assess the

by the Fifth Circuit to justify a bus company's policy excluding persons over age 40 from consideration for initial hire as intercity drivers. In *Usery v. Tamiami Trail Tours, Inc.*[74] the court held that even though the employer had not established that substantially all applicants over forty were unable to drive buses safely, it had satisfied the court that "some members of the discriminated against class possess a trait precluding safe and efficient job performance [i.e. deterioration through the aging process] that cannot be ascertained by means other than knowledge of the applicant's membership in the class."[75] Emphasizing that "the safe transportation of bus passengers from one point to another" was the very essence of the employer's business,[76] the court dismissed the government's assertion that "the physical examination, training program and road test that all new drivers are subjected to were sufficient to screen out those applicants of any age who would not be qualified to be safe bus drivers."[77] "[W]hile chronological age could not be isolated as a factor automatically indicating that an individual could not adjust to the rigors of the [intercity driving] schedule, medical science could not accurately separate chronological from functional or physiological age."[78]

Given this latter finding, the Fifth Circuit "did not have to consider the problem of when, if ever, employer *costs* for individual screening might make such screening 'impractical.' "[79] The court did state, however, that it would not suffice for an employer merely to allege that individualized screening would require "added expense."[80]

The *Tamiami* approach has subsequently been noted with approval by the Supreme Court;[81] but employers have not had much success making out such a defense.[82]

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physical abilities and capabilities of each female who might seek a particular job, as a unique individual with a strength or stamina below or above average . . . ." 272 F. Supp. at 357. The Seventh Circuit reversed, holding that Title VII mandates that each candidate be "afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis." 416 F.2d at 718.

74 531 F.2d 224 (5th Cir. 1976).

75 *Id.* at 235.

76 *Id.* at 236.

77 *Id.* at 238.

78 *Id.* at 237. The validity of this conclusion has been questioned, since "the company continued to employ over-40 drivers hired before that age, apparently determining their competence on an individual basis [through recurring physicals]." FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at 143. *Compare* Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985) (rejecting employer's defense of impracticality of determining fitness of flight engineers over age 60).

79 FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at 144 n.39 (emphasis added).

80 531 F.2d at 235 n.26. In this regard, see Rodriquez v. Taylor, 428 F. Supp. 1118 (E.D. Pa. 1976), *cert. denied*, 436 U.S. 913 (1978), in which the court, rejecting the city's claim that all persons over the age of 41 could properly be excluded from hire as a security officer, observed that *inexpensive* tests can be devised which could accurately determine whether a particular individual over 41 had the physical and mental capacity for the position.

81 *See Western Airlines*, 472 U.S. 400 (There must be a showing by a preponderence of the evidence that individual screening is highly impractical or impossible, and thus group exclusion is reasonably necessary.).

82 In *Diaz*, for example, Pan Am persuaded the district court that while there are *some* males with the characteristics necessary to meet the needs of airline passengers, "the actualities of the hiring process would make it more difficult to find these few males;" thus, given "the present state of the art of employment selection," to "eliminate the female sex qualification would simply eliminate the best available tool for screening out applicants likely to be unsatisfactory and thus reduce the average level of performance." 442 F.2d at 387-88. The Fifth Circuit nevertheless rejected this applica-

Clearly the BFOQ exception permitting overt discrimination against an entire group has been narrowly constrained by the decisional law.[83] Employers will be required to suffer loss of business through customer dissatisfaction, or incur increased costs of accommodating or screening females and older workers, rather than adopt financially attractive exclusionary policies. Categorical exclusion is permitted only where it can be shown that the unique characteristics of the group make the safe and efficient performance of the job impossible, and further that the impairment would jeopardize the core operations of the business. The employer is required to use "feasible" individualized selection devices rather than resort to inexpensive group screening. All of this seems consistent with, indeed mandated by, the goals of Title VII. But when we move from deliberate to "non-deliberate" discrimination, from treatment to impact cases, we see a significantly different judicial response to employer concerns about costs and profits.

C. *Disparate Impact Cases*

1. Reasonable Accommodation/Undue Hardship

In sharp contrast to the BFOQ area, cost containment plays a major role in the defense of employment practices that interfere with religious observance.

Title VII, which originally included religion among the unlawful grounds for decision making, was amended in 1972 to require employers to "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless it can be demonstrated that this would entail "undue hardship on the conduct of the employer's business."[84] The amendment is directed at situations involving a "neutral rule of general applicability [which] conflicts with the religious practices of a particular employee,"[85] in other words a case of *unintended* disparate impact.[86]

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tion of *Weeks* because the characteristics for which individual screening was allegedly impractical related to "non-mechanical functions which we find to be tangential to what is 'reasonably necessary' for the business involved . . . . Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential." 442 F.2d at 388-89. *But see* Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984) (inability to predict which pregnant flight attendants will suffer ailments justifies blanket exclusion of pregnant attendants from flight duty).

83 Indeed at least one court has found the BFOQ standard so restrictive of employer autonomy that it has refused to apply it in the context of a fetal vulnerability program, opting instead for what we will soon see is the more open ended business necessity analysis. *See infra* text accompanying notes 185-96.

84 42 U.S.C. § 2000e(j) (1982). The legislative history is set out in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

85 *Hardison*, 432 U.S. at 87 (1977) (Marshall, J., dissenting).

86 The duty to accommodate could have been developed from disparate impact analysis that is available generally to Title VII plaintiffs. For example, a work schedule requiring Saturday and Sunday work would be neutral on its face but would have a disparate impact on employees with religious beliefs that prohibit them from working of their Sabbath, be it Saturday or Sunday. A showing of disparate impact would shift the burden of proof to the employer to justify the work schedule as a business necessity. The employer might be able to generally sustain its work schedule. But, if plaintiff could show that an alternative existed which had a less drastic religious impact, pretext might be established so that the employer

Because both BFOQ and undue hardship are affirmative justifications for discriminatory conduct, one might expect that judicial interpretation of the two would closely resemble each other. Yet in *Trans World Airlines, Inc. v. Hardison*[87] the Supreme Court read the defense in reasonable accommodation cases in such a way that the interests of the religious observer are subordinated to the cost concerns of the employer.

Plaintiff Hardison, who was employed at TWA's maintenance base, challenged his work schedule because it required him to report on Saturdays, his Sabbath as a member of the Worldwide Church of God. The base operated 24 hours a day, every day of the year. Because of his low position on the seniority list, he could not bid out of Saturday work.[88] When he was unable to work out any accommodation with the employer and union, Hardison was discharged for failure to report to work on Saturdays.

Hardison had proposed several alternatives to a Saturday shift, each of which would have required the employer to substitute another employee for him on that day. Concluding that these were reasonable accommodations, the court of appeals held that TWA's refusal to adopt any of them constituted a violation of Title VII. Justice Marshall expanded on this point in his dissent:

> Did TWA prove that it exhausted all reasonable accommodations, and that the only remaining alternatives would have caused undue hardship on TWA's business? To pose the question is to answer it, for all that the District Court found TWA had done to accommodate respondent's Sabbath observance was that it "held several meetings with [respondent] . . . [and] authorized the union steward to search for someone who would swap shifts." To conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense.[89]

The majority of the Supreme Court, however, concluded that "each of [the] suggested alternatives would have constituted an undue hardship within the meaning of the statute . . . ."[90] These accommodations would have "caused other shop functions to suffer," or "involved premium overtime pay," or "involved a breach of the seniority provisions of the contract."[91] "It was essential to TWA's business to require Saturday and Sunday work from at least a few employees,"[92] and thus "TWA had done all that it could to accommodate Hardison's religious beliefs without incurring substantial costs or violating the seniority rights of other employees."[93] "To require TWA to bear more than a de minimus cost in order

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would still be required to make an individual exception to the generally applicable work schedule.

FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at 165.

87 432 U.S. 63 (1977).

88 Hardison had had sufficient seniority in his original department to get his shift preference. He decided, however, to transfer to a different department, where he began at the bottom of the seniority ladder.

89 432 U.S. at 91.

90 *Id.* at 77.

91 *Id.* at 76-77.

92 *Id.* at 80.

93 *Id.* at 83 n.14.

to give Hardison Saturdays off is an undue hardship."[94] Responding to the dissent's assertion that the cost of accommodation would have been minimal, the Court alluded to "the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays."[95]

While there are constitutional[96] and statutory[97] complications with the comparison, it is noteworthy to contrast the *Hardison* undue hardship cost defense (premised on the out-of-pocket expenses needed to accommodate certain employees[98]) with the rejection of such a defense in the

94 *Id.* at 84. As one Treatise has observed: "Given the size of the airline and the kinds of costs apparently involved in *Hardison*, it would appear that the *de minimus* standard is close to an absolute standard." B. SCHLEI & P. GROSSMAN, *supra* note 48, at 235 n.73.

95 432 U.S. at 84 n.15. This allusion seems to suggest that undue hardship can be made out by anticipated, as well as actual present, hardship. *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 224 n.57, contrasting this notion with the EEOC Guidelines, which take the position that "[a] mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship." 29 C.F.R. § 1605.2(c)(1) (1980).

The Court has recently held that an employer satisfies the § 701(j) obligation if it shows that the employee was offered *any* reasonable accommodation, and that there is no duty to accept the employee's proposal merely because it involves no undue hardship. Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. 367 (1986). The Court reaffirmed its reading that § 701(j) does "not impose a duty on the employer to accommodate at all costs." *Id.* at 373.

96 There are "important constitutional questions [respecting the establishment clause of the First Amendment] that would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer." *Hardison*, 432 U.S. at 90 n.3 (Marshall, J., dissenting). In the Court's view, "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *Id.* at 81. The dissent thus reserved judgment on the abstract issue of just "how much cost an employer must bear before he incurs 'undue hardship.'" *Id.* The reasonable accommodation/establishment clause issue was aired in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976), *vacated and remanded*, 433 U.S. 903 (1977). It is interesting to compare the Court's rejection of preferential treatment here with its qualified acceptance in other areas of Title VII doctrine. *See, e.g.*, Sheet Metal Workers' Int'l v. EEOC, 106 S. Ct. 3019 (1986); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

97 Any accommodation that would interfere with seniority rights of other employees conflicts, the Court noted, with the special protection accorded such rights by Title VII and Supreme Court precedent. 432 U.S. at 81. "[A]bsent discriminatory purpose, the operation of a seniority system cannot be an unlawful practice even if the system has some discriminatory consequences." *Id.* at 82. *See also* Brodin, *supra* note 16.

98 The EEOC Guidelines, revised after *Hardison*, adopt a comparative approach to the determination of undue hardship. They provide that "due regard [will be] given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." 29 C.F.R. § 1605.2(e)(1) (1980). The Guidelines go on to provide that the regular payment of premium wages for substitute workers can constitute undue hardship, but that the Commission "will presume that infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation" and that "administrative costs necessary for an accommodation will not constitute more than a de minimis cost." *Id.* *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 235. *See also* Redmond v. GAF Corp., 574 F.2d 897, 902-03 ("The term reasonable accommodation is a relative term and cannot be given a hard and fast meaning. Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship.").

For cases in which the employer was required to bear costs of accommodation, see Brown v. General Motors Corp., 601 F. 2d 956 (8th Cir. 1979) (employer could not justify discharging plaintiff who, due to religious beliefs, refused to work a Friday evening shift, where employee could have

disparate treatment cases discussed above. *Hardison* requires the employer to make only minimal expenditures in order to avoid discrimination against religious observers, while the BFOQ cases place a significantly greater financial burden on employers to provide equal opportunity.[99]

An explanation for the judicial deference to employer cost concerns in reasonable accommodation cases may lie in the different nature of the discrimination involved, and in the number of persons affected. BFOQ cases involve direct and deliberate exclusion of entire groups. In cases like *Hardison*, on the other hand, no discriminatory purpose is attributed to the employer; and the number of employees adversely affected is likely to be relatively small.[100] *Hardison* seems to reflect a judicial inclination to

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been accommodated without extra costs and with only de minimus efficiency problems, since there was an available replacement.); Minkus v. Metropolitan Sanitary Dist., 600 F.2d 80 (7th Cir. 1979) (employer could not justify refusal to accommodate Sabbatarian who could not take Saturday test on the basis of the cost of preparing a second test, when employer had not considered lesser cost of sequestering.). For cases in which the employer was not required to bear the costs of accommodation, see Wren v. T.I.M.E.-DC Inc., 595 F.2d 441 (8th Cir. 1979) (employer need not use a replacement driver to accommodate driver's religious beliefs where that would mean incurring costs to locate a replacement and possible loss from cancellation of runs when replacement could not be found.); Smith v. United Ref. Co., 21 FEP 1481 (W.D. Pa. 1980) (employer established that a day's delay in shutting down refinery, caused by unauthorized absence of supervisor who attended religious meeting, cost $30,000 in losses, which constituted undue hardship.).

99 The Supreme Court has adopted a similarly narrow view of the reasonable accommodations required of employers for handicapped persons under the Rehabilitation Act of 1973, where neither first amendment nor seniority concerns exist. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979), holding that nursing education program did not have to make modifications requested by an applicant with serious hearing disability, like providing close individual supervision and dispensing with certain courses, because they constituted "fundamental alterations" going far beyond what statute requires. *Id.* at 410. Accommodations would only have to be made for a particular handicap if they imposed no "undue financial hardship [or] administrative burden." *Id.* at 412. It has been suggested that the "college's reluctance to devise a special program for Ms. Davis was probably based [not on public safety but] on efficiency; it undoubtedly would cost more to tailor its program to Ms. Davis' special needs." *See* McGarity & Schroeder, *supra* note 24, at 1042.

Administrative regulations implementing the Rehabilitation Act require reasonable accommodation "unless the recipient can demonstrate that the accommodation would impose an undue hardship." To determine whether the latter is the case, the department will consider the overall size of the program, the type of enterprise, and the nature and cost of the accommodation. *See* 34 C.F.R. § 104.12(c) (1985 Dep't of Educ.). For cases balancing the costs and benefits of accommodation, see Nelson v. Thornburgh, 567 F. Supp. 369, 382 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (holding that the employer was required to bear the cost of readers and electronic devices to assist blind employees because the modest costs of such accommodation were outweighed by the social costs of excluding blind workers); Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979) (holding that the Oakland Unified School District was not required to provide an aide to a blind applicant for an administrative position); OFCCP v. Texas Indus., Inc., N. 80-OFCCP-28 (Dep't of Labor, 1980) (noted in B. SCHLEI & P. GROSSMAN, *supra* note 48, at 289) (employer did not have to accommodate cement truck driver by providing him a helper for heavy lifting since that would involve a substantial modification of the job and would impose a significant financial cost).

100 As has been observed: "The accommodation requirement differs from *Griggs* in terms of the degree to which claims of discrimination can be handled on an aggregate basis. The consequence test of *Griggs* flowed from recognition of the facts that racial discrimination is directed toward a class and that the most effective remedies eliminate unnecessary employment barriers for the class as a whole. These remedies attack patterns of discrimination, identified through use of statistical evidence. The accommodation standard, in contrast, does not apply an aggregate analysis, presumably because the diverse and myriad practices of religious groups defy generalized statistical description. The standard requires courts to weigh the impact of specific employment policies on a specific individual's religious practices and to fashion an individual remedy. Thus, the accommodation standard identifies the victims of employment discrimination in terms of individuals, not classes." *See* Note, *Accommodation of an Employee's Religious Practice Under Title VII*, 1976 ILL. L.F. 867, 871.

require the blameworthy employer (like Southwest Airlines)[101] to pay a bigger price for its transgression than the "innocent" employer whose neutral rule causes adverse effect; and to balance the magnitude of the violation, measured by the size of the group harmed, against the cost to the employer of avoiding discrimination. A look at the development of the cost defense in disparate impact litigation appears to confirm this hypothesis.

2. Business Necessity

Unlike BFOQ and undue hardship, the business necessity defense in disparate impact litigation is a wholly judge made concept, drawn from no specific statutory language or provision.[102] As such, it has developed into an amorphous and imprecise component of Title VII doctrine.[103] Over time, a cost containment dimension has crept into the business necessity concept, pulling it far from its original moorings in the *Griggs* decision.

a. Griggs *and the Early Decisional Law*

The origin of Title VII's overriding importance as a business regulatory scheme can be traced to the decision in *Griggs v. Duke Power Co.*[104] That case transformed the statute from a law forbidding only purposeful discrimination to one which forbids facially neutral practices which have an unintentional adverse effect.[105] At the same time, *Griggs* contained the seeds of the cost justification which is the subject of this article.

Griggs presented the Supreme Court with a typical workplace scenario. The employer, in an effort ostensibly designed to "improve the overall quality of the work force,"[106] adopted a requirement for hire or transfer into an operating department that the applicant possess a high school diploma or pass a general intelligence test. Although there was "no showing of a discriminatory purpose in the adoption of the diploma and test requirements . . . .,"[107] they "operated to render ineligible a

101 *See supra* text accompanying notes 59-67.

102 The term "common law legislation" has been used to describe statutes which give the judiciary "broad mandates to act as policy makers." See Van Valkenberg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584 (1984). Title VII may be so described. The Act does not define with any precision the "discrimination" that it makes unlawful, leaving it for judges to construct theories of liability and defense.

103 The open-ended nature of the business necessity defense has generated a considerable literature. *See, e.g.*, Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981); Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

104 401 U.S. 424 (1971). *See generally* Blumrosen, *supra* note 48; Brest, *The Supreme Court 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 22-54 (1976); Brodin, *supra* note 16, at 955-59.

105 *See* Fiss, *supra* note 2, at 237-49.

106 401 U.S. at 431.

107 *Id.* at 428. Prior to the effective date of Title VII, Duke Power had "openly discriminated on the basis of race in the hiring and assigning of employees at [the plant in question]." *Id.* at 427. By formal policy, black employees were restricted to the maintenance department. This policy was abandoned in 1965, when Title VII became effective, and the diploma and test requirements were put in its place. The latter criteria had an exclusionary result similar to the former overt segregation. The extent to which the Court's adoption of disparate impact theory may in some sense have been a

markedly disproportionate number of Negroes . . . ."[108] The requirements were adopted "without meaningful study of their relationship to job-performance ability" and neither requirement was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[109]

Writing for a unanimous Court, Chief Justice Burger read Title VII to mandate the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. 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.
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> . . . .
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> [G]ood 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 . . . [because] Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.[110]

Thus Duke Power Company had violated Title VII by using selection devices with disparate impact and no job relation.

As with so many Supreme Court decisions that break new legal ground, however, there was precious little guidance in *Griggs* as to how the no-fault theory of discrimination would actually operate. Most important for present purposes, the Court was sketchy as to what constitutes sufficient justification for a practice that adversely affects a protected group.[111] *Griggs* mandated that an employer seeking to use such screening devices must bear the administrative cost of "meaningful study" of their relation to the job to be performed. Employers can implement the devices only if they are predictive of job performance. Once this is established, the device can be used because the employer need not bear the cost of employing unproductive workers.[112]

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response to the difficulty of proving discriminatory purpose is a question about which we can only speculate.

108 *Id.* at 429. The showing of disproportionate impact was based on general statistics relating to possession of a high school diploma and success on the intelligence test rather than specific applicant flow figures for the Duke Power Company. *Id.* at 430 n.6.

109 *Id.* at 431.

110 *Id.* at 431-32. In so holding, the Court adopted a view of the fair employment principle that had been suggested by several scholars. *See, e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Fiss, *supra* note 2 (if a selection device excludes disproportionate numbers of minorities but does not operate to improve productivity or performance, then the device is the "functional equivalent of race" and should be prohibited.).

The *Griggs* principle finds considerable support in the language of the Act—Congress cast its net broadly when it prohibited practices that "in any way . . . 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).

111 This has left the lower courts "a considerable degree of freedom in shaping the contours of the defense." *See* Comment, *supra* note 103, at 912.

112 Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such,

Subsequent decisions have elaborated on the job relation defense as applied to scored testing devices. They place a heavy burden on the employer who seeks to use such devices. In *Albermarle Paper Co. v. Moody*,[113] the Court adopted the validation requirements used by the Equal Employment Opportunity Commission, which insisted on a precise empirical demonstration that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[114] In so doing the Court cast aside the objection that it was requiring "an impossibly expensive and complex validation study" which would discourage employers from giving objective tests.[115] The Court held further that even "[i]f an employer does then meet the burden of proving that its tests are 'job-related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's interest in 'efficient and trustworthy workmanship.' "[116]

The Supreme Court has similarly required employers utilizing screening devices other than tests to statistically validate those devices when they disadvantage protected groups. In *Dothard v. Rawlinson*,[117] for example, the employer's minimum height/weight requirements for

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Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

401 U.S. at 436.

113 422 U.S. 405 (1975).

114 *Id.* at 431 (quoting the EEOC Guidelines, 29 C.F.R. § 1607.4(c)).

115 422 U.S. at 449 (Blackmun, J., concurring in the judgment). The validation process requires the employer to retain an expert, undertake a job analysis, gather test and job performance data, and apply an accepted validation technique. *See generally* FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at § 2.2; B. SCHLEI & P. GROSSMAN, *supra* note 48, at 80-161.

As one court has recently put it, the "proof of the job relatedness of facially neutral but racially significant job criteria is frequently an arduous task, involving expert testimony and nationwide studies and reports." Bunch v. Bullard, 795 F.2d 384, 393 n.10 (5th Cir. 1986). Some have questioned whether employers of all sizes should be required to absorb these costs, and have suggested that they may encourage employers to abandon objective testing. *See* Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting).

116 422 U.S. at 425. Ironically, the language and legislative history of § 703(h), 42 U.S.C. § 2000e-2h (1982), which exempts from the Act's prohibitions "professionally developed ability test[s]" that are "not designed, intended or used to discriminate," would appear to argue against the imposition of such no-fault validation requirements. *See* Brodin, *supra* note 16, at 947-52; 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 (1972). Nevertheless, the Court has reaffirmed the employer's obligation to prove empirically that a test with disparate impact is job related. *See Teal*, 457 U.S. at 451-52.

New EEOC Uniform Guidelines adopted in 1978, 29 C.R.F. § 1607, have loosened somewhat the standards for validation which *Albemarle* incorporated. *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 92-97. Also, Washington v. Davis, 426 U.S. 229 (1976), a non-Title VII challenge to a written test used to select police recruits, refused to apply strict validation requirements and upheld the examination merely on a showing of a "direct relationship between performance on Test 21 and perfomance on the policeman's job." 426 U.S. at 249-50. While the Court has not explicitly diluted validation requirements in a Title VII action, "the Court appeared to extend its acceptance of training success as an appropriate criterion to the Title VII arena by its affirmance, albeit without opinion, of United States v. South Carolina 445 F. Supp. 1094 (D.S.C. 1977) (three judge panel), *aff'd without opinion sub nom.*, National Educ. Ass'n. v. South Carolina, 434 U.S. 1026 (1978)." B. SCHLEI & P. GROSSMAN, *supra* note 48, at 127.

117 433 U.S. 321 (1977).

prison guard positions excluded virtually all females from consideration. Defendants contended that the requirements were job related because they "have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor."[118] The Court, however, held that the lack of empirical evidence was fatal to the defense. It added:

> If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that "measure[s] the person for the job and not the person in the abstract."[119]

Thus the prison authorities would have to incur the costs of devising, validating, and administering a test, rather than inexpensively measuring applicants against a height/weight chart.

In its *Griggs* decision, however, the Court used the term business necessity interchangeably with the concept of job relatedness. It was left unexplained whether business necessity, described as the "touchstone" of Title VII,[120] is a separate form of justification, or merely another descriptive phrase for job relation. The *Griggs* decision unfortunately did not "give any clue as to the relationship, or indeed the difference, if any, between 'job relatedness' and 'business necessity,' a question which has been the subject of varied and wideranging opinion by the lower courts."[121] While the job relation defense has been substantially clarified by the Court in decisions like *Albermarle*, little attention has been paid to the contours of business necessity.

The potential distinction between job relation and business necessity was raised in *Johnson v. Pike Corp.*[122] In *Johnson*, the plaintiff challenged the employer's rule that required discharge of any worker who was subjected to successive wage garnishments by his creditors. The rule was found to have a discriminatory effect on minorities and thus the question became one of justification. Pike argued that the rule constituted a business necessity because of the time and expense involved when the company had to administer employee garnishments.[123] In rejecting this defense, the district court held that the "sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance or

118 *Id.* at 331.

119 *Id.* at 332 (citation omitted).

120 401 U.S. at 431. It has been observed that "the business necessity doctrine thus adopted in *Griggs* appears in neither the explicit language nor the legislative history of the 1964 Act." Note, 84 YALE L.J., *supra* note 103, at 98 (citing Wilson, *supra* note 116 at 854 n.62).

121 B. SCHLEI & P. GROSSMAN, *supra* note 48, at 92, 113.

122 332 F. Supp. 490 (C.D. Cal. 1971).

123 Specifically, the employer pointed to "the expense and time attendant to responding to attachments and garnishments by various sections of the company's management and clerical staffs," and the "annoyance and time involved in answering letters and telephone calls from its employees' creditors . . . ." *Id.* at 495.

even expense to the employer."[124] Such costs were the price that Congress required employers to pay to end discrimination.[125] In the court's view, the defendant would have to demonstrate that employees became unproductive as a result of successive garnishments in order to make out a valid defense to a showing of disparate impact. "The ability of the individual effectively and efficiently to carry out his assigned duties is, therefore, the only justification recognized by the law."[126] For the *Johnson* court, business necessity occupied a universe no larger than job relation.[127]

Other lower court decisions rendered in the years immediately following *Griggs* evidenced a similar lack of sympathy towards employers' efforts to minimize costs. *Jones v. Lee Way Motor Freight, Inc.*,[128] for example, involved a challenge to a no transfer policy which had the effect of locking blacks into intracity driving jobs to which they had been previously discriminatorily assigned. Choice intercity routes were reserved for whites. Among the reasons advanced by the company to support the policy was the cost of training intracity drivers to work as intercity drivers. The court held that the employer had not made a showing that its policy was "necessary to the safe and efficient operation of the business," and thus fell short of demonstrating business necessity."[129] With regard to the attempt at a cost defense, the Tenth Circuit wrote:

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124 *Id.*

125 In passing the 1964 Act, Congress was fully aware that putting an end to racially discriminatory employment practices would place a burden on employers in terms of their time, inconvenience and expense. . . . It may seem unfair that the employer should be made to suffer for the discrimination practiced by others [in seeking disproportionate numbers of garnishments against minorities]. But this was the price Congress determined necessary to end discrimination. . . . [I]f the employer were permitted to discharge an employee because it cost a little more to attend to the clerical work when his wages are garnished, the effort to end discrimination would fail. Racial discrimination in employment cannot be tolerated, the expense or inconvenience in complying with the law notwithstanding.

Id. at 496.

126 *Id.* "If [an employee] is an unproductive worker, he may be terminated because he is unproductive, but not for a supposedly causal relationship which has the effect of being racially discriminatory." *Id.* at 495. The court found no correlation in the record between wage garnishment and work efficiency. *Id.* Indeed it observed that the garnishment rule deprived the employer of "an otherwise capable employee," requiring the company to "expend considerable time and effort to train a replacement." *Id.* at 496. *See also* Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974), indicating in a similar case that the employer "must at least prove that its garnishment policy fosters employee productivity."

127 The district court, noting that *Griggs* did not answer the "question whether business necessity includes expense and inconvenience to the employer," concluded:

While there may be in many situations a clear distinction between business necessity relating to job capability and business necessity relating to the employer's expense and inconvenience, it is submitted that the Court in *Griggs* intended the definition therein outlined to be exclusive. The Court liberally construed Title VII in order to implement the congressional directive that members of minority groups be insured equal opportunity in employment. All attempts to depart from this mandate must be carefully scrutinized.

332 F. Supp. at 495. *Johnson* has been criticized in some of the literature. *See, e.g.*, Casenote, Johnson v. Pike Corp., 85 HARV. L. REV. 1482, 1485 (1972) ("[T]he court's conclusion that the business necessity defense is available only when an employment practice measures the employee's ability to carry out his assigned duties . . . rests on an unnecessarily broad reading of the *Griggs* opinion.").

128 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *Jones* came down before the Supreme Court pronouncement in *Griggs* but followed lower court precedent adopting impact theory.

129 *Id.* at 249.

> The training costs are somewhat illusory. To fill a line driver vacancy with a new hire rather than a transferee will entail as much training if not more because a transferee has some knowledge of company policy and procedure. The training of a new city driver to replace the transferee will entail some costs, but we believe that these would not be substantial enough to outweigh the detriment to the plaintiffs of permanently locking them in city drivers jobs.[130]

Robinson v. Lorillard Corp.[131] struck a similar chord. Plaintiffs challenged a departmental seniority system which, because of prior discrimination in assignments, had the effect of freezing blacks into inferior jobs. Lorillard asserted that its seniority system was dictated by business necessity, specifically that it had been compelled to adopt the system at the threat of a strike by the union, and that it would foster "[e]fficiency, [e]conomy and [m]orale."[132] In affirming a judgment for plaintiffs, the Fourth Circuit held that

> [a]voidance of union pressure . . . fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. . . . Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable.[133]

The court elaborated: "While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative."[134] It concluded by recognizing that while "some additional administrative costs may be imposed . . . to eliminate discrimination, avoidance of the expense is not a business pur-

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130 *Id.* at 250. *See also* United States v. N.L. Indus., Inc., 479 F.2d 354, 366 (8th Cir. 1973), rejecting a similar defense based on training costs; United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 310-11 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973), requiring the employer to set up an extensive retraining program to give porters the opportunity to qualify as brakemen.

131 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

132 *Id.* at 799.

133 *Id.* at 799.

134 *Id.* at 799 n.8. As to the efficiency argument, the court was unpersuaded that the seniority progression system was consistent with maintaining maximum productivity, and suggested that alternatives existed (such as permitting each employee to establish "his capacity to handle the job") that carried less adverse impact. *Id.* at 799-800. The court wrote:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

444 F.2d at 798. The court added: "It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory." *Id.* at 798 n.7.

The *Robinson* formulation of the business necessity standard has been widely adopted, including its "less discriminatory alternative" component. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 662-63 (2d Cir. 1971); cases collected in Note, supra note 9, at 398-400. It has been noted that the "lesser discriminatory alternatives component of the disparate impact analysis provides the courts with an essential tool whereby they can maximize the implementation of the equal opportunity goal while simultaneously preserving all truly necessary and efficient business practices." *Id.* at 399 (footnote omitted).

pose that will validate an otherwise unlawful employment practice."[135]

The distinction between justification based on lost productivity and that based on cost saving was drawn again in *Chrapliwy v. Uniroyal, Inc.*,[136] which involved the shutdown of defendant's footwear division and a layoff/bumping practice that had an adverse effect on female workers. Uniroyal's defense focused on the expense that would be required to train employees for new positions rather than bump senior employees down into those positions. The court estimated the cost at $600,000, but nevertheless rejected this defense, holding that "dollar cost alone is an immaterial consideration under the business necessity doctrine, except when expenditures of monies may curtail operations to the extent that incumbent employees may lose their jobs."[137]

Business necessity was thus narrowly construed in the years following *Griggs*. The courts made it clear that the existence of a valid business purpose, such as cost containment, was not enough to support a practice which operated to exclude disproportionate numbers of minorities or women.[138] Instead, "this doctrine of business necessity 'connotes an irresistible demand.' The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal. . . . In other words, there must be no acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' "[139] This tight formulation of business necessity paralleled BFOQ doctrine, both representing affirmative defenses for policies which violate the equal opportunity principle, either directly or indirectly. The inclusion of a cost justification in either defense was no doubt viewed by the courts as an unacceptable threat to the integrity of that principle.

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135 444 F.2d at 800. Schlei & Grossman state that *Robinson*

> appears to establish a balancing test—the impairment of the safe and efficient operation of the business weighed against the racial impact. The problem is how to strike the balance. For example, if the *Robinson* test were to be applied to the situation in *Johnson*, the result is not clear. If the employer can show evidence that the discharge rule saves costs by reducing the administrative expense in handling garnishments, the amount of costs saved must somehow be weighed against the racial impact. While the balance is easy to state—the higher the costs and the lower the amount of racial or gender impact, the more likely a court is to find business necessity—it is impossible to provide a more predictive rule where an employer's cost savings are at issue.

B. SCHLEI & P. GROSSMAN, *supra* note 48, at 55.

136 458 F. Supp. 252 (N.D. Ind. 1977).

137 *Id.* at 271. The court did entertain Uniroyal's alternative theory, that the mass bumping required by a nondiscriminatory system might cause severe loss of productivity and thus sales, and suggested that upon a proper evidentiary showing this could constitute business necessity. *Id.* at 272-73. *See also* Ruckel v. Essex Int'l, Inc., 14 FEP Cases 403 (N.D. Ind. 1976), holding that the challenged practice of hiring persons known to be qualified rather than checking individual qualifications "may have been efficient in that it saved time and search costs" but was not "essential to the safe, efficient operation of the business." *Id.* at 411.

138 The business purpose standard has been uniformly rejected. *See Robinson v. Lorillard Corp.*, 444 F.2d at 798; *Jones v. Lee Way Motor Freight*, 431 F.2d at 249; cases collected in Note, *supra* note 103, 84 YALE L.J. at 100 n.13, 14. Such a standard comports more with a subjective intent theory of liability (i.e., the notion that the existence of a business purpose negates discriminatory intent) than with disparate impact (where the key question is whether the exclusionary effect of a practice can be tolerated because the practice produces a more productive workforce.).

139 *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d at 308 (citations omitted, emphasis in orignal).

b. *The Emergence of the Cost Defense—The Public Safety Cases*

Recent years have seen an expansion of the concept of business necessity to include a cost containment dimension.[140] This evolution has occurred during a period in which the Supreme Court's commitment to the disparate impact principle has been questioned,[141] and American business has come under substantial pressures to cut labor and related costs.[142]

The judicial equation of cost containment with business necessity can be traced to a line of cases involving screening devices other than objective tests[143] and in situations which affect public health and safety.[144] *Spurlock v. United Airlines, Inc.*[145] illustrates the phenomenon.

Paul Spurlock, a black man, brought a disparate impact challenge to two of United's pre-employment requirements for entry into its flight of-

140 For a general treatment of the business necessity doctrine, see Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (analyzing the development of conflicting standards of business necessity); FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, § 1.5; B. SCHLEI & P. GROSSMAN, *supra* note 48, at 102-90; Note, *supra* note 9, at 376; Comment, *supra* note 103; Note, *supra* note 103, 84 YALE L.J. 98. Initially the question had to be resolved as to whether job relatedness and business necessity were the same or different concepts. The courts have generally resolved this by applying the job relation standard to tests and similar screening devices which focus on specific jobs, and business necessity to practices which are broader in perspective. *See* Note, *supra* note 9, at 387-89. There then emerged three main areas of uncertainty in the lower courts' efforts to develop a workable rule: What factors are sufficiently legitimate to override the prima facie showing of disproportionate impact; the magnitude of the burden placed upon the employer to establish a legitimate business purpose; and "whether the employer should be required to adopt the least discriminatory alternative employment practice which would meet the legitimate needs of his business." *Id.* at 387.

141 One writer has aptly observed:

> While *Griggs* was a landmark case in the development of fair employment law under Title VII, it was decided during a period of rapid and substantial change in the membership and character of the Supreme Court. Consequently, the Court's subsequent decisions have failed either to maintain or extend the strict analysis foreshadowed by *Griggs*. Indeed, the Court appears to have made a concerted effort to repudiate the philosophical underpinnings of the *Griggs* holding while struggling to forge its own consensus of the proper analysis to be employed under Title VII. The result, as one of the Justices has described it, has been a 'meandering course [for] Title VII adjudication.' Unable to reach a consensus on the appropriate standard under Title VII, the Court has handed down decisions in the decade since *Griggs* that have raised more questions than they have resolved. Consequently, both the status of the law under Title VII and the continuing viability of *Griggs* are in a substantial state of uncertainty.

Id. at 400 (citations omitted).

142 *See* Briscoe, *Strategic Human Resources Decision-making: An Economic Lesson*, 21 HUMAN RESOURCE MANAGEMENT 2 (1982) ("During economic downturns, the name of the game for many American business firms is survival. As inventories pile up, prices often soften and organizations adjust by 'cutting [personnel] costs.' " The article criticizes the practice of treating the "substantial costs" of recruitment, selection, training and development of personnel as expenses to cut, rather than as an investment in the company's future.); *Big Business Deserts the Democrats*, THE NATION, July 5, 1986, at 1 ("In a variety of ways sagging growth and profits at home and increased competition abroad made the business community more cost-sensitive."); *The Average Guy Takes It In The Chin*, New York Times, July 13, 1986, at § 3, p.1, col. 2 (noting the "cost-cutting trend" in wages); *The Ax Falls on Equal Opportunity*, New York Times, January 4, 1987, at § 3. p.27 ("If you think of equity and efficiency as major concerns in corporations, and you think of a pendulum swinging between the two, you realize that what is happening now is that the pendulum is swinging toward efficiency.").

143 For a discussion of the requirement for empirical demonstration of job relation see *supra* note 115 and accompanying text.

144 Reliance upon public safety as a basis for creating exceptions to individual rights doctrine is of course not unique to Title VII. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (establishing a "public safety" exception to the *Miranda* rule).

145 475 F.2d 216 (10th Cir. 1973).

ficer training program. At the time of application he possessed a commercial pilot's license and was between twenty-one and twenty-nine years of age. He did not, however, have a college degree or the minimum of five hundred hours flight time which United also required; rather, he had completed only two years of college and only 204 hours of flight time.[146]

Given "the minuscule number of black flight officers in United's employ" (nine out of five thousand nine hundred)[147] the district and circuit courts held that Spurlock had established a prima facie case of disproportionate impact.[148] Both courts went on to conclude, however, that United had met its burden of demonstrating that the challenged qualifications were job related.[149] The district court relied on "[s]tatistical studies made by United [which] establish that there is indeed a direct and substantial correlation between successful completion of the training program and a college degree, especially when that degree is in science related areas" and which "demonstrate a close correlation between flight time and the quality of flight time and success in job performance."[150] The only study set out in the opinion, however, compared the number of flight hours of trainees with their failure rate in the training program,[151] and demonstrated something of correlation (but far from a straight line correspondence) between increased hours and increased success.[152] Nothing in the opinion cited any empirical evidence of a relationship between pre-employment requirements and performance on the job.

The Court of Appeals for the Tenth Circuit observed that United does not train applicants but instead requires them to be pilots at the time of their application; applicants who have more flight hours are more likely to succeed in the training program; and the statistics showed that five hundred hours was a reasonable minimum to require of applicants to insure their ability to pass United's training program. The court added: "The evidence also showed that because of the high cost of the training program, it is important to United that those who begin its training program eventually become flight officers. This is an example of business

146 The district court found that United's recruiting brochure, which Spurlock had relied upon, listed as qualifications a commercial pilot's license, two years of college, and between 165 to 200 flying hours. 330 F. Supp. 228, 229 (D. Colo. 1971). The brochure continued: "Our training program is designed to make you thoroughly proficient regardless of the extent of your flight background. We are in the flying business and can give you all of the flying you need." *Id.* Unbeknownst to Spurlock, an internal memorandum adopted by the employer increased the requirements to those set out above; subsequently United placed an advertisement that again raised the number of flight hours, this time to 1000. *Id.* Following his rejection, plaintiff amended his original application to inform United that he had " 'increased my total flight time to five hundred hours, and earned my multi-engine rating.' " *Id.* at 230.

147 475 F.2d at 218.

148 *Id.* It is interesting to note that although the courts found that the selection criteria were uniformly applied, *id.* at 217, the evidence indicated at least two hires who did not meet these qualifications. *See* 330 F. Supp. at 231.

149 475 F.2d at 218.

150 330 F. Supp. at 235.

151 475 F.2d at 219 n.1.

152 Those trainees with 200 or less hours failed at a rate of 9%, while those with 1500 hours or more failed at a rate of only 2%. Yet the failure rate for persons with 201 to 500 hours went up to 14% (instead of down from 9%), and those with 501 to 1000 hours had nearly the same (8%) failure rate as those with 200 hours or less. *Id.*

necessity."[153]

Spurlock thus treated success in the training program as synonymous with competence on the job, and further characterized United's desire to minimize training expenses as a business necessity.[154] Both propositions were substantial departures from the prevailing interpretation of *Griggs*.[155] Moreover, absent from both the trial and appellate court opinions was the usual exploration of less discriminatory alternatives, such as requiring fewer flight hours or years of college.[156] In light of these shortcomings, the Tenth Circuit attempted to limit its ruling.

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and *the economic and human risks* involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related.[157]

The court reasoned that because aircraft cost as much as twenty million dollars and transport up to three hundred passengers, the public interest in safety required the court to move with "great caution before requiring an employer to lower his pre-employment standards for such a job."[158]

Significantly undermining the logic of *Spurlock* is the fact that the dispute was over which licensed pilots would be accepted for the airliner training program, not which trainees would ultimately be placed in the cockpit of a United jetliner.[159] While it is not open to debate that the economic and human risks of placing an unqualified person in the latter

153 475 F.2d at 219 (footnote omitted). With regard to the college degree, the court continued:

> United officials testified that the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program . . . . We think United met the burden of showing that its requirement of a college degree was sufficiently job-related to make it a lawful pre-employment standard.

Id.

154 This equation of cost containment with business necessity may have been influenced by the trial court's observation that "the air line industry has been in a slump." 330 F. Supp. at 230. This is in stark contrast with the Fourth Circuit's rejection of United's "maximum return on training costs investment" argument in support of an age BFOQ in Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

155 *See supra* text accompanying notes 104-39.

156 *See supra* text accompanying notes 113-39.

157 *Spurlock*, 475 F.2d at 219 (citations omitted, emphasis added). The court cited to EEOC Guidelines for its proposition that job relation should be measured on a sliding scale. *See* 29 C.F.R. § 1607.5(c)(2)(iii). *See also* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 170. It has been observed that the "*Spurlock* analysis could lead to the ironic situation that the higher the level of the job, the less the burden on the employer to show that the qualifications are actually related to the ability to perform that job." FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at 57.

158 *Spurlock*, 475 F.2d at 219.

159 *See* MATERIALS ON EMPLOYMENT DISCRIMINATION *supra* note 18, at 159-60. The district judge seems to have confused these two, because in describing Spurlock's challenge to the entry requirements he wrote: "The logical next step would be to say that an applicant could not be failed in the school anywhere along the way, but that he was entitled to complete the school no matter how poorly he was doing." *Spurlock*, 330 F. Supp. at 235.

position are staggering, the consequences of doing so with regard to the training program seem simply to be the loss of investment in the unsuccessful trainee.[160] A ruling in Spurlock's favor would have increased access to the jetliner training program by modifying some of the prerequisites; it would not have brought unqualified persons behind the controls of a 747.

Containing training costs, rather than protecting public safety, was therefore the real thrust of the airline's successful defense. Given that United was far from a "Mom & Pop" business,[161] and that the pre-employment qualifications resulted in a nearly total exclusion of minorities from United's thousands of pilot positions, the result reached in *Spurlock* is hard to harmonize with *Griggs* and its progeny.

The "economic and human risks" gloss on the job relation/business necessity defense has been widely adopted by the courts.[162] It has also been invoked successfully by employers seeking to avoid the expense of making individual rather than group selections. *Furnco Construction Corp. v. Waters*[163] and *New York City Transit Authority v. Beazer*[164] are two cases

160 If United's training regimen had any validity whatsoever, it would certainly weed out those persons who could not demonstrate the ability to safely pilot a modern airliner.

161 It would be a different business necessity case if, for example, the employer could not afford to run any training program at all, but instead had to hire persons already experienced airline pilots. United ran a program which it represented was "designed to make [trainees] thoroughly proficient regardless . . . of your flight background," 330 F. Supp. at 229, and was merely seeking to avoid the cost of training persons with a lower statistical probability of graduating.

162 *See* Davis v. City of Dallas, 777 F.2d 205, 213 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1972 (1986), and citations therein. In Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981), for example, a female applicant sought a position as yard employee with a company engaged in transporting new automobiles by tractor-trailer. She was rejected because of the pre-employment requirement for two years truck driving experience. While the court found that the requirement had a demonstrable disparate impact and would exclude virtually all females, it concluded that the employer had met its burden of justification.

> The important public interest in safety on the roads and highways is sufficiently weighty to convince us that Complete Auto's experience requirement for yard employees is manifestly related to the safe and efficient operation of its business of transporting automobiles over the public highways.

645 F.2d at 1263 (citations omitted).

As suggested in the dissent, however, the exclusionary effect could have been avoided by the expenditure of modest sums on a training program. 645 F.2d at 1268 (Keith, J., dissenting). Judge Keith noted that Complete Auto's yard employees rarely, if ever, drove trucks and employees hired without the prior experience could be adequately prepared for the job of yard employee by undergoing a minimal amount of on the job training. *Id.* at 1268.

See also Rice v. City of St. Louis, 464 F. Supp. 138, 142-43 (E.D. Mo. 1978) (requirement of college degree for public health program representative upheld), *aff'd*, 607 F.2d 791 (8th Cir. 1979). At least one court has limited the *Spurlock* doctrine to human, and not merely economic, risks. See Kinsey v. First Regional Securities, Inc., 557 F.2d 830, 837 (D.C. Cir. 1977) where the court refused to extend the *Spurlock* analysis to qualifications for a securities salesperson, a job which did not involve public safety. The court stated:

> [Defendant] asserts that, on the basis of business necessity, it decided not to invest in the training of Kinsey, who lacked sales experience and sales motivation. Appellee relies on Spurlock v. United Airlines, Inc. . . . .
>
> We cannot earnestly compare the training program of a securities sales representative with that of a flight officer who ultimately is responsible for the safety of passengers as well as costly aircraft. In the latter, public interest is paramount and justifies high employment standards. The cost of [defendant's] . . . training program is not the economic risk that was the concern of the court in *Spurlock* . . . . [T]he investment cost in training its salesmen cannot sufficiently justify [defendant's] application of criteria which operates to freeze the status quo of an historical preference for whites in the profession.

163 438 U.S. 567 (1978).

on point. *Furnco* was a Title VII action challenging the company's practice of limiting those eligible for positions as bricklayers to individuals whose past work in that field was personally known to the job superintendent. The company was in the business of relining blast furnaces in steel mills. Plaintiffs, black men who were experienced bricklayers, had unsuccessfully sought employment at one of Furnco's jobsites. Although they were fully qualified,[165] their applications were rejected because their names did not appear on the superintendent's list.[166] Plaintiffs mounted a challenge under both disparate treatment and disparate impact theories. Though the Court entertained only the disparate treatment claim,[167] its opinion by Justice Rehnquist relied upon the concept of business necessity:

> The District court elaborated at some length as to the "critical" necessity of insuring that only experienced and highly qualified firebricklayers were employed. Improper or untimely work would result in substantial losses both to Interlake [the company for whom Furnco was performing the work], which was forced to shut down its furnace and lay off employees during the relining job, and to Furnco, which was paid for this work at a fixed price and for a fixed time period. In addition, not only might shoddy work slow this work process down, but it also might necessitate costly future maintenance work with its attendant loss of production and employee layoffs; diminish Furnco's reputation and ability to secure similar work in the future; and perhaps even create safety hazards, leading to explosions and the like. These considerations justified Furnco's refusal to engage in on-the-job training or to hire at the gate, a hiring process which would not provide an adequate method of matching qualifications to job requirements and assuring that the applicants are sufficiently skilled and capable.[168]

The economic and human risks recited here would arise only if Furnco were compelled to hire *unqualified* persons. But the analysis was applied to a practice in which qualified bricklayers were rejected because they were not part of the superintendent's network. Moreover, although

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164 440 U.S. 568 (1979).

165 438 U.S. at 570.

166 The Court of Appeals concluded that the list consisted solely of white persons. 551 F.2d 1085 (7th Cir. 1977). Because of past charges of discrimination, however, the company had apparently required its superintendent to supplement his list with names of some black bricklayers; this self-imposed affirmative action plan resulted in a favorable bottom line for overall hiring. 438 U.S. at 571-72. Subsequent to its decision in *Furnco*, the Court has ruled that such a bottom line does not insulate an otherwise discriminatory practice from a *Griggs* challenge. *See* Connecticut v. Teal, 457 U.S. 440 (1982).

167 The court held for the first time that disparate impact theory was not applicable where the "case did not involve employment tests . . . or particularized requirements such as the height and weight specifications . . . ." 438 U.S. at 575 n.7 (citations omitted). This limitation of *Griggs* to objective selection devices was criticized by the dissent, which would have directed the lower court to explore the disparate impact challenge and, if a prima facie case were established, determine whether the practice was "justified by business necessity." *Id.* at 583-84 (Marshall, J., concurring in part and dissenting in part).

168 438 U.S. at 570-71. Under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which the Court held applicable in *Furnco*, the employer's burden was to demonstrate that "the importance of selecting people whose capability had been demonstrated to defendant's brick superintendent is a 'legitimate, nondiscriminatory reason' for defendant's refusal to consider plaintiffs." 438 U.S. at 574 (citations omitted).

the existence of less discriminatory alternatives would normally defeat a claim of business necessity, such alternative selection devices were ignored by the Court.[169] Observing that "[c]ourts are generally less competent than employers to restructure business practices,"[170] the Court permitted Furnco to continue its inexpensive selection procedures at the price of work opportunities for qualified minority persons.

Beazer[171] was a class action challenge to the New York City Transit Authority's (TA) rule against employing persons who use methadone, a drug widely utilized as part of a transitional cure for heroin addiction. The named plaintiffs were former employees and applicants who were dismissed or refused employment because of their methodone use. They claimed that the automatic exclusion from all positions[172] of persons successfully undergoing methadone treatment violated the *Griggs* principle because it operated disproportionately against minorities and could not be justified on job relation/business necessity grounds.[173]

The district court ruled for the plaintiffs. It found that blacks and Hispanics suffered three times as much from the enforcement of the challenged rule,[174] that a substantial number of methadone users were just as employable as other members of the general population, and that routine screening procedures augmented by information from the methadone programs would enable TA to identify the unqualified users on an individual basis.[175] Thus a blanket exclusion could not be justified, and individual consideration of applicants would have to be undertaken. The district court's injunction, however, permitted the TA to continue to exclude methadone users from safety sensitive positions.

The Supreme Court reversed and upheld the TA's exclusionary

169 The Court of Appeals had devised "a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent." 551 F.2d, at 1088. "A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list." *Id.* at 1088-89.

170 438 U.S. at 578.

171 399 F. Supp. 1032 (S.D.N.Y. 1975), *aff'd* 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979).

172 Under this rule,

> if it is revealed that a current employee of the TA is a user of methadone, he will be discharged, or if an applicant for employment is a user of methadone, he will not be employed. This policy applies to all positions in the TA regardless of whether they are operating or nonoperating positions. Moreover, the policy operates as an absolute exclusion—no consideration being given to individual factors such as recent employment history, successful adherence to a methadone program, or evidence of freedom from heroin use.

399 F. Supp. at 1036. The TA employed about 47,000 persons at the time, and hired about 3,000 annually. 440 U.S. at 571; 399 F. Supp. at 1053.

173 The Court emphasized that the plaintiffs "have never attempted to present a discriminatory *purpose* case and would be hard pressed to do so in the face of the District Court's explicit finding that no animus motivated TA in establishing its policy . . . ." 440 U.S. at 583-84 n.24 (citation omitted, emphasis in original). Justice White disagreed with this assessment, suggesting there was evidence of discriminatory purpose against the addict population, "composed largely of racial minorities . . . ." *Id.* at 609 n.15 (White, J., dissenting).

174 The District Court had found disparate impact in two statistics: of the TA employees who were referred to the company doctor for suspected drug use, 81% were black or Hispanic; and approximately 65% of all persons on methadone maintenance in New York City were black or Hispanic. 440 U.S. at 579. There were approximately 40,000 persons in New York City on methadone maintenance at the time. 399 F. Supp. at 1037.

175 440 U.S. at 577.

practice. The majority concluded that even if plaintiffs' "weak" statistical showing established a prima facie case of discrimination, it was rebutted by TA's demonstration that its narcotics rule is job related.[176]

> TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbituates, and amphetamines, and of a majority of all methadone users . . . . [T]hose goals require the exclusion of all methadone users from the 25% of its positions that are "safety sensitive" . . . . [T]hose goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions.[177]

Writing for the dissenters, Justice White responded:

> Petitioners had the burden of showing job relatedness. They did not show that the rule results in a higher quality labor force, that such a labor force is necessary, or that the cost of making individual decisions about those on methadone was prohibitive. Indeed . . . petitioners have not come close to showing that the present rule is "demonstrably a reasonable measure of job performance." No one could reasonably argue that petitioners have made the kind of showing demanded by *Griggs* or *Albermarle Paper Co. v. Moody*. By petitioner's own stipulation, this employment barrier was adopted "without meaningful study of [its] relationship to job-performance ability." As we stated in *Washington v. Davis*, Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution . . . ." Therefore, unlike the majority, I think it insufficient that the rule as a whole has some relationship to employment so long as a readily identifiable and severable part of it does not.[178]

As in *Spurlock* and *Furnco*, cost concerns permeate the Court's discussion of job relation/business necessity. Although the majority conceded that TA's rule was "broader than necessary,"[179] it observed that any alternative to the rule of total exclusion "is likely to be less precise—and will assuredly be more costly."[180] Individual screening would require adoption of procedures for gathering information about applicants and monitoring methadone users after they are hired.[181] The Court emphasized that the respondents had failed to prove that unqualified methadone users "could be excluded as cheaply and effectively in the absence of the rule."[182]

As in *Spurlock* and *Furnco*, the cost dimension was couched in public

176 *Id.* at 587. The Court seemed to be suggesting that the weaker the prima facie case, the easier it will be for the employer to show job relation/business necessity. *See* Note, *Title VII: Discriminatory Results and The Scope of Business Necessity*, 35 LA. L. REV. 146, 154-56 (1974).

177 440 U.S. at 587 n.31 (citations omitted).

178 *Id.* at 602 (White, J., dissenting) (citations omitted).

179 *Id.* at 592.

180 *Id.* at 590.

181 *Id.* The district court had devised such procedures, primarily involving reference checks from the methadone clinics.

182 *Id.* at n.33. The dissenters relied on the finding of the district court that "the bad risks could be culled from this group [those who successfully participated in the maintenance program for one year] through the normal processing of employment applications" and "without additional effort." *Id.* at 608. *See also* 440 U.S. at 604.

safety terms.[183] But again the Court's approach misconstrues the question in dispute—the *Beazer* plaintiffs did not contend that Title VII required the TA to risk disastrous consequences by employing drug impaired persons as subway drivers. Rather, consistent with established doctrine, they argued the Act required the TA to incur the additional expenses involved in individualized screening instead of excluding persons on the basis of a group characteristic. The Supreme Court decision subordinates equal opportunity to the employer's bottom line. Allocation of costs, not business necessity or public safety, is what the *Beazer* case was all about.

It has been observed that "the trend in the Court is to diminish the level of the employer's burden of proving business necessity and to undercut the vigorous enforcement of Title VII."[184] A major thread in this trend is the acceptance of cost avoidance as legal justification for practices which produce discriminatory effect. Had the BFOQ model been applied in *Furnco*, *Beazer*, and *Spurlock*, those employers would have been required to restructure their methods of selection to avoid the discriminatory consequences of group screening.

The public safety rationale has also been employed to permit selection on the basis of gender. In *Wright v. Olin Corp.*[185] it was held that "an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on employment opportunity that are reasonably required to protect the health of unborn children of women workers against hazards of the workplace."[186] Olin had adopted a "female employment and fetal vulnerability" program, an increasingly common risk-oriented screening practice.[187] The program identified jobs requiring contact with chemicals known or suspected to be harmful to fetuses or female reproductive systems, and excluded women from such jobs. A challenge was brought under Title VII.

The Fourth Circuit explicitly recognized that the BFOQ defense ap-

183 "For example, some 12,300 are subway motormen, towermen, conductors, or bus operators. The District Court found that these jobs are attended by unusual hazards and must be performed by 'persons of maximum alertness and competence.' " 440 U.S. at 571. After recognizing the safety concerns, the district court concluded: "[I]n my view *the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.*" 399 F. Supp. at 1036 (emphasis added).

It is interesting to contrast the judicial response to the public safety/cost defense in a disparate treatment context. In Parson v. Kaiser Aluminum & Chemical Corp., 727 F.2d 473 (5th Cir. 1984) the court found that Kaiser failed to promote the plaintiff because of its "not necessarily misplaced fear that Parson's promotion would trigger a violent and prolonged (and, thus, expensive) reaction on the part of certain white, racially-motivated employees." *Id.* at 477. The court, citing *Manhart*, held this was not a valid defense. *Id.* at 478.

184 *See* Note, *supra* note 9, at 404. The writer also discerns a trend "to reincorporate intent as an element of the analysis." *Id.* at 410, 416-19.

185 697 F.2d 1172 (4th Cir. 1982).

186 *Id.* at 1189-90.

187 *See* 697 F.2d at 1187 n.24. For a general discussion of risk-oriented as compared with performance oriented screening, see Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577 (1986); Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980); Howard, *supra* note 19; McGarity & Schroeder, *supra* note 24.

plied in such cases but found it too narrow to justify Olin's program.[188] Instead the court chose to apply the "wider business necessity defense."[189] In the court's view, the protection of workers' unborn children can properly be considered business necessity if the employer can prove "that significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, that fertile women workers, though not men workers, be appropriately restricted from exposure to those hazards and that its program of restriction is effective for the purpose."[190] Such a showing could be rebutted by proof that there are alternatives which are acceptable "in terms of their effectiveness *and their economic* and technological feasibility," and would protect against fetal harm with less discrimination against females.[191]

Although the court's stated focus was on the safety of the unborn and it disavowed any concern for the potential tort liability that Olin might incur as a result of its operations,[192] the question of cost allocation lies at the core of cases like *Wright*. In adopting its fetal vulnerability program, the company had rejected the alternatives of substituting nontoxic materials in its plants, improving ventilation, or providing workers with protective equipment because such alternatives were not "feasible."[193] The *Wright* decision permits employers to maintain male only workplaces even if the technology exists to make them safe for all workers, because it defines infeasibility in cost as well as technological terms. The employer need only demonstrate that the required reduction in hazards would be economically infeasible. This "allows employers to hide profit maximizing efficiency concerns behind contrived solicitude for the well-being of others."[194] Given the enormous number of females who would be excluded under such programs, the weighing of cost concerns in *Wright* contrasts sharply with the refusal of courts to do so in

188 697 F.2d at 1185-86 n.21. It certainly could not be shown that all or substantially all females were unable to perform the tasks involved.

189 *Id.*

190 *Id.* at 1190.

191 *Id.* at 1191 n.29 (emphasis added).

192 The court agreed with the plaintiffs that "the mere purpose to avoid liability and consequent economic loss may not suffice, standing alone, to establish a business necessity defense." *Id.* at 1190 n.26. *See also* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553 (11th Cir. 1984) (potential litigation costs in a lawsuit seeking recovery for fetal injury from exposure to radiation cannot form the basis for the business necessity because that would "shift the focus of the business necessity defense from a concern for the safety of Hospital patients to a focus of concern for Hospital finances." *Id.*).

193 697 F.2d at 1182.

194 *See* McGarity & Schroeder, *supra* note 24, at 1049. Writing before the decisional law in this area developed, one commentator observed:

> [E]mployers could not exclude members of the susceptible sex without first attempting to eliminate or minimize the harmful effects . . . . By excluding all members of the susceptible sex rather than alleviating the health problem, an employer avoids the responsibility for maintaining a safe work environment. An employer cannot plead that the cost of eliminating the problem justifies a BFOQ because, as the EEOC has recognized, 'remedying inequality normally costs money.' When the elimination of health hazards is technically infeasible, a member of the susceptible sex should have the right to decide whether to work in the dangerous job or industry.

Sirota, *supra* note 48, at 1059 (citations omitted). *See also* Howard, *supra* note 19, at 826-27.

traditional BFOQ cases. It also contrasts with the objective test cases like *Albermarle* where the cost of validation is substantial.[195] On remand, Olin's exclusionary program was upheld. The district court concluded that all acceptable alternatives such as the use of respirators, better ventilation and the substitution of dangerous chemicals had been exhausted or were not "feasible," and that the exclusionary practices were necessary to protect the unborn.[196]

c. *The Expansion of the Cost Defense—Fringe Benefits and Pay Equity*

While the cost defense has often appeared in the context of cases challenging selection criteria for positions affecting public safety, decisional law documents its emergence into areas where only economic, not human, risks are at stake.

Like *Manhart* and its progeny, *Wambheim v. J.C. Penny Co.*,[197] involved a Title VII challenge to the employer's fringe benefit scheme, here its medical plan. J.C. Penney adopted a head of household rule that limited coverage of spouses to situations where the employee earned more than half of the couple's total income.[198] As a result of this facially neutral practice, only thirty-seven percent of married female employees received dependent coverage, compared with ninety-five percent of the males.[199] Applying classic *Griggs* analysis, the Ninth Circuit held that a prima facie case of disparate impact was established. The court, however, went on to conclude that J.C. Penney had demonstrated business necessity by showing the practice was keeping "the cost of the plan to its employees as low as possible, so that the needy can afford coverage."[200] While admitting that "[c]ost undoubtedly was a factor considered in the process,"[201] the court nevertheless rejected plaintiffs' assertion that this was an impermis-

195 *See supra* text accompanying notes 113-16. As one commentary has put it,

> [t]he standard of review for risk-oriented screens that test for risk to the public is usually quite lax, in stark contrast to the stringent validation requirements that the courts impose upon performance-oriented employment screens. The courts often require employers to spend vast sums to validate written performance examinations, but they willingly uphold risk-oriented screens on the most farfetched allegations of threats to public safety.

McGarity & Schroeder, *supra* note 24, at 1038.

196 585 F. Supp. 1447, *vacated on other grounds*, 767 F.2d 915 (1984). The acceptability of less discriminatory alternatives raises a question similar to the question presented by the undue hardship cases. *See supra* notes 84-101 and accompanying text. In Levin v. Delta Air Lines, 730 F.2d 994 (5th Cir. 1984), for example, the plaintiffs argued that Delta could have transferred rather than laid off pregnant flight attendants. The Fifth Circuit held this did not constitute a "less discriminatory alternative": "the job of flight attendant is manifestly distinct from any ground position; the training and skills required are generally unrelated. Consequently it cannot be said that permitting such transfers entailed *no burden* for the employer and was administratively a natural alternative to placing pregnant flight attendants on maternity leave." 730 F.2d at 1001-02 (emphasis added). *Compare* Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) and Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1983) (discharge of pregnant x-ray technicians unlawful where alternatives to protect fetus were available).

197 705 F.2d 1492 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). *See supra* text accompanying notes 35-47.

198 Prior to its adoption, only male employees were eligible for coverage for their spouses. 705 F.2d at 1493.

199 705 F.2d at 1493-94. The court found that 12.5% of the married female employees qualified as heads of households, compared to nearly 90% of the married males. *Id.*

200 705 F.2d at 1495.

201 *Id.*

sible defense under *Manhart*. That case was not controlling, the court held, because the challenged fringe benefit rule was *neutral*, and not *intended* to promote discrimination between the sexes.[202] No explanation was provided for basing the propriety of cost justification on the element of intent, when the undeniable effect of Penney's policy was nearly as exclusionary as its previous overt policy of excluding all female employees from dependent coverage.[203]

The notion that avoidance of the costs of compliance can constitute a justification for practices with discriminatory effect has expanded into the realm of pay equity. Plaintiffs in comparable worth litigation have invoked the *Griggs* principle to challenge disparate wage structures,[204] contending that the practice of setting wages by reference to the existing labor market perpetuates the bias therein against female workers.[205] Such a showing would seem to require the employer to demonstrate that the wage setting practice is somehow job related or dictated by business necessity. The courts that have dealt with these cases have, however, permitted employers to raise what amounts to a cost defense.

In *Christensen v. State of Iowa*,[206] for example, a class of female employees at the state university brought a Title VII action challenging the University's practice of paying less for clerical work than it did for main-

202 *Id.*

203 By permitting cost cutting through the limitation of health coverage, *Wambheim* reaches a contrary result than that reached in Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). In that case, the Court struck down under Title VII a health benefit plan that covered all medical conditions for spouses of female employees, but provided only limited pregnancy coverage for spouses of male employees. The plan was held unlawful because it afforded less protection to married male employees than married female employees. 462 U.S. at 676. The Court explained that "if a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII." *Id.* at 682. The additional cost of providing equal coverage was explicitly rejected as justification for refusing to do so. *Id.* at 685 n.26. Yet *Wambheim* accepts the very same cost justification on the ground that Penneys' practice discriminated *indirectly*, rather than directly.

204 Title VII includes a prohibition against discrimination "with respect to . . . compensation." 42 U.S.C. § 2000e-2(a)(1) (1982).

205 *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 478. The Supreme Court has not directly addressed the viability of comparable worth theory, but in County of Washington v. Gunther, 452 U.S. 161 (1981) it held that Title VII wage disparity claims are not restricted (as are claims under the Equal Pay Act, 29 U.S.C. § 206(d)) to jobs involving equal work. The Bennett Amendment, 42 U.S.C. § 2000e-2(h) was held to incorporate into Title VII only the affirmative defenses of the Equal Pay Act. *Gunther* involved a claim that the employer intentionally set wages for female jobs below what it knew through its own survey they were actually worth. The Court's decision left open the question of "the nature or contours of the 'comparable worth' lawsuit." B. Schlei & P. Grossman, *supra* note 48, at 474. For discussion of the application of impact theory, see generally Brown, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127 (1986); Loudon, *Applying Disparate Impact to Title VII Comparable Worth Claims: An Incomparable Task*, 61 IND. L. REV. 165 (1986); Note, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 CALIF. L. REV. 730 (1983); Note, *Sex-based Wage Discrimination Under Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083 (1982); Note, *The Exception Swallows the Rule: Market Conditions as a "Factor Other Than Sex" in Title VII Disparate Impact Litigation*, 86 W. VA. L. REV. 165 (1983).

For a general discussion of wage rates and their relationship to gender segregation of the labor market see Blumrosen, *supra* note 24; Note, *Use of the Market Wage Rate in Employment Discrimination Suits: Equal Work as the Key to Application*, 61 NOTRE DAME L. REV. 513 (1986); *See also* Hoyman & Stallworth, *Suit Filing By Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 69-70 (1986); Note, *supra* note 205, 86 W. VA. L. REV. at 165-68 and citations therein, describing the wage gap between men and women.

206 563 F.2d 353 (8th Cir. 1977).

tenance work of comparable value to the employer.[207] Prior to 1974, the University set wage scales for its nonprofessional positions by reference to the local labor market. Since this labor market was segregated by sex, the court concluded that "UNI's pay system perpetuated the traditional disparity between the wages paid to women and those paid to men."[208] In an effort to remove these inequities, the University adopted the Hayes System "under which compensation was to be based on an objective evaluation of each job's relative worth to the employer regardless of the market price."[209] Each position was evaluated according to thirty-eight factors and assigned a value.

In implementing the new pay scheme, however, the University ultimately disregarded the job value ratings produced by the objective system. Instead, it modified the system by providing for an advanced step in starting pay for many of the physical plant employees, but not for beginning clerical employees, because the local job market paid higher wages for physical plant jobs than the beginning pay under the system. "As a result, some physical plant employees, mostly male, continued to be paid more than clerical employees, all female, despite equivalent seniority and labor grade."[210]

Premising their challenge on *Griggs*, plaintiffs attacked the employer's practice of setting wages in reliance on the labor market, which given the Hayes study had a demonstrable disparate impact on the salaries of female employees. The Eighth Circuit affirmed the lower court's dismissal, stating:

> [Plaintiffs'] theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.[211]

The acceptance of a Title VII market rate defense in *Christensen* and elsewhere[212] is particularly troublesome in light of the explicit rejection

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207 *Id.* at 354.
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.* at 356 (footnote omitted). One writer has read the implicit holding of *Christensen* to require the employer invoking the market rate defense to "demonstrate, by a preponderence of the evidence, a shortage of qualified workers or an actual difficulty in recruiting workers for certain jobs;" then Title VII would permit "the pay differential necessary to attract, retain, and motivate competent employees" as a form of business necessity. *See* Loudon, *supra* note 205, at 183. There was, however, no such showing made by the University or relied upon by the court in that case.
212 *See* American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986) (practice of paying market wage rate not actionable under Title VII despite employer's knowledge that its wage structure disadvantages women and ability to alter wage structure in favor of comparable worth); American Fed. State, County and Municipal Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985) ("the decision to base compensation on the competitive market, rather than on a theory of comparable worth" is too complex to be analyzed under *Griggs* theory. 770 F.2d at 1406); Spaulding v. University of Wash-

of this same defense in Equal Pay Act litigation. As the *Christensen* court recognized,[213] the market rate justification is not available to an employer who pays women lower wages than men for equal work.[214] The Equal Pay Act as interpreted by the courts does indeed abrogate the laws of supply and demand. It operates in the same way that minimum wage legislation compels employers to pay more for certain positions than they would have to on the open market.[215] Yet the Title VII cases have permitted employers to exploit gender segregation in the labor market by paying females less than the employer's own assessment of their worth, and then to defend this practice on cost containment grounds.[216]

The success of the market rate defense should be viewed in the context of the more general development of cost defense in impact litigation. Again we observe the phenomenon of judicial rejection of cost containment as a justification for discrimination which is overt and direct (unequal pay for equal work) contrasted with the acceptance of such jus-

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ington, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982). One treatise even concludes that "the Supreme Court in *Gunther* gave [the market rate defense] tacit approval." *See* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 479. At least one court has questioned the validity of the market rate defense under Title VII. *See* Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 n.6 (9th Cir. 1982) (permitted employer to use prior salary as the basis for a new employee's salary only if the employer had an acceptable business reason for doing so. "Not every reason making economic sense is acceptable." *Id.*). *See also* Norris v. Arizona Governing Comm., 671 F.2d 330, 335 (9th Cir. 1982), *aff'd*, 463 U.S. 1073 (1983) ("Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the market place . . . .").

213 563 F.2d at 356 n.7.

214 *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974). In *Corning* the Court determined that higher wages were paid to night inspectors (all of whom were male) because of the need to recruit men to perform what was regarded as women's work and "simply because men would not work at the low rates paid women inspectors." The wage differential thus "reflected a job market in which Corning could pay women less than men for the same work." The Court nevertheless concluded that while the company's taking advantage of such a situation may be understandable as a matter of economics, its differential "became illegal once Congress enacted into law the principle of equal pay for equal work." 417 U.S. at 205. *See also* Brennan v. Victorial Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) (rejected as justification for the wage differential that women were willing to work for less than men); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970) (rejected as justification for pay differential that orderlies could not be recruited in the existing labor market unless they were paid more than nurses); Marshall v. Georgia Southwestern College, 489 F. Supp. 1322, 1330 (M.D. Ga. 1980) (rejected the employer's market supply & demand justification for the differential between female and male professors). Differences in productivity or profitability, on the other hand, do constitute proper justification under the Equal Pay Act for a wage differential. *See, e.g.*, Hodgson v. Robert Hall Clothes, 473 F.2d 589 (3d Cir. 1972), *cert. denied*, 414 U.S. 866 (1973) (difference in profitability between the men's and women's departments was a factor other than sex justifying a wage disparity); Futran v. Ring Radio Co., 501 F. Supp. 734, 739 (N.D. Ga. 1980) (talk show host's ability to generate revenues can constitute a "factor other than sex" to justify a wage disparity).

215 It has been suggested that the Equal Pay Act was "designed to reform [a gender-based labor] market to end the gender bias, just as the minimum wage provisions of the Fair Labor Standard Act (of which the Equal Pay Act is a part) were designed to make jobs pay more than the market would yield." MATERIALS ON EMPLOYMENT DISCRIMINATION, *supra* note 18, at 549.

216 The allowance of a market rate defense in Title VII litigation has been widely criticized in the literature. *See* Brown, *supra* note 205, at 169; Note, *supra* note 205, 71 CALIF. L. REV. at 753 ("An employer's bare reliance on prevailing market wages to set salary rates should not qualify under any definition of business necessity."); Note, *supra* note 205, 86 W. VA. L. REV. at 184 ("Given that both Title VII and the Equal Pay Act serve the same fundamental purpose against discrimination based on sex, it is difficult to appreciate the different analyses given the defense of market conditions presented under the two Acts.").

tification when the discrimination results from the operation of a "neutral" rule (like market rate).

A major component of impact theory is the recognition that neutral personnel practices can have an adverse impact on protected groups because of conditions *outside* the employer's control. In *Griggs*, therefore, the condition of inferior educational opportunities for blacks in North Carolina was the triggering mechanism for the disparate impact of Duke Power's selection criteria. Despite the Company's lack of responsibility for unequal education, it was adjudged in violation of Title VII and ordered to adapt its practices to the realities of societal inequities. Yet cases adopting cost justification in pay equity litigation ignore this fundamental point. Thus in *Briggs v. City of Madison*,[217] the district court ruled in favor of the employer based on its market rate defense stating that "[u]nder Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create."[218]

As a doctrinal matter, it is not readily apparent why Duke Power Company must absorb the expense of restructuring its hiring practices in order to avoid the disparate impact that results from unequal educational opportunities, while that same employer need not absorb the increased labor costs of restructuring its compensation or fringe benefit scheme so as to avoid the disparate impact that results from a gender segregated labor market.[219] Perhaps the unspoken difference is one of magnitude—the overall expense of undertaking comprehensive job evaluation studies and equalizing[220] wage structures is potentially of an order much greater than that involved in test validation. Whether enforcement of equal opportunity law should ever be suspended in the interest of cost savings, regardless of the size of the cost, will be dealt with in the next section.

III. The Case Against the Cost Defense

While *Griggs* seemed to establish "that the national interest in eliminating employment discrimination overrides the employer's interest in administrative convenience and cost saving,"[221] recent decisional law has begun to tip the balance the other way. Restrictions originally placed on employer justification for discriminatory practices—such as the requirements for an empirical showing of job relation and the absence of a less

217 536 F. Supp. 435 (W.D. Wis. 1982).

218 *Id.* at 447.

219 As one Treatise has aptly noted, *Christensen* and *Manhart*

> cannot be reconciled since *Manhart* gains implicit support from the disparate impact cases. For example, in a testing case like *Griggs*, the employer, forced to forego the use of a test because it is not job related, may have to spend more money selecting employees though [sic] other techniques such as interviews, on-the-job trials or the creation of a new and valid test. Another example would be the garnishment case where an employer, taking account of the fact that minority group employees are more likely to have their wages garnished, abrogates a rule providing for discharge of garnished employees, thus undertaking the costs of handling garnishments.

FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at § 1.5, p.44.

220 Under the Equal Pay Act, an employer is not permitted to equalize wages by lowering the higher salaries; it must, instead, raise the lower ones. *See* 29 U.S.C. § 206(d) (1982).

221 Note, *supra* note 205, 71 CALIF. L. REV. at 754.

discriminatory alternative—have in many contexts given way to a business necessity defense which in reality is based on cost avoidance. Significantly, in none of the decisions in which this has occurred has the defense been premised on a showing that the cost of compliance would be prohibitive, or would threaten the viability of the enterprise. The allowance of such cost justification in fair employment law is ill-advised. If Title VII is to operate effectively in the American workplace to extend opportunities to groups traditionally excluded, justification for discriminatory practices must be narrowly confined to situations where job performance, productivity,[222] or the very financial existence of the enterprise is at stake. The dollar costs of compliance are properly placed upon employers; minorities and women should not be required to suffer loss of equal opportunity in the interest of budget cutting. The Supreme Court recognized this when in *Manhart* it eschewed cost justification, and the same concerns compel a similar repudiation in disparate impact as well as disparate treatment cases.

The innovation of *Griggs* was based on the realization that employers can do as much harm to minorities and women by unintentional acts as they can by acts designed to discriminate. The Court, having observed firsthand the tremendous difficulty plaintiffs have in proving discriminatory intent, equated the two types of employer behavior for purposes of Title VII enforcement.[223] Given the equation of purposeful discrimination and practices which are its functional equivalent, the affirmative defenses in both types of lawsuits should be substantially similar.

The case against the cost defense emerges when we consider it against the background of legislative goals underlying Title VII, the congressional response to *Griggs*, and the widespread rejection of cost justification in analogous contexts. It would be disingenuous to contend that the Eighty-Eighth Congress actually anticipated the development of impact doctrine and the business necessity component thereof when it enacted Title VII in 1964.[224] What is clear is that Congress adopted as its goal the elimination of employment discrimination,[225] and sought "to se-

222 As the Court observed in 1982, "Title VII guarantees . . . individual[s] . . . the *opportunity* to compete equally with white workers on the basis of job-related criteria." Connecticut v. Teal, 457 U.S. 440, 451 (1982).

223 *See generally* Brodin, *supra* note 16. As has been noted, "disparate impact doctrine furthers a number of social purposes," including aiding in the elimination of covert intentional discrimination for which proof of intent is lacking, alleviating the present harm due to past discrimination, facilitating the elimination of prejudice based on nonmerit grounds, and reducing inequities between groups in the society. *See*, Note, *Wage Discrimination*, 34 STAN. L. REV. 1083, 1089-90 (1982).

224 *See* Note, *supra* note 103, 84 YALE L.J. at 98 ("the business necessity doctrine thus adopted in *Griggs* appears in neither the explicit language nor the legislative history of the 1964 Act."). Some writers have found in the general legislative history support for a broad business necessity defense. *See* Comment, *supra* note 103; Note, *supra* note 103, 84 YALE L.J. at 104 ("Congress evidenced a substantial concern for preserving business efficiency and indicated that Title VII was not intended to interfere with productivity."). Others read the same history to envision a narrow defense. *See* Blumrosen, *supra* note 48, at 83 ("the precise issue, whether management prerogatives and business convenience would be subordinated to the need to eliminate racial discrimination, was confronted and rejected by both houses of Congress," citing the defeat of an amendment which would have exonerated employers who believed in good faith that the discriminatory practice would be "more beneficial to the normal operations of his particular business or to its good will.").

225 H.R. REP. No. 914, 88th Cong., 1st Sess., 26 (1963).

cure to all persons of all races, color, religions, and nationalities the right to share equally and fairly in the opportunities for employment throughout the range of the national economy."[226] Congress thus spoke expansively in prohibiting practices which "deprive or tend to deprive" anyone of such opportunities.[227] When Congress did address the question of business justification in 1964, it did so by creating a narrow BFOQ.[228] And in 1972 Congress "recognized and endorsed the disparate impact analysis employed by the Court in *Griggs*."[229] Under these circumstances it is fair to conclude that Congress viewed the reasonable expenses necessary to eliminate discrimination as a cost of doing business, and not a justification for continuing such discrimination.[230]

Not surprisingly, the question of cost justification has arisen in many

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226 S. REP. No. 867, 88th Cong., 2d Sess., 1 (1964).

227 42 U.S.C. § 2000e-2(a)(2) (1982).

228 *See supra* notes 48-83 and accompanying text. In its decision in *Wright*, the Fourth Circuit observed:

> [The BFOQ] was obviously designed as a necessary, narrow exception to the otherwise flat prohibition against the most obvious form of employment discrimination—an overt qualification such as "males only." But nothing in the statutory exception itself or in Title VII in general suggested that this defense defined the full reach of business justification defenses under Title VII—whether to overt or other forms of discrimination—and the *Griggs* Court's recognition of the obviously wider business necessity defense soon confirmed that this was not the case.

697 F.2d at 1185 n.21. It is the position of this Article that the BFOQ provision does indeed set the contours for *all* business justification under the Act.

229 *Teal*, 457 U.S. at 447 n.8. When Congress adopted the 1972 Amendments to Title VII (*see* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. §§ 2000e-1-17 (1982)) which expanded the enforcement powers of the EEOC, it in effect ratified *Griggs*. *See* Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L.J. 105 (1986), which concludes:

> An examination of the legislative history of the 1972 amendments to the Civil Rights Act of 1964 reveals that the disparate impact theory of discrimination was ratified in the 1972 amendments.
>
> Congress was aware of the decision in *Griggs v. Duke Power Co.* and realized its importance in eradicating discrimination. Although the *Griggs* doctrine was not debated nor expressly approved by the 1972 amendments, proponents of the bill embraced the doctrine and used it to support their arguments in favor of various provisions of the bill. Congress also insisted that federal employees be protected under Title VII and directed the Civil Service Commission to comply with the requirements of *Griggs*. Thus, in the 1972 amendments, Congress ratified *Griggs* and the disparate impact theory of discrimination.

Id. at 116. *See also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 982 (1982) (taking the position that the 1972 Amendments constituted ratification of *Griggs* theory). The Supreme Court has reaffirmed *Griggs* on several occasions. *See Teal*, 457 U.S. 440; County of Washington v. Gunther, 452 U.S. 161, 178 (1981). For a recent scathing attack on impact theory which concludes that Congress did not intend to prohibit disparate impact, see Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985).

230 One writer has observed with reference to the comparable worth area:

> Objections relating to the cost of remedying sex-based wage discrimination are often misplaced. Title VII's primary objective is the achievement of equitable, not economically efficient, employment practices. In enacting Title VII, Congress in no way authorized the courts to balance the cost of eliminating wage discrimination against its benefits. Nothing in the legislative history of Title VII indicates that Congress placed a price tag on the cost of correcting discrimination in employment . . . . Even if Title VII was concerned with economic efficiency, it embodies an assumption that inequitable employment practices impair the operation of the labor market, in that such practices are ultimately inefficient. A market concerned with traits unrelated to job capacity (such as sex) is not performing at its fullest capacity.

Note, *supra* note 205, 86 W. VA. L. REV. at 186 (footnote omitted).

other contexts, and it is instructive to observe its treatment elsewhere. As noted above,[231] an employer's goal of minimizing its labor costs does not constitute legal justification for paying females less than males for equal work, or for paying wages below the statutory minimum. Cost avoidance is also unacceptable as a defense to an action under the Age Discrimination in Employment Act ("ADEA").[232] It has been noted that "[b]ecause some costs are directly associated with aging, such as increased pension and benefit costs and higher wages paid to senior employees, the cost of retaining any individual employee usually increases over time."[233] "Thus, particularly in reduction-in-force situations, the employer's temptation is to effect maximum cost reductions by laying off the older employees."[234] Similarly, if an employer is required (by collective bargaining agreement or otherwise) to pay new employees on a salary scale that increases with past experience, the incentive may be to hire younger applicants. In short, "if employers are permitted to make employment decisions based on cost, systematic discrimination against the aged could result."[235] In recognition of this, cost containment has not generally been accepted as a "reasonable factor other than age" or "good cause," the affirmative defenses under the ADEA.[236]

Geller v. Markham[237] illustrates that the rejection of cost justification

231 *See supra* notes 213-16 and accompanying text.

232 29 U.S.C. §§ 621-34 (1982).

233 Note, *The Cost Defense Under the Age Discrimination in Employment Act*, 1982 DUKE L.J. 580, 581 (1982). *See also* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, (E.D. Mich. 1976)

> Cost differentials in employment have been denominated as the real rather than imagined reasons for discrimination against the aged. Higher employment costs may result from increased direct compensation or benefit programs, higher training costs, and higher costs brought about by the diminished productivity of older persons resulting from reduced ability or physical disabilities.

Id. at 1317 (footnote omitted).

234 Player, *Proof of Disparate Treatment Under the ADEA: Variation on a Title VII Theme*, 17 GA. L. REV. 621, 657 (1983).

235 Note, *supra* note 233, at 581.

236 *See* EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984) (rejected argument that forced retirement can be justified on economic necessity grounds absent showing that the necessity for drastic cost reductions is real and there is no less discriminatory alternative); B. SCHLEI & P. GROSSMAN, *supra* note 48, at 506 and citations therein; Player, *supra* note 234, at 657 and citations therein; Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 574-87 (1979). *See also* Department of Labor Interpretive Regulations, 29 C.F.R. § 860.103(h) (1986):

> A general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

The writers in the age area have distinguished between direct or absolute costs (such as salary and fringe benefits) which they conclude are improper bases for decision making, and indirect costs (such as lost productivity and increased absenteeism), which are proper bases. *See* B. SCHLEI & P. GROSSMAN, *supra* note 48, at 507; Note, *supra* note 233, at 582; Note, *supra* note 236, at 567. This distinction is consistent with the proposition set forth in this Article that business necessity must be based on productivity concerns, and not the expense of compliance.

237 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

under the ADEA extends to impact cases as well as those of overt, direct discrimination. *Geller* involved a claim that the defendant school board's policy of giving hiring preference to teachers with less than five years experience had a disproportionate impact on older applicants. On the basis of plaintiff's statistical showing, the Second Circuit agreed and found the policy discriminatory under the *Griggs* theory. The school board asserted that the preference was nevertheless "supportable as a necessary cost-cutting gesture in the face of tight budgetary constraints,"[238] because of the higher salaries that had to be paid to experienced teachers. The court explicitly rejected this cost justification.[239]

Cost has been accepted by some courts as a "factor other than age" when used in conjunction with an assessment of the individual employee's productivity on the job. Thus in *Donnelly v. Exxon Research and Engineering Co.*[240] the employer had a policy of discharging persons who were not producing at least seventy-five percent of the value of their wages. The court rejected plaintiff's claim that this relative cost formula would adversely affect older employees, whose salaries had risen against falling productivity. In so ruling, the court emphasized the job performance component of Exxon's policy:

> It would be unlawful . . . if an employer were to fire an older worker doing satisfactory work who, because of his seniority, received a certain salary because the employer wished to replace him with someone else who would do no better work but who, as a younger man with less seniority, would do the work for less.[241]

The courts in the equal pay and age discrimination areas have acknowledged that enforcement of the fair employment principle compels prohibition of cost-cutting measures which adversely affect protected

238 *Id.* at 1034.

239 *Id.*

In dissenting from the Supreme Court's denial of certiorari, Justice Rehnquist disagreed with "the rationale employed by the Court of Appeals in rejecting the Board's 'cost' justification for its policy." 451 U.S. at 948. Asserting that the defendant was entitled to discriminate against experienced applicants because that was a factor other than age, he chastised the Second Circuit for "tie[ing] the hands of local school boards in dealing with ever-increasing costs . . . ." *Id.*

For other cases rejecting a cost defense under the ADEA, see Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1978) (the employer's faculty reduction plan, which gave a preference in retention to untenured members and thus had an adverse impact against older faculty, could not be justified on cost savings grounds); Laugesen v. Anaconda Co., 510 F.2d 307, 316 (6th Cir. 1975) (economically motivated reduction in force "would not dispose of the case if Laugesen's age induced Anaconda to discharge him instead of someone else."); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979) ("Where economic savings and expectations of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons."); Bishop v. Jelleff Assocs., 398 F. Supp. 579, 590 (D.D.C. 1974) (termination to avoid vesting of pension benefits was because of age and thus in violation of ADEA); LaChapelle v. Owens-Illinois, 14 Fair Empl. Prac. Cas. (BNA) 737-39 (N.D. Ga. 1976) (consent judgment; employer may not maximize profits by choosing the younger employees for trainee positions).

240 12 Fair Empl. Prac. Cas. (BNA) 417 (D.N.J. 1974), *aff'd mem.*, 521 F.2d 1398 (3d Cir. 1975).

241 *Id.* at 421-22. *See also* Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1216 (N.D. Ga. 1973) (employer may only terminate on basis of cost if high cost is related to low performance); Note, *supra* note 233, at 582, 598. *But see* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1319 (E.D. Mich. 1976) (ADEA permits employer "to consider employment costs where such consideration is predicated upon an individual as opposed to a general assessment that the older worker's cost of employment is greater than for other workers").

groups and which are not performance based. Many an employer with an eye on costs would be induced to employ a workforce of minimally competent persons, selected by means of the most inexpensive procedures, willing to accept the lowest wage, and requiring the least expenditures in terms of fringe benefits and accommodations.[242] Antidiscrimination legislation seeks the inclusion into that workforce of others who are able to perform the work but may require more expensive selection devices in order to be identified, or higher costs once on the job. Adoption of a cost defense not based on productivity or performance (either actual or predicted) will significantly restrict employment opportunities for those intended as beneficiaries of such legislation.[243]

The question of the propriety of imposing on business the costs of complying with legislation deemed in the public interest is not, of course, limited to fair employment law.[244] In such areas as antitrust and labor relations, cost avoidance or profit maximization generally do not suffice to justify statutory violations.[245] Indeed even when the economic survival of the company is at stake, it has been held that violations of labor relations legislation cannot be justified on the basis of the financial exigencies.[246]

To the extent that decisions such as *Beazer* and *Spurlock* represent an

242 An example of this phenomenon is the relocation of company facilities to geographical areas with lower labor and operating costs. As has been noted,

> [s]uch decisions may well cause a disparate impact on minorities because of broad residential segregation in our society. Thus, when an employer with an inner city plant with a work force that reflects minority representation in the city decides to close that plant and move the work to a plant in an area of low minority population, the impact on minority group employment opportunities is clear.

FEDERAL LAW OF EMPLOYMENT DISCRIMINATION, *supra* note 47, at § 1.5. Some have thus suggested application of the *Griggs* principle to relocation cases. *Id.* (and citations therein). *But see* Image of Greater San Antonio v. Brown, 570 F.2d 517, 521 (5th Cir. 1978) (rejecting an impact challenge to a reduction in force by the Air Force because it was "based in economic necessity and sound business sense"); Jones v. General Tire & Rubber Co., 608 F. Supp. 1013 (W.D.N.C. 1985) (rejecting an impact challenge to a plant relocation).

243 This writer thus rejects the approach proposed in Note, *supra* note 103, 84 YALE L.J. 98, in which an employer would not be required to avoid disparate impact by substituting a less discriminatory practice if the cost differential between the challenged practice and the alternative is "not insubstantial." *Id.* at 115. This proposal would perpetuate the solicitude towards profit maximization that has undercut the effectiveness of the *Griggs* principle. *See, e.g.,* Clady v. County of Los Angeles, 770 F.2d 1421, 1432 (9th Cir. 1985) (concluding that the cost savings of using one selection device over a less discriminatory one is a legitimate basis for continuing use of the more discriminatory device).

244 In the public sector, of course, it has long been acknowledged that the cost of implementing constitutional rights is not sufficient to override the provision of those rights. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 92 n.29 (1972).

245 *See* Note, *supra* note 236, at 589-90 and citations therein (discussing the "failing company" defense in antitrust litigation and analogous defenses in the labor field).

246 *See* NLRB v. Manley Truck Line, Inc., 779 F.2d 1327 (7th Cir. 1985). The N.L.R.B., having found that the employer violated § 8(d) of the National Labor Management Relations Act (29 U.S.C. § 141-187 (1982)) by unilaterally implementing a wage deferral program that modified an existing collective bargaining agreement, refused to hold the action excused by the doctrine of compelling economic necessity. The employer made a showing based on "a generally depressed national economy, an energy crisis," and its own particularly bleak financial picture. 779 F.2d at 1328. It asserted that the wage deferral plan was a necessary means of cost reduction "to avoid bankruptcy, plant closure, and the loss of jobs." *Id.* at 1330. The Seventh Circuit held that the Board acted properly in refusing to carve out an "economic necessity" exception. *Compare* NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), holding that a debtor in possession may unilaterally modify a collective bargaining agreement during bankrupcy proceedings without running afoul of § 8(d).

implicit cost-benefit analysis, in which the court determines whether elimination of the discriminatory practice is justified when viewed against the costs of doing so, it is significant to note that such analysis has been rejected in the analogous occupational safety area. In *American Textile Manufacturers Institute, Inc. v. Donovan*[247] the cotton industry challenged the standard set by the Occupational Safety and Health Administration (OSHA) which limited the exposure of textile workers to cotton dust which causes brown lung disease. OSHA estimated the total industry-wide cost of compliance at $656.5 million. The manufacturers' trade group argued that the Occupational Safety and Health Act,[248] which was designed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions,"[249] required OSHA to demonstrate that the reduction in risk of harm to workers was justified in light of the costs of attaining that reduction. OSHA countered that the statutory language mandating the standard "which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health"[250] required the adoption of the most stringent standard, bounded only by technological and economic feasibility. A cost-benefit approach, the government argued, would amount to "placing a [dollar] value on human life and freedom from suffering."[251]

Ruling in favor of the government's interpretation, the Court held that Congress itself defined the basic relationship between costs and benefits, by placing the benefit of worker health above all other considerations. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in the Act. Thus feasibility analysis rather than cost-benefit analysis is required by the statute.[252]

"Feasible" was defined for the purposes of OSHA as "capable of being done."[253] It is limited in an economic sense only in the situation where achieving the workplace safety standard would threaten the economic viability of the industry.[254] Congress used the term "feasible" be-

247 452 U.S. 490 (1981).

248 29 U.S.C. §§ 651-678 (1982).

249 *Id.* § 651(b).

250 *Id.* § 655(b)(5).

251 452 U.S. at 507 n.26.

252 *Id.* at 509 (citations omitted). The Court noted that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the fact of the statute." *Id.* at 510.

For a discussion of other public health statutes which have been interpreted to be "cost-oblivious," see Schwartz, *supra* note 15, at 294-95. *Compare* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116 (1985), holding that Congress intended in its Clean Water Act to grant the Environmental Protection Agency authority to issue variances to plants not economically capable of meeting pollution standards.

253 *American Textile Mfrs. Inst.*, 452 U.S. at 508.

254 *Id.* at 522. As Judge McGowan put it in an earlier decision, "Congress does not appear to have intended to protect employees by putting their employers out of business," and thus a standard "that is prohibitively expensive is not 'feasible.' " Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (1973). Yet he added that "[s]tandards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins ad-

cause it was "concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment."[255] Congress, however, "was fully aware that the Act would impose real and substantial costs of compliance on the industry, and believed that such costs were part of the cost of doing business."[256]

This feasibility approach closely resembles the one adopted in the BFOQ and early business necessity case law.[257] The employer is required to discontinue practices that discriminate (directly or indirectly) unless it can be demonstrated that the practice is essential to the existence of the business and there is no feasible alternative. *Manhart* notwithstanding, the past decade has seen a judicial drift towards a very different approach in which cost containment and cost-benefit analysis play a significant role. Given the implications of this development for the enforcement of the fair employment principle, and the absence of a clear indication from Congress that cost avoidance can excuse noncompliance with Title VII, this development must be viewed with great concern.

Moreover, the Title VII enforcement mechanism is not structured to facilitate a sophisticated, ad hoc cost-benefit approach. While Congress has delegated to an administrative agency, OSHA, broad authority to set and enforce standards of workplace safety,[258] the Equal Employment Opportunity Commission is designed merely to investigate Title VII complaints and seek conciliation of those found justified. It has the power to issue administrative interpretations of Title VII but it lacks rule-making authority.[259] It is in the federal district courts that Title VII standards are developed and enforcement is accomplished; such courts seem ill-equipped to engage in the kind of intensive financial fact inquiry required by the cost-benefit calculus.[260]

Professor Tribe has recently complained that in the constitutional law area, the Supreme Court is "coming increasingly to resemble a judicial Office of Management and Budget, straining constitutional discourse

versely." 499 F.2d at 478. *See also* Howard, *supra* note 19, at 847 (asserting that while it is unreasonable to require employers in the interest of worker safety to incur prohibitive costs that would lead to bankruptcy, substantial costs short of that are appropriate). It has been similarly noted in the fair employment context that "costliness does become significant in extreme circumstances. A remedy should not be imposed which threatens a business with extinction." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1150 (1971).

255 452 U.S. at 514.

256 *Id.*

257 *See supra* notes 48-83 & 104-39 and accompanying text.

258 *See* Schwartz, *supra* note 15 at 295-96.

259 *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); 42 U.S.C. § 2000e-4 (1982). *See generally* Pierce, *The Regulation of Genetic Testing in the Workplace—A Legislative Proposal*, 46 OHIO ST. L.J. 771, 830 (1985).

260 For a pessimistic view of courts' "ability to evolve workable concepts to direct the economic forces" involved in the areas of labor, unfair competition and monopoly, see LANDIS, THE ADMINISTRATIVE PROCESS 33-34 (1938). *See also* Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619 (1927) (observing that there are certain "fields where law necessarily means the application of standards . . . to the unlimited versatility of circumstance," and here administrative rather than judicial decision making is preferred).

through a managerial sieve" in which the costs are somehow balanced against the benefits of enforcing rights.[261] As demonstrated above, this phenomenon has also occurred with regard to Title VII enforcement. It represents an unjustified intrusion of judicial notions of cost effectiveness into a domain that Congress created without such notions.

Conclusion

Title VII was enacted by Congress as a vehicle for ridding the American workplace of discrimination based on race, color, religion, national origin, and gender. The statute sweeps broadly, prohibiting unintentional as well as intentional acts of discrimination. A judge-made cost defense has, however, quietly but significantly undercut Title VII's effectiveness, threatening to swallow Congress' antidiscrimination mandate. This defense contrasts with the rejection of cost justification in analogous areas of the law. Discriminatory practices should only be permitted in situations of real business necessity, where productivity and not merely profit maximization is at stake. Equal employment opportunity, as promised by the Civil Rights Act of 1964, cannot be otherwise achieved in today's competitive business environment.

261 L. TRIBE, CONSTITUTIONAL CHOICES, at viii. Tribe decries the use of "instrumental calculations of utility or . . . pseudo-scientific calibrations of social cost against social benefit . . . whose essence is to deny the decisionmaker's personal responsibility for choosing." *Id.*