

COMMENT

HIV Disease and Disparate Impact Under The Americans With Disabilities Act: A Federal Prohibition of Discrimination on the Basis of Sexual Orientation?

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Over the last thirty years civil rights groups have successfully persuaded Congress to protect, among others, racial minorities and the disabled from employment discrimination. Title VII and judicial interpretations of Title VII extend protection to these groups when they face either intentional discrimination or employment criteria which have a disparate "impact" on their class. Attempts to protect homosexuals against employment discrimination at the federal level, however, have failed. This comment notes that the Americans with Disabilities Act ("ADA") may have changed that situation. The author contends that the ADA's prohibition against employment criteria with disparate impacts on the disabled may serve to protect gay men from employment discrimination based on sexual orientation. First, the author describes epidemiological studies showing that employment screens which discriminate based on sexual orientation have a disproportionate effect on HIV-infected individuals. The author goes on to examine the development of the disparate impact test in the courts as well as the history and text of the ADA itself. The legislative history of the ADA reveals an intention to protect the HIV-disabled from employment discrimination, but also reflects an intention not to protect against discrimination based on sexual preference. Nonetheless, the author contends that if the courts adopt a broad interpretation of disparate "impact," employment screens based on sexual orientation will be invalid under the ADA as they have a disproportionate impact on the protected HIV-positive class. The author concludes with an argument that such an

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interpretation is most consistent with the language and legislative intent of the ADA.

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PROLOGUE

MR. BARTLETT. Mr. Kemp, now, the Senate passed an amendment that said that nothing in this bill can be construed to include homosexuals as a disabled group. That is the subject of some amount of controversy, at least in limited groups.

My question of you is, in your opinion, is there anything in the bill, leaving aside that amendment, if that amendment were not in there, is there anything in the proposed legislation that would include sexual preference in any back door or front door way AS A DISABILITY, A, and B, should we, regardless of your answer to the first question, should we include that exception, or that clear statement that sexual preference is not a disability under this bill?

MR. KEMP. I don’t think that—no to the first question, Mr. Bartlett. The second—

MR. BARTLETT. On the record, the answer is, there is nothing in the bill that includes, in your opinion, at all, that includes sexual preference as a disability *or* a protected class of individuals?

MR. KEMP. Yes. I don’t think there is anything in the bill that includes sexual preference *as a disability*.¹

* * * * *

1. *The Americans With Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomms. on Employment Opportunities and Select Education of the House Comm. on Education and Labor, 101st Cong., 1st Sess. 14 (1989) (emphasis added).*

MR. HELMS. I do not understand why, for example, you went down the road of including in your definitions people who are HIV positive, because 85 percent or more of the HIV positive people in this country are known to be drug users or homosexual or both.

MR. HARKIN. Then I respond to the Senator that they are not covered under this bill on the basis of their homosexuality or drug use.

MR. HELMS. The Senator better read his committee report, because it says they are covered.

MR. HARKIN. They are covered on the basis of their HIV infection²

* * * * *

The hard fact of political life is that, in order to draft a bill that can pass both Houses of Congress and garner a presidential signature, it is sometimes politic to leave some things unsaid. But that political decision is also a judgment to delegate those matters to the courts without much direction.³

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I

INTRODUCTION

The "gay rights" movement is popularly thought to be propelled by the decision of many individuals to publicly identify themselves as homosexual.⁴ Indeed, despite the considerable short-run personal discomfort and attendant ambivalence "coming out" can entail,⁵ survey evidence suggests that gay people who do "come out" only rarely end up viewing the evolution of identity that results as being, on balance, a negative experience.⁶

The attitudes of heterosexuals towards homosexuality and the "gay rights" movement similarly reflect both ambivalence and evolution.⁷ For example, the proportion of heterosexuals acknowledging homosexual acquaintances or friends and generally favoring protection for homosexuals

2. 135 CONG. REC. S10,768 (daily ed. Sept. 7, 1989).

3. Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 927 (1993).

4. See, e.g., Joseph P. Shapiro et. al., *Straight Talk About Gays*, U.S. NEWS & WORLD REP., July 5, 1993, at 42 (finding that "straight America's growing acceptance of gays is directly related to the willingness of gays to come out of the closet" and that "Americans who know gay people are the most likely to support new civil-rights protections").

5. See, e.g., JAMES D. WOODS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 171-72 (1993).

6. *Id.* at 217.

7. See Bill Turque et. al., *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 34.

against employment discrimination is climbing.⁸ At the same time, however, the percentage of Americans who believe that homosexual behavior is wrong has held steady, and the percentage that favors decriminalization of homosexual behavior has actually declined.⁹ Indeed, while certain liberal urban areas have acquired reputations as gay "meccas,"¹⁰ large areas of the country remain inhospitable at best towards the presence of "out" homosexuals.¹¹ As a result, particularly in conservative areas of the country, large numbers of homosexuals continue to remain "in the closet" for fear of unacceptable negative repercussions should knowledge of their sexual orientation become public.¹² Somewhat parallel to the history of the black civil rights movement, then, the "gay rights" movement so far has had uneven geographic success.¹³

Title VII of the Civil Rights Act of 1964 was the first legislation to explicitly protect racial minorities from employment discrimination by private employers throughout the United States.¹⁴ The Act was at first thought to prohibit only intentional discrimination or disparate "treatment." However, judicial recognition of claims of discrimination based on the disparate "impact" of facially neutral employment criteria in *Griggs v. Duke Power Co.*,¹⁵ vastly expanded the scope of protection afforded racial minorities under Title VII.¹⁶

Drawing on the strategies and momentum of earlier civil rights movements, groups advocating on behalf of the disabled have subsequently persuaded Congress to extend similar protections from employment

8. See, e.g., Shapiro, *supra* note 4, at 45 (the percentage of Americans who personally know someone gay increasing from 27.5% to 53% between 1985 and 1993; and 65% of Americans favoring "equal rights" for gays).

9. Robert J. Blendon et. al., *Public Opinion and AIDS: Lessons for the Second Decade*, 267 JAMA 981, 983 (1992). One possible explanation of these contradictory trends may be that while moral objections to homosexual behavior may be declining, AIDS has led to increased opposition to homosexual behavior on purely medical grounds—both rational and irrational.

10. As of 1994, 8 states and about 160 municipalities had adopted gay rights laws, including "nearly all the major business centers [with the exceptions] of Houston and Miami." In addition, 71% of Fortune 1000 companies responding to a National Gay and Lesbian Task Force survey reported having anti-discrimination policies covering sexual orientation. Ed Mickens, *WorkLine*, THE ADVOCATE, March 22, 1994, at 19. A total of 70 million Americans now live in jurisdictions barring discrimination on the basis of sexual orientation. Alistair D. Williamson, *Is This the Right Time to Come Out?*, HARV. BUS. REV., July-Aug. 1993, at 26. These legislative enactments have elicited a conservative backlash, however, and there have been numerous repeals attempted on state and local levels. See, e.g., Turqe, *supra* note 7, at 34; Howard A. Simon & Erin Daly, *Sexual Orientation and Workplace Rights*, 18 EMPLOYEE REL. L.J. 29, 46 (1992).

11. See, e.g., Marghe Covino, *Spirit Sisters Take Bay Area by Storm*, BAY AREA REP., Apr. 7, 1994, at 1, 11.

12. *Id.*

13. See generally *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1582 (1989).

14. See JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, *THE LAW OF EMPLOYMENT DISCRIMINATION* 1-15 (1993).

15. 401 U.S. 424 (1971).

16. FRIEDMAN & STRICKLER, *supra* note 14, at 201.

discrimination to the disabled. Notable results have included the passage of the Rehabilitation Act in 1973¹⁷ and the Americans With Disabilities Act ("ADA")¹⁸ in 1991.¹⁹ In sharp contrast with these successful expansions of civil rights, however, efforts to extend the disparate treatment²⁰ or impact²¹ protections of Title VII to homosexuals on the federal level have, until now, uniformly failed.

This paper examines the extent to which the HIV epidemic and the passage of the ADA may, ironically, have changed that situation. In particular, this paper will explore whether the ADA prohibition of employment criteria with disparate impacts on the disabled may serve to protect gay men from employment discrimination based on sexual orientation in jurisdictions where such discrimination might otherwise be legal.²²

In explicating this theory, the epidemiological facts underlying the disproportionate effect on HIV-infected individuals of employment screens based on sexual orientation will first be presented. Next, the evolution of the concept of disparate impact discrimination will be traced from its beginnings with race-based claims under Title VII to its uncertain incarnation in the Rehabilitation Act. The statutory text of the ADA and the Equal Employment Opportunity Commission's ("EEOC") guidelines promulgated pursuant to the ADA will then be considered, and the faithfulness of the EEOC guidelines to the statutory text will be questioned. The defenses available to an employer faced with such a disparate impact claim will also be assessed, both for what further light they shed on the appropriateness of the EEOC interpretation of the ADA standard of disparate impact as well as

17. Pub. L. No. 93-112, 87 Stat. 335 (codified as amended at 29 U.S.C.A. §§ 701-797 (West Supp. 1993)).

18. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101-12213 (West Supp. 1993) and 47 U.S.C.A. § 225, 611 (West Supp. 1993)).

19. See generally James S. Alexander, Note, *The Appropriate Standard: Disparate Impact Under Section 504 of the Rehabilitation Act of 1973*, 68 MINN. L. REV. 1019 (1984); Arlene Mayerson, *Title I—Employment Provisions of the Americans With Disabilities Act*, 64 TEMP. L. REV. 499, 500 (1991).

20. See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (holding no unlawful sex discrimination under Title VII when defendant refused to hire effeminate man deemed homosexual). Though the continued vitality of *Smith* may have been thrown into doubt by the Supreme Court's subsequent decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that Price Waterhouse's implicit requirement that female partners not display traditionally "masculine" traits was intentional "sex-plus" discrimination under Title VII), courts seem less willing to entertain claims of Title VII sex-discrimination by males displaying traditionally "feminine" traits. Cf. *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (holding company requirement that males have short hair while females could have either short or long hair did not constitute "sex-plus" intentional discrimination).

21. See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-31 (9th Cir. 1979) (effort to invalidate sexual orientation employment screens as having a disparate impact on men dismissed as "an artifice to 'bootstrap' Title VII protection for homosexuals under the guise of protecting men generally" inconsistent with legislative intent).

22. This paper will not directly address the ADA prohibition of disparate treatment of those actually or perceived to be infected with HIV. Though not without certain theoretical difficulties, the protections in the ADA against "disparate treatment" of individuals so situated are more clear-cut.

for their substantive strength. The legislative history of the ADA will then be explored for what guidance it can offer a judiciary faced with the task of delimiting the appropriate standard of disparate impact under the ADA, particularly in light of the conflicting intentions of Congress to appear to preserve the rights of employers to discriminate on the basis of sexual orientation while simultaneously protecting the HIV-disabled from discrimination.

I will then argue that an expansive interpretation of the disparate impact standard under the ADA is most consistent with the statutory text and might best serve to resolve the conflict inherent in the effort to protect the HIV-disabled from employment discrimination without making sexual orientation discrimination *qua* sexual orientation discrimination illegal. I acknowledge that my argument superficially resembles the kind of "bootstrapping" derided by the Ninth Circuit in *DeSantis v. Pacific Telephone & Telegraph Co.*²³ Nevertheless, I conclude that there are more compelling bases than in *DeSantis* in both the policy motivations underlying the ADA and in its legislative text and history to justify the judicial proscription of employment screens based on sexual orientation.

II

HIV INFECTION AND DISPARATE IMPACT UNDER THE ADA

A. *The Epidemiological Background*

In America, the HIV epidemic was first identified within²⁴ and has come to be strongly associated in the public mind with the gay male community.²⁵ Indeed, five years into the epidemic, gay and bisexual males ac-

23. See *supra* note 21.

24. Gottlieb et. al., *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WEEKLY REP. 250 (1981).

25. Tom Morganthau et. al., *The AIDS Epidemic: Future Shock*, NEWSWEEK, Nov. 24, 1986, at 31. In a 1986 Gallup poll, 18% of respondents indicated that they avoided known or suspected homosexuals and 33% indicated that they avoided places where homosexuals were present in order to reduce their chances of HIV infection. *Id.* at 33. Similarly, in 1988, 8.5% of respondents nationally and 12.5% in the South still admitted making efforts to avoid personal interaction with homosexuals. Blendon et. al., *Occasional Notes—Discrimination Against People With AIDS*, 319 NEW ENG. J. MED. 1022, 1023 (1988). Of 13,000 complaints of AIDS-related discrimination analyzed by the ACLU, 91% came from gay or bisexual men and 21% were based "on the perception of having, or being at risk for, HIV illness." NAN D. HUNTER, AMERICAN CIVIL LIBERTIES UNION AIDS PROJECT, EPIDEMIC OF FEAR: A SURVEY OF AIDS DISCRIMINATION IN THE 1980S AND POLICY RECOMMENDATIONS FOR THE 1990s 1, 13, 19 (1990). Moreover, while blatant disparate treatment may be declining, the ACLU predicts increasing "subtle and preemptive" forms of discrimination including "closed-door hiring [] decisions" based on perceived illness, largely motivated by economics. *Id.* at 46. See also Shapiro, *supra* note 4, at 47 (39% of Americans say they are less sympathetic towards gays because of the AIDS crisis); Ingrid Grieger & Joseph G. Ponterotto, *Students' Knowledge of AIDS and Their Attitudes Towards Gay Men and Lesbian Women*, 29 J. OF COLLEGE STUDENT DEV. 415 (1988) (finding AIDS and homosexuals inextricably bound in the minds of Americans).

counted for 75% of AIDS cases in the United States.²⁶ Although this proportion has slowly declined, as of September 1993, gay and bisexual males still comprised 59% of newly diagnosed cases of AIDS and constituted 61% of the cumulative deaths in the epidemic.²⁷ Moreover, the vast and persistent disparity in infection rates between homosexual and heterosexual males²⁸ suggests that the former may constitute the bulk of AIDS cases well into the foreseeable future.

The disparate impact on the HIV-infected of employment criteria that screen out homosexual males increases as both the disparity in infection rates (“seropositivity”) between homosexual and heterosexual males and the proportion of homosexuals among all males in a given labor market increase.²⁹ Thus, for example, in a labor market in which there are 79 times as many heterosexual as homosexual males (an incidence of homosexuality of 1.25%³⁰) and homosexual males are only 10 times as likely to be HIV-positive as heterosexuals, an employment screen that detects and excludes all male homosexuals would allow 88.7% of the HIV-positive and 98.9% of the HIV-negative to pass. This represents a relatively equal pass ratio of 89.7%, (i.e., 88.7%/98.9%). In contrast, in a labor market in which there are only 9 heterosexuals for every homosexual male and homosexual males are 20 times more likely to be HIV-positive than heterosexual males, the same screen would exclude a much greater proportion of the HIV-positive—only 31.0% of the HIV-positive would pass compared with 92.5% of

26. Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome: United States*, 35 MORBIDITY & MORTALITY WEEKLY REP. 757, 758 (1986).

27. CENTERS FOR DISEASE CONTROL, 5 HIV/AIDS SURVEILLANCE REPORT, Oct. 1993, at 6. *But see* Lawrence K. Altman, *Cases of AIDS Increase Among Heterosexuals*, N.Y. TIMES, Mar. 11, 1994, at A8 (noting proportion of new AIDS cases among heterosexuals rising from 1.9% to 9.0% between 1985 and 1993).

28. *See* SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH (SFPDPH), HIV INCIDENCE AND PREVALENCE IN SAN FRANCISCO IN 1992: SUMMARY REPORT FROM AN HIV CONSENSUS MEETING 3 (1992) (finding seroprevalence of 12% and seroconversion of 4% annually among gay male youth aged 17-25; 45% seroprevalence and 1.5% annual seroconversion among gay males 26 and older; 63% seroprevalence and 3.5% annual seroconversion among gay male intravenous drug users; 0.2% seroprevalence and 0.03% annual seroconversion among all women; and 0.1% seroprevalence and 0.02% annual seroconversion among heterosexual males); Eugene McCray et. al., *Sentinel Surveillance of Human Immunodeficiency Infection in Sexually Transmitted Disease Clinics in the United States*, 19 SEXUALLY TRANSMITTED DISEASES 236, 237 (1992) (finding HIV seroprevalence ranging from 14.3 to 64.2% of non-IVDU gay male STD clinic patients (median 36.1%); and median seroprevalence of 1.0% for male and 0.7% for female STD clinic patients reporting no risk factors).

29. For an example of an “objective” screen for homosexuals, see *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991) (employer using psychological test with explicit questions regarding sexual orientation) (partially depublished opinion).

30. Evidence suggests this estimate of the incidence of homosexuality would be conservative. *See* Susan M. Rogers & Charles F. Turner, *Male-Male Sexual Contact in the U.S.A.: Findings from Five Sample Surveys, 1970-1990*, 28 THE J. OF SEX RESEARCH 513 (1991) (finding that 5-7% of American men self-report adult same-gender sexual contact); *See also* SFPDPH, *supra* note 28, at 3 (finding an estimated 14.3% of male San Franciscans homosexual).

the HIV-negative—a comparative pass ratio of 33.6% for the HIV-positive.³¹

B. The Legal Background

1. Disparate Impact Under Title VII

Section 703(a) of Title VII forbids an employer

(1) to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin³²

In *Griggs*, the Supreme Court departed from a narrow interpretation of this provision limited to intentional discrimination and held that Title VII bars employment criteria disproportionately impinging on a protected class regardless of intent. For example, objective screening criteria such as the diploma and intelligence testing requirements at issue in *Griggs*,³³ though facially neutral with respect to race, could still be invalidated if a plaintiff demonstrated that, in the aggregate, the screen disproportionately burdened a protected class and the employer then failed to show that the challenged screen was "related to job performance" and justified by "business necessity."³⁴

In implementing the prohibition on "disparate impact" discrimination, the EEOC set forth the general rule that

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact³⁵

31. Comparing only homosexual and heterosexual males, of course, may be inappropriate. However, if lesbians are included with homosexual males, the lower seroprevalence of the former significantly reduces the average seroprevalence of all homosexuals, and any lower incidence of lesbianism as well may reduce the proportion of a given labor force that is homosexual—thus diluting any disparate impact. Compare with Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 23 (1989) (discussing problem of overly inclusive racial and sexual comparison groups in the context of black women).

32. 42 U.S.C.A. § 2000e-2(a)(1) (West 1981). Congress explicitly codified *Griggs v. Duke Power Co.*, *supra* note 15, in the Civil Rights Act of 1991. Title VII, § 703(k)(1)(A) now reads: "An unlawful employment practice based on disparate impact is established under this Title only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C.A. § 2000e-2(K)(1)(A).

33. *Griggs*, 401 U.S. at 427-28.

34. *Id.* at 431.

35. 29 C.F.R. § 1607.4(D) (1993). The regulations continue:

Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representa-

In the context of handicap, the difficulty of gathering statistically significant samples has led implementing agencies to abandon application of this "four-fifths" rule.³⁶ Nevertheless, it remains true that in the Title VII context, courts have subsequently employed *Griggs* and the "four-fifths" rule to judicially invalidate a wide variety of objective employment screens with disparate impacts on protected classes.³⁷

Furthermore, in *Watson v. Fort Worth Bank and Trust*,³⁸ the Supreme Court recently made clear that even subjective or discretionary employment practices³⁹ may be invalidated in some cases under a disparate impact theory.⁴⁰ For example, in *Watson*, the plaintiff argued that her continuing exclusion from upper management—though not enough to prove disparate "treatment"—could still prove that the bank's wholly discretionary system of internal promotions had a disparate impact on minorities. Writing for the Court, Justice O'Connor suggested that subjective promotion criteria can underpin a kind of discrimination that straddles the interface between disparate treatment and impact:

Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problems of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with "a lot of money . . . for blacks to

tion in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

Id.

36. The implementing guidelines for the ADA, for example, make clear that "[t]he Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part." 29 C.F.R. § 1630.10 (1993).

37. See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970) (requirement of no arrests having disparate racial impact), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972); *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158 (8th Cir. 1977) (requirement of no criminal convictions having disparate racial impact). *Contra* *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519 (E.D. La. 1971) (requirement of no criminal convictions justified by business necessity when employee in "security sensitive" position had been convicted of theft and receiving stolen goods); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490 (C.D. Cal. 1971) (requirement of no garnishments having disparate racial impact); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981) (prior experience requirement having disparate impact on women).

38. 487 U.S. 977 (1988).

39. At least some gay men perceive employers to be conscious of their disparate HIV-seropositivity. See, e.g., Ronald Mark Kraft, *The Other Arquette*, *ADVOCATE*, Apr. 5, 1994 at 54, 54 ("To [openly-gay actor Alexis] Arquette much of Hollywood's homophobia is really just twisted AIDS-phobia. 'The reality is that they expect a gay actor to be HIV-positive,' he says. 'And they expect that if you're HIV-positive, you'll die from AIDS during the filming of their movie. It's fucking ridiculous. There is probably a greater chance that you'll get hit by a car in front of the fucking set.'").

40. *Watson*, 487 U.S. at 990.

have to count.” Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat.⁴¹

Watson seems to suggest, then, at least in the Title VII context, that a combined showing of even statistically insignificant imbalances in a workforce, subjective employment evaluation processes and evidence that indicates the presence of “subconscious stereotypes” may, in certain instances, be sufficient to get a disparate impact discrimination claim to a jury.

2. *Disparate Impact Under The Rehabilitation Act*

In contrast with the unequivocal prohibition of disparate impact discrimination under Title VII,⁴² the statutory prohibition on unintentional employment discrimination under the Rehabilitation Act is less straightforward. Section 504 simply provides that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance⁴³

The Rehabilitation Act was modelled on Title VI, an earlier statute prohibiting discrimination by recipients of federal financial aid.⁴⁴ In contrast with Title VI, however, § 504 explicitly required that individuals claiming discrimination show that they were discriminated against “solely” because of handicap.⁴⁵

Consequently, though the EEOC construed § 504 to incorporate the *Griggs* standard of disparate impact,⁴⁶ the federal courts of appeal at first split on the validity of this statutory construction.⁴⁷ In particular, the Second⁴⁸ and Tenth⁴⁹ Circuits felt that § 504’s “solely” because of handicap language required demonstration of a stronger causal relationship linking

41. *Id.*

42. See Text of Title VII § 703(K)(1)(A), *supra* note 32.

43. 29 U.S.C.A § 794.

44. Alexander, *supra* note 19 at 1020 n.7.

45. *Id.* at 1033.

46. *Id.* at 1027 n.41. Current § 504 regulations provide that “[a] recipient may not . . . utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,” 45 C.F.R. § 84.4(b)(4) (1992), and also

may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

45 C.F.R. § 84.13(a) (1992). The appendix to the regulations makes explicit that § 84.13(a) “is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971),” 45 C.F.R. 84.13(a) app. A, at 383 (1992).

47. See Alexander, *supra* note 19, at 1020-21.

48. See *Joyner By Lowry v. Dumpson*, 712 F.2d 770, 775-76 (2d Cir. 1983).

49. See *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1384-85 (10th Cir. 1981).

the employer's behavior having the disparate impact on the handicapped to unjustifiable antecedent (or concurrent) consideration of disability than what typically would suffice under Title VII after *Griggs*.⁵⁰ In contrast with the absolute prohibition on the consideration of race or sex under Title VII, these courts reasoned that, even after the passage of § 504, handicap remained "a legitimate basis for exclusion" in appropriate cases.⁵¹ Accordingly, only an unjustified decision not to accommodate a disabled individual's handicap constituted discrimination "solely" on the basis of handicap. The statutory language did not support wholesale invalidation of all employment screens—only those that unjustifiably impacted the disabled.⁵²

50. Concurrently, the Supreme Court was retreating from an expansive standard of disparate impact under Title VI, a move made more significant by the decision of Congress in 1978 to explicitly link Title VI and § 504 rights. See Alexander, *supra* note 19, at 1026. Though the Court had originally interpreted Title VI as allowing claims without any showing of discriminatory intent, see *Lau v. Nichols*, 414 U.S. 563, 567-68 (1974), in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the Court desired to avoid a Title VI prohibition of "benign" disparate treatment, and so found that Title VI protections extended only so far as those of the equal protection clause under *Washington v. Davis*, 426 U.S. 229 (1976) (holding that showing of discriminatory impact alone was insufficient to state an equal protection claim). Thus, the vitality of *Lau* was thrown seriously in doubt.

Confusion persists in the Court's latest treatment of disparate impact under Title VI, *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582 (1983), in which five justices agreed that discriminatory intent need not always be shown to state a claim under Title VI, but could not agree as to why. Justices White and Marshall felt that intent need not be shown at all. *Id.* at 584 n.2. Justices Stevens, Brennan and Blackmun felt that "although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid." *Id.* In any event, Justices White and Rehnquist would limit Title VI remedies to injunctive relief absent a showing of discriminatory intent. *Id.* at 607.

51. See Alexander, *supra* note 19, at 1034.

52. See generally Alexander, *supra* note 19, at 1027-29.

These holdings effectively precluded Title VII-like claims of unintentional discrimination under § 504. In contrast with this movement to require intent under § 504, within *Griggs*, Justice Burger perceptibly moves away from a narrow holding limited to situations in which intentional discrimination is causally linked to the effect of a challenged employment screen. Though he begins by noting that intentional discrimination had led to the denial of education to blacks, *Griggs*, 401 U.S. at 430, by the conclusion of *Griggs*, Justice Burger reduces the holding to one issue—whether or not a challenged employment practice with any kind of disparate impact can (ahistorically) be shown to be related to job performance. *Id.* at 431.

Some courts apparently deemed the exigencies of remedying past intentional discrimination pressing enough to subsequently invalidate what had previously been legitimate facially-neutral job-ratting screens. For example, in *Gregory v. Litton Sys. Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), the Ninth Circuit affirmed the District Court's determination that Title VII prohibited employers from screening employees based on arrest records—this despite a lack of any well-developed findings that blacks had been disproportionately arrested BECAUSE OF race, *Gregory*, 472 F.2d at 632. See, e.g., Douglas A. Smith et. al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 235-39, 246-49 (1984) (describing the lack of consensus as to whether disproportionate arrest rates for blacks are empirically explained by racial or non-racial influences).

Thus, under this expansive Title VII disparate impact standard, employment screens that were not job-related and consistent with business necessity were invalid even though, strictly speaking, race was not shown to CAUSE the disproportionate impact—so long as race was at least CORRELATED with the disproportionate impact. See also *Johnson v. Pike Corp.*, 332 F. Supp. 490 (C.D. Cal. 1971) (explicitly finding that whether or not wage garnishments occurred disproportionately among blacks BECAUSE OF race "immaterial" for Title VII disparate impact purposes).

Thus, for example, though a general requirement that employees have driver's licenses would be valid, the denial of employment to a particular blind individual without a license would constitute discrimination "solely" on the basis of handicap if the lack of a driver's license could have been reasonably accommodated.

Soon after the decision of the Second Circuit in *Joyner*,⁵³ the Supreme Court took a middle path in attempting to resolve the issue. In *Alexander v. Choate*,⁵⁴ the Court chose to "be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds."⁵⁵ Thus, the Court "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504,"⁵⁶ but "assum[ed] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."⁵⁷ In keeping with its earlier decision limiting disparate impact claims under § 504 in *Southeastern Community College v. Davis*,⁵⁸ the Court reasoned that disparate impact challenges requiring a recipient of federal aid to make "reasonable" accommodations or changes to its program were valid, but rejected claims calling for 'fundamental' or 'substantial' modifications.⁵⁹

3. *Whither the ADA?*

a) *"Discrimination" and the Text of the Statute*

The substantive employment provisions of the ADA were modelled on the anti-discrimination provisions of the Rehabilitation Act,⁶⁰ and its enforcement provisions explicitly incorporate the provisions of Title VII.⁶¹ The statute states that

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V

53. See *supra* note 48.

54. 469 U.S. 287 (1984).

55. *Id.* at 299.

56. *Id.*

57. *Id.*

58. 442 U.S. 397 (1979).

59. *Choate*, 469 U.S. at 300. As in *Washington v. Davis*, 426 U.S. 229 (1976), the Court here seems primarily concerned with finding a principle with which it can limit what might otherwise become strict liability. The *Choate* holding suggests, however, that in limiting the scope of disparate impact under § 504, courts should focus on the reasonableness of the requested remedy rather than heightened causal requirements.

60. See *Mayerson*, *supra* note 19, at 500.

61.

The powers, remedies, and procedures set forth in §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C.A. § 12117.

of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.⁶²

The general rule prohibiting "discrimination" under the ADA provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."⁶³

Thus, just as Title VII simply prohibits discrimination "because of" the race of an individual, the ADA similarly simply prohibits discrimination "because of" the disability of an individual. Congress intentionally omitted the § 504 requirement that discrimination be "solely" by reason of handicap.

The standard for disparate impact claims is further explicated in two distinct sections defining the meaning of "discrimination" in the ADA. First, a general provision defines discrimination as "utilizing standards, criteria or methods of administration . . . that have the effect of discrimination on the basis of disability."⁶⁴ The EEOC has interpreted this provision to simply mean that

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and: (a) That have the effect of discriminating on the basis of disability⁶⁵

Second, in an additional provision specifically addressed to employment standards, the statute defines "discrimination" as

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.⁶⁶

62. 42 U.S.C.A. § 12201(a) (emphasis added). Both before and after Congress passed the ADA, the § 504 administrative regulations specifically governing employment criteria have officially been described as "an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)." 29 C.F.R. § 84.13(a) app. A, at 352 (1989); see also *supra* note 46 and accompanying text. The use of disjunctive in the text of the legislation could be read to require that, *Choate* notwithstanding, Congress intended courts to apply the broadest disparate impact standard available under the ADA, i.e., that consistent with the precedents interpreting *Griggs*.

63. 42 U.S.C.A. § 12112(a).

64. 42 U.S.C.A. § 12112(b)(3)(A).

65. 29 C.F.R. § 1630.7(a) (1993). The Appendix to the EEOC regulations contains no comments or illustrations elaborating on this provision.

66. 42 U.S.C.A. § 12112(b)(6). In contrast with the EEOC regulations promulgated pursuant to this section, see *infra* note 67 and accompanying text, there is no requirement anywhere in the statutory text that the "screening out" of the disabled be "on the basis of" their disability. This would suggest that, as with disparate impact under Title VII, see *supra* note 52, whether or not the screening can be causally linked up to any intentional and unjustified consideration of the prohibited criteria should be

Importantly, however, the EEOC has added to this latter statutory provision, interpreting it only as making

[i]t . . . unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, *on the basis of disability*, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.⁶⁷

The EEOC's interpretation of § 12112(b)(6) may make it considerably less protective than that of § 12112(b)(3)(A) since the former requires that the screening occur "on the basis of" a disability. The addition of this phrase implies that for an employment screen to be invalid under § 12112(b)(6), its tendency to screen out a group of disabled individuals must be causally linked with some effect of their disability. This is in striking contrast to the notion of disparate impact under *Griggs*, where the disadvantage effect of an employment screen on members of protected classes need not be shown to be linked to any causal result of membership in the protected class. Rather, in keeping with the legislative goals of remedying past discrimination as quickly as possible, if a given employment screen with the requisite disparate impact cannot be justified by "business necessity," it is invalid under *Griggs* notwithstanding the adventitious nature of the relationship between membership in the protected class and the effect of the employment screen.

Thus, for example, blind individuals could sue to invalidate a requirement that all employees have driver's licenses under either § 12112(b)(3)(A) or § 12112(b)(6) because their inability to acquire a license would arise "on the basis of" blindness. However, in contrast with the result under § 12112(b)(3)(A) and the disparate impact standard of Title VII,⁶⁸ the class of individuals with sickle-cell disease could not attempt to invalidate under § 12112(b)(6) a requirement that employees have naturally

immaterial. Merely because some intentional consideration of disability may be legal, unintentional discrimination should be no less illegal.

67. 29 C.F.R. § 1630.10 (1993) (emphasis added).

The EEOC explains this regulation thus: "The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities *BECAUSE OF THEIR DISABILITY* may not be used unless the employer demonstrates that that criteria, as used by the employer, are job-related to the position to which they are being applied and are consistent with business necessity . . . Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity . . . This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests." 29 C.F.R. § 1630.10 app. 1993 (emphasis added).

68. See *supra* notes 35, 50 and accompanying text.

straight hair⁶⁹ because any lack of straight hair, while correlated with sickle-cell anemia, would not arise “on the basis of” sickle-cell anemia. Similarly, while a requirement that employees be heterosexual would appear to be invalid under the more general language of § 12112(b)(3)(A) because it would have a disparate impact on those with HIV disease, under § 12112(b)(6), the same employment screen would be valid since any screening would occur not “on the basis of” HIV disease, but rather “on the basis of” homosexuality.⁷⁰

69. Ignore for the sake of argument that this standard would easily be invalid under Title VII.

70. In explicating “job criteria that . . . *unintentionally* screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities *because of their disability*,” 29 C.F.R. § 1630.10 app. (1993) (emphasis added), the EEOC provides the following hypothetical:

An employer has a job opening for an administrative assistant. The essential functions of the job are administrative and organizational. Some occasional typing has been a part of the job, but other clerical staff are available who can perform this marginal job function. There are two job applicants. One has a disability that makes typing very difficult, the other has no disability and can type. The employer may not refuse to hire the first applicant because of her inability to type, but must base a job decision on the relative ability of each applicant to perform the essential administrative and organizational job functions, with or without accommodation. The employer may not screen out the applicant with a disability because of the need to make an accommodation to perform the essential job functions. However, if the first applicant could not type for a reason not related to her disability (*for example, if she had never learned to type*) the employer would be free to select the applicant who could best perform all of the job functions.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT IV-3 (1992) (emphasis added).

This distinction seems both tenuous and at odds with the Congressional intent to expand employment opportunities for individuals with disabilities. In the first case, an individual with a disability is protected by law because her disability prevents her from competing in the job market for administrative assistants without that protection. In the second case, however, the same individual with the same disability is presumably now unprotected (even though she too is unable to compete without legislative protection in the job market for administrative assistants) since she never learned how to type and the employer is not convinced that the inability has something to do with her hands. What of the paraplegic who never took typing lessons because she could neither afford them and moreover believed they would be pointless given employers’ historic closed-door hiring policies?

Furthermore, the employer in the EEOC hypothetical would presumably have to know whether an applicant who could not type and had requested an accommodation was in fact unable to type because of a particular disability or because she had never learned. However, the EEOC’s own guidelines seem to forbid employers from making just such inquiries before a conditional offer of employment is made. See 29 C.F.R. § 1630.13(a). Without such knowledge, a lucky employer might still justifiably refuse to make a conditional offer of employment to a disabled individual if there was indeed no nexus between the disability and the effect of the employment screen. On the other hand, if the employer guesses wrongly and refuses to make a conditional offer of employment when there is a nexus and the disability can be reasonably accommodated, that employer could claim at best to have held an erroneous but good faith belief that the requested accommodation did not derive from a disability AND that the requested accommodation represented an undue hardship. Even if such behavior could be defended as involving two “good faith” mistakes, this kind of behavior is clearly prohibited by different section of the act—§ 12112(b)(5)(b)—which independently prohibits “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.” Thus, unless the prohibition on *Griggs*-style “unintentional” unjustifiable screening is to be read out of the statute, the prohibitions of § 12112(b)(3)(A) and § 12112(b)(6)(A) must address something other than failures to reasonably accommodate.

Assuming the EEOC's limiting construction of § 12112(b)(6) is valid, however, a causal link between the disparate impact of a heterosexuality requirement and HIV disease nevertheless may exist. In particular, if any of the positive value an employer attached to heterosexuality reflected subconscious stereotypes of lower HIV-seropositivity among heterosexuals, then the screening effect would arguably occur "on the basis of disability."⁷¹

b) Statutory Defenses

As with the vague prohibition on discrimination in Title VI,⁷² the Rehabilitation Act originally contained no explicit codification of defenses.⁷³ In interpreting the Rehabilitation Act, courts were thus forced to improvise; many ended up borrowing from the concepts and precedents developing under Title VII.⁷⁴ Consequently, as under Title VII, employers facing claims of handicap discrimination based on the disparate impact of selection criteria have defended themselves by maintaining that the criteria are " 'job-related,' i.e. that they are required by 'business necessity.' "⁷⁵ In *Prewitt v. United States Postal Service*, the Fifth Circuit set forth the relevant standard under the Rehabilitation Act:

The test is whether a handicapped individual who meets all the employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individuals or others."⁷⁶

The statutory text of the ADA, in contrast, explicitly provides: It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.⁷⁷

71. Even if HIV stereotypes played no conscious part in the decision to institute such a formal or informal policy, given *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977 (1988), see *supra* notes 38-41 and accompanying text, it may be that the combination of a statistical disparity between HIV-positivity in a given workforce and the relevant labor market, subjective hiring criteria, and evidence suggesting subconscious stereotyping about HIV disease would be enough to state a disparate impact claim under the ADA.

On the other hand, if the employer was at all conscious of disparate HIV seroprevalence in preferring heterosexuals, the behavior would seem to constitute, at a minimum, an instance of mixed-motive disparate treatment.

72. 42 U.S.C.A. § 2000d (West 1981). See also *supra* note 44 and accompanying text.

73. 29 U.S.C.A. § 790 et seq.

74. See, e.g., *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 306-07 (5th Cir. 1980).

75. *Id.*

76. *Id.* at 307.

77. 42 U.S.C.A. § 12113(a). The EEOC guidelines relevant to "charges of discriminatory application of selection criteria" promulgated pursuant to this provision track the statutory provision verbatim. The interpretive guidance for this section provides:

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately nega-

The meaning of § 12113(a) is perhaps deliberately obscure. On the one hand, it appears to conflate the traditional defenses to disparate impact claims—"business necessity"—with the traditionally independent defense of "reasonable accommodation."⁷⁸ On the other hand, if the phrase "and such performance" does not refer to anything in the "business necessity" provision that precedes it,⁷⁹ it may be that the second part of the sentence merely sets out what may also remain an entirely independent defense—"reasonable accommodation." Indeed, it may even be that proof of "business necessity" necessarily requires an employer to reengineer all employment practices with disability in mind so that accommodations reasonably to be undertaken are "built in" its personnel policies.⁸⁰ The nuances of this provision aside, this much remains clear: a defendant faced with a claim of disparate impact must still show—at a minimum—"business necessity."

As originally explained in *Griggs*, the "business necessity" defense required an employer to "show[] that any given requirement . . . [had] a manifest relationship to the employment in question."⁸¹ Subsequently, a variety of lower courts at first interpreted "business necessity" under *Griggs*

tive impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, *i.e.*, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity."

29 C.F.R. § 1630.15 app. 1993. Thus, it may be that a showing of business necessity may be sufficient with respect to class-based claims, while with respect to an individual plaintiff, an employer may have to show not only "business necessity" in the abstract, but also the inability to reasonably accommodate the individual.

78. The tendency of the EEOC regulations spelling out the meaning of "discrimination" under the ADA to conflate disparate impact with failure to accommodate seems less heterodox given what seems to be this same conflation in the statutory text governing defenses. Nevertheless, it may also be that the EEOC simply prefers in this case to let the ADA's defense "tail" wag its *prima facie* case "dog."

79. This does not seem an unreasonable reading, since the "such performance" in the second part of the text has no clear referent in the preceding text.

80. This seems to be the import of § 12112(7) of the Act, which defines "discrimination" as failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C.A. § 12112(7).

The EEOC interpretive guidance suggests that the requirement of a "traditional" interview may be an employment screen with a disparate effect on the disabled, *e.g.*, the hearing-impaired, that may nevertheless be justified by business necessity. However, if a reasonable accommodation is possible in the form of a qualified interpreter, the employer would be required to provide that interpreter or be liable under the ADA. Perhaps "traditional" interviews in fact cannot be justified by "business necessity," and only interviews that necessarily involve case-by-case or class-by-class flexibility in response to differing disabilities can survive "business necessity" scrutiny. For example, if writing notes or communicating through an interpreter falls within the range of "reasonable accommodations" acceptable to an employer during the interview (and presumably for purposes of subsequent communication), the ability to interview "traditionally" may in fact not be justifiable as a "business necessity."

81. *Griggs*, 401 U.S. at 432.

as involving the “heavy”⁸² burden of demonstrating a “close nexus”⁸³ between the policy in question and a “substantial end goal” of the employer.⁸⁴ Typical of these early expansive readings of *Griggs*, for example, is the Fourth Circuit opinion in *Robinson v. Lorillard Corp.*,⁸⁵ a case considering the disparate racial impact of the seniority provisions of a collective bargaining agreement:

[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.⁸⁶

Almost twenty years later, in *Wards Cove Packing Co., Inc. v. Atonio*,⁸⁷ the Supreme Court sounded an unequivocal retreat from the expansive language of these lower court decisions.⁸⁸

From the statement in *Griggs* that “[t]he touchstone is business necessity,” the Court in *Wards Cove* derived the far weaker conclusion that “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.” The Court stated, “there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business to pass muster.” Finally the Court ruled that this weak “business justification” standard is met when the practice advances broader business goals of the defendant, rather than only when the practice is used to evaluate employees’ abilities to perform the particular job for which the procedure is used.⁸⁹

The Court did not get in the last word, however. Soon thereafter, *Wards Cove* engendered a bruising partisan battle pitting conservatives

82. See, e.g., *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1299 (8th Cir. 1978); *Smith v. Olin Chem. Corp.*, 555 F.2d 1283, 1286 (5th Cir. 1977).

83. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 949 (D. Neb. 1986), *aff'd* 834 F.2d 697 (8th Cir. 1987).

84. *Id.*

85. 444 F.2d 791 (4th Cir. 1971).

86. *Id.* at 798.

87. 490 U.S. 642 (1989).

88. See generally Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896 (1993). Some defendants and lower courts may have merely been collapsing the judicial criteria for testing a facially discriminatory standard—the “bona fide occupational qualification” (BFOQ) defense—with those for assaying disparate impact “business necessity” defenses. See, e.g., *Omaha Girls Club*, 629 F. Supp. at 949; *Abrams v. Baylor College of Medicine*, 581 F. Supp. 1570 (S.D. Tex. 1984). Indeed, some commentators have likened the BFOQ defense to a “business necessity” defense in the cases where a facially-neutral employment standard would screen out 100% of a protected class. See generally BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 358-59 (2d ed. 1983).

89. Note, *supra* note 88, at 899.

against liberals in both political branches. The result was the passage of the Civil Rights Act of 1991, legislation that explicitly codified "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing, Co., Inc. v. Atonio*, 490 U.S. 642 (1989)."⁹⁰

How might an employer seeking to exclude homosexuals still defend such screening as being justified by "business necessity"? One claim might be that heterosexuality has a "manifest" relationship to successful customer relations.⁹¹ For example, in *Fernandez v. Wynn Oil, Co.*,⁹² the defendant pointed to a "customer preference" for male executives in intentionally excluding a female executive from an international sales position that would have involved extensive interaction with foreign executives from male-dominated business cultures. The Ninth Circuit rejected the claim, noting that

stereotyped customer preference [does not] justify a sexually discriminatory practice . . . and the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception. The EEOC has promulgated regulations stating that the only customer preference allowed as a BFOQ exception is one necessary for the purpose of genuineness or authenticity (e.g., a performer). [citation omitted]⁹³

Fernandez involved a claim of "bona fide occupational qualification," (BFOQ), in response to a charge of intentional discrimination. It is unclear whether customer preferences would receive similarly short shrift when what is involved is merely the application of facially-neutral standards having a disparate impact.

Indeed, a different case focussing on the effectiveness of interactions with co-workers suggests that "business necessity" may not involve nearly as onerous a defense burden as a BFOQ. In *Stephen v. PGA Sheraton Resort, Ltd.*,⁹⁴ an individual employee brought a race-based disparate impact challenge to the hotel's policy of discharging (primarily Caribbean-American) employees who were found not to speak English well enough to understand orders. The district court had found that the hotel personnel department stated it wished it had "a hundred more [employees] just like

90. 42 U.S.C.A. § 1981 note (West 1994).

91. For example, in 1991, Cracker Barrel Old Country Store Inc., a 100-unit chain of family restaurants, instituted a policy of terminating "non-heterosexual" employees and initiated a "store-by-store purge" of gay staffers. Jack Hayes, *Cracker Barrel Comes Under Fire For Ousting Gays*, NATION'S RESTAURANT NEWS, Mar. 4, 1991, at 1. Cracker Barrel defended itself, claiming the new exclusionary policy was instituted purely because "employing people with other than 'normal heterosexual values' was inconsistent with its [family values] philosophy and that of its customers," *id.*, and because a customer had complained about "two male employees allegedly kissing in the dining room." *Id.* at 79.

92. 653 F.2d 1273 (9th Cir. 1981).

93. *Id.* at 1276-77. One wonders if domestic prejudices are so easily ignored.

94. 873 F.2d 276 (11th Cir. 1989).

[the plaintiff]."⁹⁵ Similarly, the plaintiff's supervisor had characterized the plaintiff in writing as a "hard working employee, [who] d[id] what was asked of him."⁹⁶ In contrast, three defense witnesses testified that "the plaintiff could not understand English well enough to perform his assigned duty of bringing supplies to the various departments [and t]he plaintiff's inability to understand English resulted in supplies being misdelivered At least one employee had to obtain her own supplies on several occasions."⁹⁷ The appellate court deemed the latter evidence a sufficient showing of "business necessity" to rebut the plaintiff's prima facie statistical showing of the disparate impact of the hotel's language policy.⁹⁸

Similarly, in *Chambers v. Omaha Girls Club*,⁹⁹ the Eighth Circuit approved of a defendant's policy of discharging unmarried pregnant employees, notwithstanding the policy's proven racial disparate impact. Despite its admonition that the "business necessity" defense involved the "heavy burden"¹⁰⁰ of showing a "compelling need" to maintain practices unjustifiable by mere "routine business considerations,"¹⁰¹ the Eighth Circuit declined to hold the lower court's finding of "business necessity" clearly erroneous.¹⁰² Rather, the appellate court deferred to the district court's conclusion that the policy was central to the Girls' Club purpose of pointing out to "young girls between the ages of eight and eighteen"¹⁰³ the "greatest number of available positive options."¹⁰⁴ *Chambers* may thus indeed involve a stronger nexus between job qualifications and conformity with traditional "moral" values given the particular mission of the employer. However, it nonetheless suggests that "business necessity" defenses may present a considerable obstacle in the path of homosexuals seeking the invalidation of sexual orientation screens.

c) *The Legislative History of the ADA*

The EEOC's consistently narrowing constructions of §§ 12112(b)(6) and 12113(a) notwithstanding, it may well be that disparate impacts correlated (but not caused by) disabilities are still prohibited under the broader § 12112(b)(3)(A) disparate impact language. If, however, the EEOC were to insist that all disparate impact claims under the ADA must have the

95. *Stephen v. PGA Sheraton Resort*, 669 F. Supp. 1573, 1574 (S.D. Fla. 1987).

96. *Id.* at 1575.

97. *Id.* at 1574-75.

98. *Stephen*, 873 F.2d at 279.

99. 834 F.2d 697 (8th Cir. 1987).

100. *Id.* at 701.

101. *Id.*

102. This case was litigated and decided before the Supreme Court's decision in *Wards Cove*. Moreover, the appellate court explicitly found that a validation study was unnecessary for a "business necessity" defense—and particularly if the hypothetical "business necessity" was unamenable to validation by empirical study! *Id.* at 702.

103. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 950 (D. Neb. 1986).

104. *Id.*

causal characteristics suggested for § 12112(b)(6), the courts might be forced, as in *Griggs*,¹⁰⁵ to examine the legislative history of the bill to determine whether or not such a construction in fact implements the intent of Congress.

1) *Disparate Impact*

The report of the House Committee on Education and Labor states that the § 12112(b)(3)(A) provision of the ADA was intended to incorporate [] a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and *eliminating discriminatory effects of job qualification procedures*. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discrimination [sic] by effect as well as design." [citation omitted]¹⁰⁶

This language in the report clearly suggests two things. First, both § 12112(b)(3)(A) and § 12112(b)(6) apply to employment standards. Second, at a minimum, Congress desired the judiciary to assess disparate impacts under the ADA in a manner consistent with *Choate*.

In contrast, the discussion in the same report with respect to § 12112(b)(6) is more ambiguous. Though the initial language in the report does not limit § 12112(b)(6) to employment screens that screen out *because of disability*,¹⁰⁷ the only example subsequently provided to explain the provision specifically discusses just such a screen:

If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet *because of a disability*, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is non-discriminatory on its face and it is otherwise lawful under the legislation.¹⁰⁸

Whether the absence of other examples logically entails that Congress intended that all screens invalidated under § 12112(b)(6) necessarily satisfy the same causal requirements is uncertain. Indeed, another section of the

105. *Griggs*, 401 U.S. at 433-34.

106. H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2, at 61 (1990) (emphasis added).

107. The introductory paragraph discussing the § 12112(b)(6) provision reads:

[this section . . . specifies that discrimination includes using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2, at 70 (1990).

108. H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2, at 71 (1990) (emphasis added).

same report may suggest that Congress envisioned a concept of disparate impact under the ADA broader than that implicit in the EEOC's limiting construction of § 12112(b)(6):

The Committee recognizes that the phrasing . . . in this legislation differs from section 504 by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted A literal reliance on th[at] phrase . . . leads to absurd results. . . . The question [is] whether [the reasons] articulated for the rejection other than handicap encompass unjustified consideration of the handicap itself. [citation omitted]. In sum, the existence of non-disability related factors in the rejection decision does not immunize employers.¹⁰⁹

Though this passage is arguably more directly relevant to mixed-motive disparate treatment discrimination, it may suggest that even causally over-determined employment screens with disparate impacts may be invalid under § 12112(b)(6). For example, even if an employer's purely moral objection to homosexuals were causally sufficient to undergird a sexual orientation employment screen, even a non-dispositive independent causal contribution to the screen of subconscious stereotypes related to HIV disease—as in *Watson*—might nonetheless be sufficient to constitute screening out "because of" disability. As under Title VII, a showing of disparate impact alone unrebutted by a showing of job-relatedness and business necessity might be enough to invalidate a screen—the existence of independent (good or bad) causally sufficient reasons for the screen notwithstanding.¹¹⁰

Indeed, the penchant of the EEOC during the Reagan and Bush administrations to read broad *Griggs*-style disparate impact out of the law did not go unnoticed, even by members of the GOP. During the debate over the 1991 Civil Rights Act, for example, Senator David Durenberger noted thus:

[EEOC] Chairman Kemp believes that the ADA allows persons with disabilities to sue based on a neutral practice that screens out a single individual, while title VII of the Civil Rights Act of 1964 requires a plaintiff to challenge a neutral practice only when that practice screens out a statistically significant number of minorities

Chairman Kemp's argument . . . [is] . . . flaw[ed since] . . . the plain language of the ADA allows individuals with disabilities to sue when a neutral practice screens out a "class of individuals." And I would note that it is a fundamental principle of statutory interpretation to first examine the words of the statute to determine congressional intent . . . the Americans With Disabilities Act does allow a plaintiff to successfully maintain a cause of action against an employer when the employer utilizes a neutral practice that screens out "a class of individuals with disabilities." Chairman Kemp

109. H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 2, at 85-86 (1990).

110. "[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." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

is simply wrong when he states that title VII allows a suit based on numbers, while the ADA does not.

[I]f Chairman Kemp believes that *Griggs*-type disparate impact analysis does not apply under the ADA, then I believe that the chairman is mistaken. The legislative history makes clear that . . . whether the challenged qualification standard, employment test or other selection criteria screens out one or one thousand individuals, [if disparate impact is shown] the employer's defense remains the same: The employer must show job-relatedness and business necessity.¹¹¹

2) *HIV and Homosexuality*

The most cursory examination of the legislative history of the ADA quickly reveals an unequivocal intent to prohibit discrimination on the basis of actual or perceived HIV disease along with an equally unequivocal intent to exclude homosexuality and bisexuality from protection *as disabilities* under the Act. More detailed examination, however, uncovers an awareness on the part of many legislators of a potentially intractable contradiction inherent in any attempt to achieve both these ends simultaneously.

With the decision of the Supreme Court in *School Board of Nassau County v. Arline*,¹¹² it had become clear that a contagious disease could be a handicap protected under the Rehabilitation Act. The Court, however, explicitly declined to rule on whether asymptomatic infection with HIV was covered under § 504.¹¹³ A political consensus favoring protections for people in all stages of HIV disease eventually emerged, however, culminating in the explicit recommendation of the Presidential Commission on the HIV Epidemic in the summer of 1988 that anti-discrimination legislation be made the "centerpiece of [American] AIDS strategy."¹¹⁴ Soon thereafter, in September 1988, the Department of Justice announced that § 504 indeed applied to people in all stages of HIV disease.¹¹⁵

The version of the ADA that eventually became law was first introduced in both the House and Senate on May 9, 1989.¹¹⁶ Conservatives were strongly opposed to the impending expanded protections for the HIV-positive, and several committee witnesses expressed strong reservations about

111. 137 CONG. REC. S13582 (daily ed. Sept. 24, 1991).

112. 480 U.S. 273 (1987).

113. *Id.* at 282 n.7.

114. *Americans With Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Education of the House Comm. on Education and Labor*, 100th Cong., 2nd Sess. 44 (1988).

115. *Americans With Disabilities Act of 1989: Hearing on S. 933 Before the Senate Comm. on Labor and Human Resources and the Senate Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 616 (1989). [hereinafter *Hearings*]. For a recent case finding HIV-infection a covered disability under the ADA, see *Doe v. Kohn, Nast & Graf*, No. Civ. A. 93-4510, 1994 WL 416269 (E.D. Pa. Aug. 4, 1994).

116. See Nancy Lee Jones, *Overview and Essential Requirements of the Americans With Disabilities Act*, 64 TEMP. L. REV. 471, 473 (1991).

the bill.¹¹⁷ At the behest of conservatives, the Senate had explicitly exempted homosexuality and bisexuality from coverage *as disabilities* under the ADA.¹¹⁸ The Senate passed the earliest version of the legislation soon thereafter on September 7, 1989.¹¹⁹

As the debate moved to the House, however, several committee members pointed to the conundrum they believed the legislation created. In hearings before the House Judiciary Committee, for example, Representative Sensenbrenner characterized the simultaneous desire to exclude homosexuality and protect the HIV-positive as a "contradiction in terms."¹²⁰ Consideration by the House was further complicated by the complex and wide-ranging subject matter of the bill, and only after hearings and reports by four full committees was the bill referred to the House Rules Committee for a hearing and vote on the procedures for amending the legislation during debate on the floor of the House.¹²¹

Thirty-five members of the House had submitted amendments for consideration by the Rules Committee, of which four each from Democrats and Republicans survived.¹²² Among those rejected was an amendment offered by Representative Dan Burton of Indiana that would have specifically legalized discrimination against homosexuals that would otherwise be prohibited because homosexuals were perceived as HIV-positive. Representative Burton explained his failed amendment thus:

[A]lthough the Americans with Disabilities Act is not intended to provide coverage for homosexuals, it could do so indirectly by giving ADA coverage of individuals who are regarded, quote unquote, as HIV positive, and with the prevalence of AIDS in the homosexual community it is easy to see how a court could conclude that homosexuals are a protected class under this act. [Because] the ADA is *in effect* homosexual rights legislation, [my amendment would have stated] that homosexuals are not deemed disabled

117. For example, in hearings conducted the day after the ADA was introduced, William B. Ball, an attorney representing the Association of Christian Schools International, expressed concern that the ADA would prevent his clients from discriminating on the basis of sexual preference. *Hearings, supra* note 115, at 122.

118. Senator Harkin replied to Mr. Ball, *supra* note 83, "[A] covered entity is not precluded by the ADA from discriminating against a person *solely* on the basis of . . . homosexuality . . . [because homosexuality] . . . is not defined as a disability." See *Hearings, supra* note 115, at 122 (emphasis added). Ironically, then, it was conservative pressure then that led the Senate to implicitly approve the 1973 decision of the American Psychiatric Association to remove non-ego-dystonic homosexuality from the DSM-III.

119. S. 933, 101st Cong., 1st Sess. (1989).

120. *Americans With Disabilities Act of 1989: Hearing on H.R. 2273 Before the House Comm. on the Judiciary and the House Subcomm. on Civil and Constitutional Rights*, 101st Cong., 1st Sess. 179 (1989).

121. Jones, *supra* note 116, at 474; see also 136 CONG. REC. H2321 (daily ed. May 15, 1990).

122. 136 CONG. REC. H2412 (daily ed. May 17, 1990).

because they are regarded as HIV positive. Now the Committee on Rules had a little trouble with this. (Emphasis added).¹²³

Though the Rules Committee rejected the Burton amendment, it did vote to recommend that the full House consider a related but narrower provision strongly supported by the National Restaurant Association—the “Chapman” amendment—that would have allowed restaurants to remove workers with communicable diseases such as AIDS to non-food-handling jobs.¹²⁴ On May 16, 1990, the Rules Committee approved a resolution supporting a “modified open rule,” and after a somewhat acrimonious debate, on May 17, the full House voted 237-172 in favor of the resolution, sealing the fate of the Burton amendment.¹²⁵ Later that day, the “Chapman” amendment narrowly passed the House, 199 to 187,¹²⁶ and on May 22, the entire ADA passed the House by a lopsided vote of 403 to 20.¹²⁷

After voting to substitute the earlier Senate version of the legislation for the version it had just passed, the House agreed with the Senate to appoint conferees to harmonize the House and Senate language—specifically with respect to the controversial “Chapman” amendment.¹²⁸ Senator Hatch eventually authored a compromise provision, and the “Chapman” amendment was deleted from the final version of the bills submitted to the House and Senate.¹²⁹

On July 12, 1990, after his motion to recommit the legislation was defeated 224 to 180, Mr. Dannemeyer remarked:

[M]ake no mistake about it . . . the homosexual activist community, once this bill is signed by the White House, is going to send out a press release yelling, “Hallelujah.” The Congress of the United States has just given us

123. 136 CONG. REC. H2321 (daily ed. May 15, 1990). Assuming the EEOC’s § 12112(b)(6) causality requirement is valid, it is easy to see how Rep. Burton’s amendment might have precluded disparate impact protection since any HIV discrimination against homosexuals based on HIV stereotypes—conscious or subconscious—would have been legalized.

124. See Jones, *supra* note 116, at 474; see also H.R. REP. NO. 101-1004, 101st Cong., 2d Sess. 92 (1991).

125. 136 CONG. REC. H2425 (daily ed. May 17, 1990). A modified open rule allows debate on a limited number of pre-approved amendments. It may be that amendments similar to the Burton amendment had also been offered earlier and rejected. The Report of the House Judiciary Committee explained that “[i]ndividuals who are homosexual or bisexual and are discriminated against because they have a disability, such as infection with the Human Immunodeficiency Virus, are protected under the ADA. The Committee specifically rejected amendments to exclude homosexuals with certain disabilities from coverage.” H.R. REP. NO. 101-485, 101st Cong., 2d Sess., pt. 3, at 75 (1990).

126. *Id.* at H2483-84.

127. 136 CONG. REC. D646 (daily ed. May 22, 1990).

128. Jones, *supra* note 116, at 475.

129. 136 Cong. Rec., S9538 (daily ed. July 11, 1990). Conservative opposition to this change was intense, with Senator Helms, in particular, insisting that the Chapman language be preserved so that restaurants could respond effectively to public perceptions that HIV was casually transmissible. *Id.* at S9535. There has been at least one curious and highly-publicized incident involving discrimination against homosexuals in the restaurant industry following the failure of the Chapman Amendment. See *supra*, note 91.

our Civil Rights Act of 1990 because 70 percent of the HIV carriers in this country are male homosexuals.¹³⁰

The legislation passed the House 337 to 28.¹³¹

The following day, only minutes before the final vote in the Senate, Senator Armstrong, the original sponsor of the language excluding homosexuality in the Senate bill—and ultimately, a supporter of the bill—noted:

I fear this bill may be used to advance the political agenda of groups that advocate for the rights of homosexuals. I recognize that the ADA is not explicitly a gay rights bill On the other hand . . . the ADA leaves many . . . troubling questions unanswered. The bill is a legislative Rorschach test, an inkblot whose meaning and significance will be determined through years of costly litigation¹³²

The Senate approved the bill 91 to 6.¹³³

III

THE PROPER STANDARD OF DISPARATE IMPACT

For several reasons, a broad standard of disparate impact, similar to that developed under Title VII, should be applied under the ADA rather than the more limited standard of disparate impact seen in pre-*Choate* interpretations of the Rehabilitation Act and the EEOC's limiting construction of § 12112(b)(6). First, Congress intentionally modelled the language of the ADA employment provisions on Title VII, eschewing the Rehabilitation Act requirement that discrimination be "solely" on the basis of disability. Second, the text of the ADA specified that its provisions should not be interpreted any more narrowly than the § 504 regulations in existence at the time the ADA was enacted. Those § 504 regulations specifically referenced Title VII and *Griggs* and, just as *Griggs* was not limited to only those disparate impacts on race-based classes occurring *because of race*, § 504 regulations have never been limited to only those disparate impacts on classes of disabled persons occurring *because of disability*. Furthermore, Congress explicitly suggested that the ADA's disparate impact theory should not be interpreted inconsistently with *Choate*, and *Choate* emphasized limiting disparate impact remedies rather than heightening causal requirements.¹³⁴

The "justice" of invalidating a screen would seem to vary directly with the proportion of a protected class the screen places at risk and inversely with the overinclusiveness of the invalidation. Viewed this way, the invalidation of sexual orientation screens in the interest of protecting the HIV-disabled hardly seems different from the invalidation of arrest record screens to further the protection of African-Americans. In *Gregory v. Lit-*

130. 136 CONG. REC. H4621 (daily ed. July 12, 1990).

131. *Id.* at H4629-30.

132. 136 CONG. REC. S9694 (daily ed. July 13, 1990).

133. *Id.* at S9695.

134. See *supra* notes 46, 59 and accompanying text.

ton Sys., Inc.,¹³⁵ for example, approximately 50% of the individuals benefitting from the invalidation of the arrest record screen were not members of the target protected class.¹³⁶ This figure is not grossly different from the percentage of homosexuals benefitting from a prohibition on sexual orientation discrimination who are HIV-negative.¹³⁷ On the other hand, sexual orientation employment screens may entail a far greater risk to those with HIV disease than arrest record screens do for African-Americans, since while up to 60% of those with HIV disease¹³⁸ might be excluded by an effective sexual orientation screen, potentially only 18.2% of blacks might be affected by a screen for arrest records.¹³⁹ Indeed, a simple unweighted ratio (i.e. 60% at risk divided by 80% undeserving beneficiaries or .75 for the sexual orientation screen; versus .36 for the arrest record screen) strongly suggests that invalidation of the sexual orientation screen is justifiable.

Furthermore, the judiciary has already had significant experience under Title VII analyzing and invalidating a wide variety of hiring criteria once viewed by employers as non-discriminatory, legitimate, and even socially desirable or important. For example, the plaintiff in *Gregory* had "previously been arrested on fourteen different occasions in situations other than minor traffic incidents."¹⁴⁰ Like homosexuality, such an extensive history of arrests—even absent any convictions—arguably would be for many people a sufficient and completely justifiable reason to deny employment to an applicant—black or white. Nevertheless, the forces of change—be they the legislative creation of new class-based protections or the advent of an epidemic—can occasion judicial scrutiny for the first time of employment criteria the legitimacy of which had never been questioned or even noted by the legislature.¹⁴¹ Indeed, if the judiciary does not respond to change, one

135. See *supra* notes 37, 52.

136. See Alfred Blumstein, *On The Racial Disproportionality Of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1260 n.2 (1982) (18.2% of black males would be confined in juvenile or adult prison or jail at some point in their lives, as opposed to 2.7% of white males). If one assumes that each of these individuals had to have been arrested and that there are roughly 6.6 times as many white as black males in America, approximately 49.7% of the individuals benefitting from the invalidation of an arrest record screen would be white.

137. Of course, if only homosexual men were considered, the degree of overinclusiveness would be virtually indistinguishable. See *supra*, note 31.

138. See *supra* notes 27-29 and accompanying text.

139. This figure is an approximation. 18.2% of black males can expect to be incarcerated in a county jail or state prison at some point in their lives. See *supra* note 136. Presumably a significantly higher percentage can expect to be arrested. On the other hand, the inclusion of females—who presumably are arrested at significantly lower rates—would lower the arrest record figure for all blacks.

140. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402 (1970).

141. Indeed, many legislators may have supported Title VII with the understanding that employers' discretion to use facially neutral qualification standards and testing devices would be unaffected by the bill. The Supreme Court nevertheless saw fit to significantly restrict the use of such standards in *Griggs*. In contrast, ADA sponsors explained carefully that the exclusion of homosexuality and bisexuality resulted from legislative recognition that the orientations were not "impairments" rather than from any moral judgment. See, e.g., H.R. REP. NO. 101-558, 101st Cong., 2d Sess., at 75-76 (1990).

can imagine situations in which an employer's illegal discrimination might forever be insulated from challenge.¹⁴²

Finally, the current theory differs in several important respects from the one notable—but unsuccessful—previous effort to use disparate impact to prohibit discrimination based on sexual orientation, *DeSantis v. Pacific Tel. & Tel. Co.*¹⁴³ First, the intent of Congress to use the ADA to protect persons suffering from HIV disease is indisputable—indeed, this was one of the main reasons the legislation was passed.¹⁴⁴ In sharp contrast, the *DeSantis* plaintiffs could only allege a potential disparate impact burdening a class never intended to be a prime beneficiary of Title VII—men.¹⁴⁵ What is more, the disproportionate burden of screens for sexual orientation is much more severe in the case of those suffering from HIV disease than the diffuse burden alleged to fall on men in *DeSantis*.¹⁴⁶

142. It might be, for example, that while an employer had once deemed homosexuality sufficient moral grounds not to hire someone, changing social mores weakened that moral objection. The advent of an epidemic, however, might provide the newly amoral employer a sufficient economic reason not to hire homosexuals. Though the latter act itself would be illegal, a profit-maximizing employer might be insulated from ADA liability by virtue of previously existing and sufficient moral grounds not to hire homosexuals.

The first such cases may already have been litigated. See, e.g. Victor Harker, *Gays Urge Equal Rights In Workplace; Plan Phoenix Rally to Call For Federal Law Against Job Bias*, THE ARIZ. REPUBLIC, Oct. 10, 1994, at B1 (describing the case of Jeffrey Blain, a gay Arizona man who lost a disability discrimination suit brought following his dismissal soon after filing an insurance claim for an HIV-related disease. Despite positive performance evaluations and a history of promotion and raises, the company defended the dismissal as due to his poor work performance and the judge instructed the jury that if it found the dismissal was "solely" because of Blain's sexual orientation, it should return a verdict for the defendant.)

143. 608 F.2d 327 (9th Cir. 1979).

144. One of the primary motivations behind the ADA's prohibition on HIV-based discrimination was the conclusion of the Presidential Commission on the AIDS Epidemic that anti-discrimination provisions were key to giving an incentive to individuals to ascertain their HIV status, seek out early treatment, and modify their sexual behaviors so as to minimize transmission of the disease. See *supra* note 114 and accompanying text. Similarly, homosexuals fearing sexual-orientation discrimination may well be deterred from forming stable same-sex relationships for fear of public identification and gravitate instead towards engaging in anonymous (and more risky) sexual behaviors. If a prohibition on sexual orientation discrimination increases the formation of stable homosexual relationships, it would thus dovetail neatly with the public health objectives implicit in the ADA. In any event, there is no question that prior to the ADA, intentional discrimination against people with HIV was rife, just as intentional discrimination against the classes protected by Title VII was endemic before its passage. Thus, just as in *Griggs*, the motivations—good or bad—underlying current employment practices should be deemed irrelevant.

145. Cf. *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250 (10th Cir. 1986) (finding that showings of disparate impact are legally insufficient when the plaintiff is a member of a historically favored group).

146. For example, assuming (conservatively) an average seroprevalence rate for homosexuals (male and female) ten times that of heterosexuals (male and female), any screen for homosexuals in a labor market where they constituted more than approximately 2.7% of job candidates would yield a disproportionate impact satisfying the EEOC's "four-fifths" rule.

In *DeSantis*, the plaintiff maintained that a higher percentage of males than females were homosexual, and thus any screen excluding homosexuals would have a disproportionate impact on males. 608 F.2d 327, 329 (1979). See generally ALFRED KINSEY ET. AL., *Homosexual Responses and Contacts*, in SEXUAL BEHAVIOR IN THE HUMAN FEMALE 446 (1953). Assuming a rate of homosexuality among

IV CONCLUSION

At least two tasks seem to have been left to the judiciary: delimiting the bounds of disparate impact under the ADA, and applying whatever standard is settled on to the case of employment criteria based on sexual orientation. Ultimately, the Court will have to face the question that Congress seems to have successfully ducked: What is more important to America—protecting those suffering from HIV disease from employment discrimination or preserving the autonomy of employers to discriminate against homosexuals?

With the Supreme Court's help, the divisive civil rights debates of the 1950's became a national consensus by the 1990's that intentional discrimination on the basis of race was a moral wrong. Congress has given the Court an opportunity to interpret the ADA in a manner consistent with the statutory text and existing judicial precedent that would invalidate sexual orientation employment screens unrelated to business necessity that disproportionately impact the HIV-disabled. Indeed, given growing indications of an emerging societal consensus in favor of prohibiting employment discrimination based on sexual orientation¹⁴⁷—and existing exemptions in the ADA for religious organizations—such a decision by the Court might well be less controversial than many decisions it made that sped the progress of other civil rights movements.¹⁴⁸ Finally, particularly given the recent trend in some jurisdictions away from anonymous HIV testing and towards more aggressive public health measures such as mandatory infection reporting and contact tracing,¹⁴⁹ a federal prohibition of employment discrimination based on sexual orientation may be necessary so that disincentives for homosexuals to avail themselves of HIV testing and early intervention will not be exacerbated by the potential for adverse employer decisions purported to be made on the basis of sexual orientation alone.

males double that of females (and equal participation in the same labor force in the example described above), 1.8% of females and 3.6% of males would be excluded by a sexual orientation screen. Even assuming males constitute a class protected from disparate impacts under Title VII, the comparative pass rate for the disproportionately impacted group would still be 98.1% of that of the advantaged group—an impact far short of the “four-fifths” requirement.

147. See *supra* note 8.

148. Injunctions prospectively invalidating sexual orientation screens, similar to the remedies suggested in *Guardians* by Justices Rehnquist and White for Title VI disparate impact cases when intent is not shown, see *supra* note 50, might well satisfy the *Choate* “reasonableness” limitation. See *supra* note 59.

149. See generally Roger Doughty, Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 Calif. L. Rev. 113 (1994); Arthur S. Leonard, *Lesbian/Gay Law Notes*, Sept. 1994, at 108 (North Carolina suspending anonymous HIV testing and requiring names and addresses of the HIV-positive).