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Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation

James S. Wrona*

I. INTRODUCTION

Education is crucial in an industrialized and highly technical society.¹ This is true not only for individuals who hope to use their education to gain employment,² but also for any nation that hopes to keep pace in

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² See JOHN JAROLIMEK, THE SCHOOLS IN CONTEMPORARY SOCIETY: AN ANALYSIS OF SOCIAL CURRENTS, ISSUES, AND FORCES 22 (1981). “Today some seventy out of every one hundred workers are employed in . . . occupations such as medical and health care, education, social welfare, technical services, research, . . . and so on. All of these occupations require a constant stream of competently trained people who require higher and higher levels of education.” Id. See also James B. Hunt, Education for Economic Growth: A Critical Investment, reprinted in EDWARD STEVENS & GEORGE H. WOOD, JUSTICE, IDEOLOGY, AND EDUCATION: AN INTRODUCTION TO THE SOCIAL FOUNDATIONS OF EDUCATION 125 (1987). The article suggests that:

Throughout history, the U.S. educational system has been challenged to meet the changing needs of a growing, complex society. Since the Russian launching of Sputnik in 1957 the American education system has not faced a greater challenge than the one it faces today. Today, America is in danger of losing the worldwide economic and technological leadership that it has built up over generations.

Id.

an extremely competitive global market.\(^3\) Colleges and universities play a vital role in students' personal growth as well as their preparation for future careers. Sexual discrimination in education,\(^4\) however, may prevent many women from reaching their full academic potential and limit their career options.\(^5\) For instance, certain testing devices may consistently and disproportionately exclude qualified women from receiving academic scholarships or financial grants.\(^6\) Additionally, the criteria for admission utilized by some institutions of higher learning may adversely affect women.\(^7\) The discriminatory effects of these practices create

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\(^3\) See George C. Keller, The Search For “Brainpower”, reprinted in Edward Stevens & George H. Wood, Justice, Ideology, and Education: An Introduction to the Social Foundations of Education 115 (1987). “Obviously, a complex, highly technological society faced with serious international problems requires ever greater numbers of persons with developed intellects.” Id. at 124. See also PARELIUS & PARELIUS, supra note 2, at 81 (“[E]ducational institutions, especially at the college and university level, contribute to economic development.”).

\(^4\) See Sara Delamont, Sex Roles and the School: Contemporary Sociology of the School 104 (1980). “Data have been provided on inequalities between the sexes in the provision of opportunities and facilities, inequalities in attainment, and differentiation in classroom processes.” Id.

\(^5\) The effects of sexual discrimination in education can have a long lasting detrimental impact on women's career plans. During the Senate debate on Title IX, Senator Bayh expressly recognized the ill-effects of sexual discrimination on women's career plans, stating, “[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . .” 118 Cong. Rec. 5806-07 (1972).

\(^6\) See Sharif v. New York State Educ. Dep't, 709 F. Supp. 345 (S.D.N.Y. 1989). The Sharif court noted that the State's practice of awarding academic scholarships based solely on SAT scores has afforded males a disproportionately higher chance of receiving scholarships than women. Id. at 355-56. See also Susan L. Gabriel & Isaiah Smithson, Gender in the Classroom: Power and Pedagogy 1 (1990). “Sex bias begins as soon as women apply for admission to college. Women students receive 28 percent less in grants and 16 percent less in loans than do males, and females are more likely to withdraw due to financial problems than are males.” Id. (citing Myra Sadker, Sex Bias in Colleges and Universities, The Report Card, No. 2 (Washington, D.C.: Mid-Atlantic Center for Sex Equality and Project EFFECT, American University, 1984)). See generally Recent Case, Civil Rights—Disparate-Impact Doctrine—Court Prohibits Awarding Scholarships on the Basis of Standardized Tests that Discriminatorily Impact Women—Sharif v. New York State Education Department, 103 Harv. L. Rev. 806 (1990) [hereinafter Civil Rights—Disparate-Impact Doctrine].

\(^7\) See Sharif, 709 F. Supp. at 354. “[T]he SAT underpredicts academic perfor-
barriers that severely limit individuals' career choices and personal development.\(^8\) Further, practices adversely affecting women in education are not only detrimental to individuals, but also impair the ability of the country as a whole to keep pace in the global economy.\(^5\) If the criteria used in awarding scholarships, granting admissions, or placing students in particular programs are affecting women in a discriminatory manner, this country is denied the benefit of having the most qualified persons trained in the most needed fields. Testing mechanisms that adversely affect women do not accurately reflect the ability of the individual in a particular field.\(^10\) Universities' use of such tests deny wom-

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8. Phyllis L. Crocker & Anne E. Simon, Sexual Harassment In Education, 10 CAP. U. L. REV. 541, 542 (1981). "Formal education is, in the United States, an important factor in an individual's career possibilities and personal development; therefore . . . obstructing that person's educational accomplishments can have severe consequences." Id. Crocker and Simon go on to state that "for those careers which require college degrees for further training, such as medicine, law, academics, and research, students' college records take on tremendous importance for their later prospects." Id. Thus, sexual discrimination may be even more debilitating for those needing additional educational training.

9. One author suggests that, "No nation can afford to waste half of its human resources; our nation's campuses must lead the way in developing and implementing a blueprint for equity." KAREN BOGART, TOWARD EQUITY: AN ACTION MANUAL FOR WOMEN IN ACADEME 2 (1984). See also Hunt, supra note 1, at 129. "If we are to grow economically, we must make a substantial investment in the education and training of all our people." Id. (emphasis added).

10. See Civil Rights—Disparate-Impact Doctrine, supra note 6, at 806.

By invalidating tests that disadvantage women, disparate-impact analysis rejects the false assumption that test results reflect actual differences between female and male intellects, and prevents the inequities that result when disproportionate numbers of female students are denied equal access to educa-
en equal access to education and limits the country's ability to train persons otherwise qualified in areas such as engineering, computer science, and medicine. In today's competitive global market "no nation can afford to waste half of its human resources ...." However, while not a new phenomenon, sexual discrimination in education has only recently gained recognition as a major problem in need of redress.

In 1972 Congress passed Title IX of the Education Amendments of 1972 (Title IX) in an attempt to alleviate the problems of sexual discrimination in education. Title IX reads in pertinent part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving any Federal financial assistance." The administrative enforcement of Title IX rests with the Office for Civil Rights, Department of Education (OCR). The OCR's...
main enforcement technique, established by Congress, is the office’s ability to terminate or refuse to grant federal assistance to programs that violate Title IX’s discriminatory prohibitions.¹⁸

While Title IX was not originally seen as an effective deterrent to the problems of sexual discrimination,¹⁹ judicial and legislative action has broadened its scope and the remedies available. For instance, the United States Supreme Court, in Cannon v. University of Chicago,²⁰ held that an individual may bring a private right of action to enforce Title IX’s prohibitions.²¹ Title IX has also been interpreted to reach em-

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¹⁸ 20 U.S.C. § 1682 (1972). Section 1682 states that a violation of § 1681 may be dealt with under this section in the following manner:

(1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . .

Id.


²¹. In Cannon, the petitioner alleged that she was denied admission to medical school based on her sex. Id. at 680. In dismissing the action, the court of appeals found that no private right of action exists under Title IX. Id. However, the Supreme Court reversed. Id. at 717. Justice Stevens, writing for the majority, stated, “Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We therefore
ployees of educational facilities. Further, in Franklin v. Gwinnett County Public Schools, the Supreme Court recently held that damage remedies may be used in cases brought to enforce Title IX.

The legislature has also broadened the application of Title IX. In 1986, Congress enacted the Civil Rights Remedies Equalization Act, which abrogates the states' Eleventh Amendment immunity in actions alleging a violation of Title IX. In 1988, the Civil Rights Restoration Act further broadened the scope of Title IX by applying Title IX on an institution-wide basis rather than on a program-specific basis. Ad-

conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute." Id. at 717.

22. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). After an extensive review of the legislative histories of Title IX and Title VI, the Court concluded that "employment discrimination comes within the prohibition of Title IX." Id. at 530.


24. In Franklin, a high school student brought a Title IX claim against Gwinnett County School District for alleged sexual harassment by one of its teachers. Id. at 1031. The student sought damages, but both the district court and the court of appeals found that "Title IX does not authorize an award of damages." Id. at 1032. The Supreme Court reversed, concluding that "a damages remedy is available for an action brought to enforce Title IX." Id. at 1038.


26. Id. Section 2000d-7 of the Civil Rights Remedies Equalization Act states: "(1) A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972, [or] title VI of the Civil Rights Act of 1964 . . . ." Id. The Act was a direct response to the Supreme Court's decision in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). In Scanlon the Court held that Congress had to "unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." Id. at 242 (citing Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 99 (1984)). Because the Court found that there was no such Congressional language present in regard to Title VI, the State could use its Eleventh Amendment immunity. Id. at 240. The Act now unequivocally states that no Eleventh Amendment immunity may be used in a Title VI or Title IX case. 42 U.S.C. § 2000d-7 (1986).


28. Id. The Civil Rights Restoration Act reversed the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984). In Grove City, the Court held that the language in Title IX was program-specific. Id. at 571. Under the Court's holding, only the specific program that received financial assistance from the federal government could be regulated under Title IX. Id. at 572. However, the Civil Rights Restoration Act subsequently mandated that Title IX is to be applied on an institution-wide basis. 20 U.S.C. § 1687. The Act states in pertinent part: "For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of . . . . (2)(A) a college, university, or other postsecondary institution, or a public system of higher education . . . ." Id. For a detailed look at the differences between program-specific and institution-wide treatment of Title IX, see Brian T. Must, Comment, Title IX and the Future of Private Education: Backdoor Regulation of a Private Entity, 22 Tulsa L.J. 109 (1986).
ditionally, in 1991 Congress enacted 42 U.S.C. 1988(b), which allows plaintiffs bringing suit under Title IX the right to receive attorney’s fees in certain circumstances. These judicial and legislative responses to Title IX have answered many questions regarding actions brought under the Act.

However, one area remains uncertain under Title IX. Neither the United States Supreme Court nor Congress has addressed whether a plaintiff may prove sexual discrimination under Title IX by using disparate-impact analysis. Unlike other forms of proof of discrimination, which center on a showing of intent to discriminate, disparate-impact analysis focuses on whether a policy, neutral on its face, has a disproportionate adverse impact upon a protected group. As discussed above, a number of testing devices adversely impact women in education. Because such tests rarely evince an actual intent to discriminate, women adversely affected will be left without a remedy unless disparate-impact analysis is adopted in Title IX cases. One article states, “The disparate-impact analysis . . . redresses bias in standardized testing more effectively than would an intent standard . . . . In such cases, proving intent to discriminate would be an extremely difficult, if not impossible, burden to satisfy.” Because of the significance of disparate-impact analysis in these types of cases, and because the issue is unsettled, extending a disparate-impact test to Title IX cases of sex discrimination should prove to be the next major battleground in Title IX litigation.

This article will first discuss the differences between disparate impact

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29. 42 U.S.C. § 1988(b) (Supp. III 1991). This section states that, “In any action or proceeding to enforce a provision of . . . title IX . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” Id.

30. See Civil Rights—Disparate-Impact Doctrine, supra note 6, at 806. “Few courts have considered whether plaintiffs must prove discriminatory intent in title IX claims.” Id.; see also Pfeiffer v. Marion Ctr. Area School Dist., 917 F.2d 779, 788 (3rd. Cir. 1990) (“[n]either the Supreme Court nor this court has decided specifically whether intent is a necessary element of a Title IX claim”); Sharif v. New York State Educ. Dep’t, 709 F. Supp. 346, 360 (S.D.N.Y. 1989) (“[n]either the Supreme Court nor any court in the Second Circuit has determined whether intent must be shown in Title IX cases”); Haffer v. Temple Univ., 678 F. Supp. 517, 539 (E.D. Pa. 1988) (noting that the law is undecided on question of whether Title XI requires finding of intent to discriminate).


32. See supra notes 6 and 7.

33. Civil Rights—Disparate-Impact Doctrine, supra note 6, at 811.
and disparate treatment. Then the viability of using a disparate-impact theory will be analyzed by focusing on how courts have interpreted statutes that are analogous to Title IX. Specifically, this paper will look to the approach taken by courts in cases involving Title VI, Title VII and the Age Discrimination in Employment Act of 1967. Finally, this article will review cases where lower courts have allowed the use of disparate-impact analysis in Title IX litigation.

II. DISPARATE TREATMENT V. DISPARATE IMPACT

Before examining whether disparate-impact analysis should be applicable to Title IX suits, the differences between disparate impact and disparate treatment should be clarified. A plaintiff using disparate treatment to prove discrimination must show that the defendant intended to discriminate.\(^\text{34}\) Dissimilarly, under a disparate-impact theory, the focus is not on intent but, rather, on whether a facially neutral policy has a disproportionate adverse impact on a protected group.\(^\text{35}\) However, this distinction does not fully explain the complexity of the two approaches. A more detailed review is needed to understand the significance of the differences between them.

A. Disparate Treatment

The United States Supreme Court first discussed the disparate-treatment theory of discrimination in *McDonnell Douglas Corp. v. Green*.\(^\text{36}\) The plaintiff in *McDonnell Douglas* claimed that an employer had discriminated against him because of his race in violation of Title VII.\(^\text{37}\) The critical question before the Supreme Court was the allocation and burden of proof in an intentional discrimination case where no direct evidence was available.\(^\text{38}\) As a result, the Court enunciated a three-
Eradicating Sex Discrimination

First, the plaintiff has the initial burden of establishing a prima facie case of discrimination. A prima facie case merely raises an inference of discrimination because the Court presumes that those acts complained of, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." However, a prima facie showing does not amount to a final finding of discrimination.

Second, if the plaintiff meets the requirements of the first step, the burden shifts to the employer to show that the reasons for rejecting the employee were not discriminatory. However, the burden that shifts to the employer is one of production, not persuasion. The Court made

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39. Id. at 802-05.
40. Id. at 802. The Court discussed the elements of a prima facie case. A plaintiff claiming a discriminatory hiring practice must show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

41. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). In Furnco the court of appeals found that the plaintiffs had made out a prima facie case of discrimination. Id. at 576. The Supreme Court agreed. Id. at 576. However, the Court took exception with the weight that the court of appeals gave to the prima facie showing. Id. The Supreme Court stated that "the Court of Appeals went awry . . . in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII . . . ." Id.

42. Id.
43. McDonnell Douglas, 411 U.S. at 802.
44. Texas Dep't of Community Affairs v. Burdine, 456 U.S. 248, 259-60 (1981). Subsequent to the McDonnell Douglas holding and prior to the Court's decision in Burdine, many lower courts had problems implementing this second phase of the test. See Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 1306 (2d ed. 1988). Compare Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980) ("It is enough for the defendants in the second phase of the case to bring forth evidence
this clear in *Texas Department of Community Affairs v. Burdine*, when it emphasized that the employer is not required to show that its reasons were nondiscriminatory by a preponderance of evidence. Rather, the employer need only "articulate some legitimate, nondiscriminatory reasons for the employee's rejection." The plaintiff has the ultimate burden of proving intentional discrimination under a disparate-treatment analysis.

Third, even if the employer offers a nondiscriminatory reason for its decision, the plaintiff must be given the opportunity to show, by a preponderance of the evidence, that the employer's reasons were in fact a pretext for discrimination.

that they acted on a neutral basis. They do not have the burden of establishing that their basis was sound."); Ambush v. Montgomery County Gov't, 620 F.2d 1048, 1052 (4th Cir. 1980) ("The defendant, in turn, may rebut such prima facie showing by explaining what he has done or producing evidence of legitimate nondiscriminatory reasons.") (quoting Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978)) with Turner v. Texas Instruments, Inc., 565 F.2d 1251, 1255 (6th Cir. 1980) ("We hold that the employer bears the burden of proving the legitimate, nondiscriminatory reasons for his actions by a preponderance of the evidence"); Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 659 (9th Cir. 1980) ("The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually.").

46. Id. at 259-60.
47. Id. at 260.
48. Id. at 253. See also Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984). The Supreme Court again emphasized that, "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employment decision 'remains at all times with the plaintiff ...'" Id. at 875 (quoting *Burdine*, 450 U.S. at 253).
49. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). During this second stage, the employer in *McDonnell Douglas* argued that it did not rehire the plaintiff because he had been involved in unlawful conduct against the corporation. Id. at 803. The Court found that the employer's stated reason was sufficient to discharge its burden of proof. Id. However, it remanded the case to give the plaintiff an opportunity to show that the employer's reason was a pretext. Id. at 804. The Court also gave examples of the type of evidence that would support a showing that the employer's explanation was a pretext, stating that, "Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired." Id. The Court also opined that statistics showing a pattern of discrimination would also be relevant. Id. at 805.

It is at this third stage of the *McDonnell Douglas* analysis where most plaintiffs either win or lose on their discrimination claims. SCHLEI & GROSSMAN, supra note 44, at 1316-17.

Because of the plaintiff's easy burden of establishing a prima facie case of disparate treatment and because defendants can normally satisfy the burden of articulating some legitimate, nondiscriminatory reason for the action in question . . . the great majority of disparate treatment cases turn on the.
Under *McDonnell Douglas* and its progeny, a plaintiff may show discrimination using disparate-treatment analysis, allowing the trier of fact to infer intentional discrimination. It is important to remember, however, that an *intent* to discriminate must be proven by a preponderance of the evidence.

**B. Disparate Impact**

Disparate impact, unlike disparate treatment, does not require a showing of intentional discrimination. Instead, the focus is on the consequences of the complained-of practice. The leading case involving disparate-impact analysis is *Griggs v. Duke Power Co.* The *Griggs* Court enunciated a three-prong test for cases using disparate-impact analysis. Although *Griggs* involved a Title VII claim of discrimination, courts have subsequently applied the *Griggs* analysis to other anti-discrimination statutes.

In *Griggs*, the employer used an aptitude test to determine whether persons were qualified for certain jobs. The plaintiffs brought a Title VII action claiming racial discrimination. The district court and the court of appeals found that the adoption of the tests was not racially

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plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination.

*Id.* (citations omitted).

50. *See supra* text accompanying note 35.
51. *Id. See also* SCHLEI & GROSSMAN, *supra* note 44, at 1324.
52. 401 U.S. 424 (1971).
53. *Id. at 432. See also* Connecticut v. Teal, 457 U.S. 440, 446-47 (1982).
57. *Id. at 426.*
motivated. Therefore, the employer’s hiring and promotion criteria were not actionable under Title VII. The Supreme Court granted certiorari and reversed the lower courts’ holdings. The Court stated that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”

In Connecticut v. Teal, the Court distilled the Griggs disparate-impact analysis into a three-prong test:

To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that ‘any given requirement [has] a manifest relationship to the employment in question,’ in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Thus, under the Griggs formula, the plaintiff must first make out a prima facie case that the employer’s practice had a substantially adverse effect on an identifiable group. This is usually done through the introduction of statistical analysis tending to show that minorities or women have been adversely affected. For example, a plaintiff may introduce proof that, on average, minorities scored disproportionately lower on the employer’s hiring test than non-minority applicants. However, the statistical proof showing a disparity must be sufficiently tailored to the type of employment at issue. For instance, a plaintiff attempting to use population/workforce comparisons must base the analysis on the relationship between the particular jobs at issue and the relevant number of qualified persons in the job market. Therefore, where the position applied for requires specific job skills, the plaintiff’s statistical analysis must focus on the adverse effect of the employer’s criteria on those minorities in the

58. Id. at 429.
59. Id.
60. Id. at 436.
61. Id. at 431. The Court further stated that, “[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” Id.
63. Id. at 446-47 (quoting Griggs, 401 U.S. at 432) (alteration in original) (citations omitted).
64. Id.
65. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977). See also SCHLEI & GROSSMAN, supra note 44, at 1326. “In attempting to establish a prima facie case, the plaintiff may introduce, among others, the following types of statistical proof: pass/fail comparisons, population/work force comparisons, or regression analysis or other types of statistical comparisons.” Id.
67. Id.
general area who possess the skills needed for the position. Simply using figures from the general population will usually be insufficient. Further, the plaintiff normally has to show that "specific elements of the [employer's] hiring process have a significantly disparate impact" on the identifiable group.

If the plaintiff can establish a prima facie case, the inquiry turns to whether the defendant can show its policy has a "manifest relationship to the employment in question." This stage of a disparate-impact discrimination case was the source of much confusion.

One area of difficulty was the character of the burden carried by the defendant. For instance, did the defendant have the burden of persuasion or merely one of putting forth some evidence of business justification? The Supreme Court put that question to rest, albeit momentarily, in *Wards Cove Packing Co., Inc. v. Atonio.* The Court stated that "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion ... remains with the disparate-impact plaintiff." However, Congress overturned this portion of *Wards Cove* when it enacted the Civil Rights Act of

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68. *Id.* However, in some cases, when the jobs at issue do not usually require specific training, or when the employer expects to train the new employees, using the general population may be acceptable. See *Dothard v. Rawlinson,* 433 U.S. 321, 329-30 (1977).

69. *Wards Cove,* 490 U.S. at 658. However, in certain circumstances the plaintiff will not be required to show that a particular employment procedure had a disparate impact on the identifiable group. See *Civil Rights Act of 1991,* 42 U.S.C. § 2000e-2(k)(1)(B)(i) (1991). "If the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." *Id.* Section 2000e-2(k)(1)(B)(i) was enacted in direct response to the *Wards Cove* decision which held that separate policies could never be analyzed as one employment practice. *Wards Cove,* 490 U.S. at 655-59.


71. SCHLEI & GROSSMAN, supra note 44, at 1328. Before recent developments in this area of the law, the authors stated, "There is an open question as to the nature of the burden that shifts to the defendant . . . ." *Id.*


73. *Id.* at 649.
“The new law shifts the burden of demonstrating business justification squarely back onto the defendant.”

Another area that caused confusion was determining what the defendant needed to show under the second prong of the analysis. Griggs held that an employer could justify its hiring practice by showing it was a “business necessity.” The Court in Wards Cove reversed course, holding that “there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business to pass muster.” The Civil Rights Act of 1991 also addressed this portion of the Court’s decision. The Act essentially returned the law to where it was prior to Ward’s Cove. Therefore, a defendant will now have to prove there was a “business necessity” for using its policy under the second prong of the Griggs test. However, exactly what the phrase “business necessity” means is difficult to ascertain given the trouble that courts have had in interpreting it in past cases. Nevertheless, it is clear that something more than the limited showing enunciated in Wards Cove is needed.

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(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter 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 . . . .

Id. (emphasis added).

75. Lex K. Larson, Civil Rights Act of 1991 24 (1992). The author supports his conclusion by focusing on the requirement in the section that the defendant must "demonstrate." Id. at 21. Larson notes that “demonstrate’ is defined to include the burdens of production and persuasion.” Id. (citing Title VII § 701(m), 42 U.S.C. § 2000e(m), added by the Civil Rights Act of 1991, § 104).

76. Id. at 23 (stating that the extent of employer’s obligation left lower courts in confusion). The author noted that “the Court described this burden sometimes as one of showing a ‘manifest relation of the employer rule to the employment in question’ (implying a light burden), and sometimes as one of showing that it is ‘necessary to safe and efficient job performance’ (implying a heavier burden).” Id. at 22 (quoting New York City Transit Auth. v. Beazer, 440 U.S. 568 (1977); Dothard v. Rawlinson, 433 U.S. 321, 330 n.14 (1977)).


79. See Larson, supra note 75, at 22.

80. See supra note 61.

81. See supra note 76.

82. See Larson, supra note 75, at 24. "Many unanswered questions remain, but at a minimum the presence of the term ‘necessity’ operates as a reminder that the job relatedness requirement is not a trivial one . . . ." Id.
Lastly, even if the defendant is able to articulate a business necessity for its practice, the plaintiff must be given the opportunity to demonstrate that the procedure was a pretext for discrimination.\(^{83}\) A plaintiff may do this by showing that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s] ..."\(^{84}\) A plaintiff using disparate-impact analysis should therefore collect information on alternative testing devices that the employer could have implemented. By way of illustration, if company A used one test that had a disproportionate effect on minorities, but company B, which was in the same type of business, used a different test that did not discriminate, introduction of company B's test would be evidence that company A's procedure was a pretext for discrimination.

C. Overview of Distinctions

In summation, a number of distinctions exist between the two forms of analysis. Those differences must be kept in mind when trying to ascertain both the impact and the relevance of extending disparate-effect proof of discrimination to Title IX. The most important distinction is that the focus of disparate impact is on a facially neutral practice that has a disproportionate effect on a class, not on the defendant's intent to discriminate.\(^{85}\) This in turn leads to a different approach for the plaintiff at the prima facie stage. The disparate-treatment plaintiff must meet the four requirements set forth under the first prong of the *McDonnell Douglas* test, which permits intent to be inferred.\(^{86}\) On the other hand, the

84. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 660 (1989) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). The Court in *Wards Cove* attached a new requirement to this part of the disparate-impact analysis as well. The Court held that any alternative practice must be as effective as the one the defendant had chosen. *Id.* at 661. The Court also held that "costs or other burdens" would be pertinent in deciding whether the alternative practice was as effective. *Id.*

However, the Civil Rights Act of 1991 effectively did away with this added requirement. 42 U.S.C. § 2000e-2(k)(1)(C) (1991). This section states that the required showing for a valid alternative employment practice "shall be in accordance with the law as it existed on June 4, 1989 ..." *Id.* *Wards Cove* was decided on June 5, 1989. *Wards Cove*, 490 U.S. at 642.
85. See supra text accompanying notes 34-35.
86. See supra note 34.
disparate-impact plaintiff's prima facie case will consist mainly of statistical evidence which shows a differential effect.87

Another distinction is made at the second stage of the respective tests. Under disparate-treatment, the defendant need only show "some legitimate, nondiscriminatory reason for the employee's rejection."88 The defendant does not have the burden of persuasion,89 which at all times remains with the plaintiff.90 However, in a disparate-impact case, the defendant shoulders the burden of persuading the trier of fact that its practice was a business necessity.91

Additionally, the plaintiff's burden in the third stage of the disparate-impact analysis is distinctive. The plaintiff must show that an alternative test would serve the employer's interest without having the same discriminatory effect.92

The distinctions between the two types of proof needed to support a discrimination claim are important for a number of reasons. First, the outcome of a case will many times turn on which analysis is used.93 More importantly, however, the differences in the two approaches illuminate the distinctive policy considerations and goals present in each.94 That is, if the courts interpret the language of the statute or regulation under which the claim is being brought as narrow in focus, an intent requirement is usually proper. The converse is that if the aim were to prohibit all forms of discrimination, then disparate-impact analysis is appropriate.

III. EXTENDING DISPARATE-IMPACT ANALYSIS TO TITLE IX

Whether to extend disparate-impact analysis to sex discrimination claims under Title IX is an important question. In education, the use of certain testing devices results in discrimination against women.95 However, the criteria used rarely manifest an intent to discriminate.96 The

87. See supra text accompanying note 65.
88. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
89. Id.
90. Id.
91. See supra text accompanying note 75.
92. See supra text accompanying note 84.
93. See Belton, supra note 34, at 1231. "[T]he same set of operative facts may yield a different outcome on liability depending upon which discrimination theory a court chooses to use." Id. See also Schlei & Grossman, supra note 44, at 489 (5th supp.) (explaining that it is not infrequent for a plaintiff to win on one but not both theories).
94. See Belton, supra note 34, at 1287 (noting that policy considerations are an integral part of the different approaches).
95. See supra notes 6 and 7.
96. See generally Civil Rights—Disparate-Impact Doctrine, supra note 6, at 806.
only way to remedy those discriminatory practices is to extend disparate-impact analysis to Title IX cases. By failing to extend such forms of proof, certain types of discrimination against women will survive, thereby rendering Title IX ineffective, except for the most blatant forms of sex discrimination in education. Because of Title IX's recent history, a review of cases that have applied disparate-impact analysis to other discrimination statutes will help predict whether such forms of proof will be accepted in Title IX litigation.

The most important case using disparate-impact analysis is *Griggs v. Duke Power Co.* To identify whether the *Griggs* logic justifies expanding disparate-impact analysis to Title IX litigation, it is important to examine the policy reasons that led the *Griggs* Court to adopt the effects test. In *Griggs*, the Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups...." The Court expressly recognized that minority groups had historically been discriminated against. In allowing the plaintiff to use disparate-impact proof of discrimination, the Court acknowledged the important interests involved in removing societal discriminatory practices, regardless of intent.

Those same concerns are present in sex discrimination cases brought under Title IX. Courts have recognized that sex, like race, is an immutable characteristic. Moreover, women, like racial minorities, have tra-
ditionally experienced discrimination in education. Further, the Supreme Court has acknowledged the similar discriminatory treatment of women and blacks. For example, in Connecticut v. Teal, the Court stated that the intent of Title VII was to remove the barriers "that had historically been encountered by women and blacks as well as other minorities." Thus, the types of societal discrimination recognized in Griggs are similarly present in Title IX cases. The public interest in eradicating the impact of sex discrimination in education equals the Griggs Court's concern of eliminating the discriminatory effects of deficient education for minority persons. Therefore, a disparate-impact test seems appropriate in the Title IX arena.

Additional support for extending disparate-impact analysis may be found in the similar objectives of Title VII and Title IX. Both statutes prohibit sex discrimination. This nexus led the Tenth Circuit Court of Appeals, in Mabry v. Board of Community Colleges & Occupational Education, to conclude that the same substantive standards should be applied for sex discrimination under Title VII and Title IX. The characteristics of race, sex and national origin in deciding whether to allow disparate-impact analysis. Id. at 313.

102. See Brown, supra note 13, at 302. "Public and private educational institutions have long been characterized by discrimination against women and girls." Id. See also supra notes 13 and 14. Similar to the history of discrimination against women in the school setting, the barriers referred to in the Griggs opinion were the inadequate education that many minority students received because of discrimination. See Connecticut v. Teal, 457 U.S. 440, 447 (1982). See also Drew S. Days, Enemies or Allies? Widening the Scope of Conflict, 66 Tex. L. Rev. 1621, 1627 (1988). Supreme Court applied disparate-impact test in Griggs due to "backdrop of racial discrimination in education . . . ." Id.

Courts have also recognized the historical discrimination against women outside the educational context, as in the area of salaries. See Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982). "Even with a business-related requirement, an employer might assert some business reason as a pretext for a discriminatory objective. This possibility is especially great with a factor like prior salary which can easily be used to capitalize on the unfairly low salaries historically paid to women." Id. See also Futran v. RING Radio Co., 501 F. Supp. 734, 739 n.2 (N.D. Ga. 1980) (noting the historically low salaries of women); Neeley v. Metropolitan Area Rapid Transit Auth., 24 F.E.P. 1610, 1611 (N.D. Ga. 1979).


104. Id. at 447.

105. 813 F.2d 311 (10th Cir.), cert. denied, 484 U.S. 849 (1987).

106. Id. at 316-17 n.6. In Mabry, a female physical education instructor brought Title VII and Title IX claims of sex discrimination after being fired from a junior college. Id. at 313. The district court dismissed the Title IX claim. Id. The district court ruled in favor of the defendant on the Title VII claim at the end of the trial. Id. On appeal, the plaintiff contented that the district court erred in dismissing her Title IX claim. Id. at 313-14. The court of appeals held that because Mabry did not appeal the district court's final judgment on her Title VII claim, an essential element of her Title IX claim was already decided, thus precluding any subsequent Title IX claim. Mabry,
Mabry court noted that because both statutes prohibited indistinguishable behavior, it was proper to apply Title VII principles to a Title IX case.107

A year after Mabry, the First Circuit Court of Appeals, in Lipsett v. University of Puerto Rico,108 adopted an identical rationale when it applied Title VII's substantive standards to the Title IX litigation.109 Lipsett relied heavily upon the legislative history of Title IX in deciding that disparate-impact analysis should be applied to cases brought under the statute.110 However, both Mabry and Lipsett dealt with university employees' Title IX claims of discrimination rather than the usual student-brought action. The legislative history relied on by the court in Lipsett specifically limited the Title VII standard for showing discrimination to "employment-related claims under Title IX."111 Even though Lipsett and Mabry involved plaintiffs who were employees of the defendants, the analytical basis used by the courts for extending disparate-impact analysis should apply to non-employee Title IX plaintiffs as well. As one article suggests, "To employ a different analysis in education cases

813 F.2d at 314. In dicta, the court noted that the same substantive standards should apply to both Title VII and Title IX claims, id. at 316-17, n.6, but finally concluded that regardless of whether Title IX requires proof of intentional discriminatory conduct, Title IX sweeps no more broadly than Title VII, and Mabry's failure to appeal the Title VII decision ended her Title IX claim as well. Id. at 318.

107. Id. See ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 7.45(b) (1987) (Title VII analysis should be applied in Title IX employment discrimination). See also Ingulli, supra note 19, at 295. "[T]he law defining 'sexual discrimination' under Title VII has been relied upon by the courts to define illegal sexual discrimination under Title IX." Id.

108. 864 F.2d 881 (1st Cir. 1988).

109. Id. at 896 (quoting Mabry, 813 F.2d at 316 n.6). "And, at least two other courts have implied that the standards governing claims arising under Title VII and Title IX were the same." Id. (citing O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986); Nagel v. Avon Bd. of Educ., 575 F. Supp. 105, 106 (D. Conn. 1983)).

110. Lipsett, 864 F.2d at 896.

111. Id. at 897. The court in Lipsett quoted from the House Report on Title IX. The House Report stated:

One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 . . . . Title VII, however, specifically excludes educational institutions from its terms. Title IX would remove that exemption and bring those in education under the equal employment provision.

would create inconsistency in Title IX enforcement mechanisms and present a baseless distinction between sex discrimination in employment and sex discrimination in education. In sum, because both Title VII and Title IX prohibit sex discrimination, and because the underlying rationale for using disparate impact in Title VII cases is applicable to Title IX claims, plaintiffs should be allowed to use proof of adverse effect to show a violation of Title IX.

Courts have applied a similar approach in extending Title VII disparate-impact analysis to cases involving another anti-discrimination statute. The overwhelming majority of courts confronted with the question of whether to expand the disparate-impact test to the Age Discrimination in Employment Act (ADEA), have answered in the affirmative. Furthermore, the rationale for this expansion is analogous to that used by courts applying disparate-impact analysis to Title IX cases. For instance, the Ninth Circuit Court of Appeals stated that “the similar language, structure and purpose of Title VII and the ADEA, as well as the similarity of the analytic problems posed in interpreting the two statutes, has led us to adopt disparate impact in cases under the ADEA.”

112. Civil Rights—Disparate-Impact Doctrine, supra note 6, at 806-07.
113. 29 U.S.C. § 623(a)(1) (1985). This section states:
(a) Employer practices
   It shall be unlawful for an employer—
   (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . . .

Id.


ADEA cases that have applied Title VII disparate-impact analysis support its expanded application to Title IX litigation for a number of reasons. First, the substantial number of ADEA cases employing reasoning identical to Title IX cases such as Mabry and Lipsett provides strong evidence that the approach used in those cases is being widely accepted. Second, the ADEA cases show that disparate-impact analysis is workable outside of the Title VII context. Third, the fact that a majority of lower courts have accepted disparate-impact proof in ADEA cases,116 notwithstanding the more limited scope of that statute,117 strengthens the argument for extending disparate-impact theory to Title IX litigation. For example, language within ADEA evinces an intent by Congress to limit the scope of the act. The ADEA allows employers to make policies based on "reasonable factors other than age."118 Chief Justice Rehnquist and others believe this language forecloses the use of disparate-impact analysis in ADEA cases.119 "Under this view, the explicit protection for age-
neutral factors confines the statute to a disparate-treatment model of discrimination." 2 Unlike the ADEA, Title IX contains no such limiting language. In fact, the Supreme Court has recognized the broad scope of Title IX. In discussing whether Title IX applied to colleges that did not accept direct federal assistance, the Court stated, "We have recognized the need to 'accord [Title IX] a sweep as broad as its language,' and we are reluctant to read into [Title IX] a limitation not apparent on its face." 2 Thus, the argument for extending disparate-impact analysis to Title IX is more persuasive than in ADEA cases.

This becomes even more apparent when the policy reasons for extending disparate-impact analysis are compared with the two statutes. The Supreme Court's rationale for allowing disparate-impact proof in Title VII cases focused on the historical discrimination against persons in Title VII's protected class. 3 However, unlike women and minorities, 4 there is a lack of historical discrimination against persons in ADEA's protected class. 2 The Supreme Court has opined that the aged do not

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29 U.S.C. § 206(d) (1976). See Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982). The Kouba court first noted that there were substantial reasons for using disparate-impact analysis in a claim brought under the Equal Pay Act. However, the court went on to state that, "We have found no authority giving guidance on the proper judicial inquiry absent direct evidence of discriminatory intent." Id. at 876. See also County of Washington v. Gunther, 462 U.S. 161 (1981). The Supreme Court stated:

Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." ... The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination ... [However,] we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act ... .

Id. at 170-71 (citations omitted).
120. Kaminshine, supra note 117, at 301.
121. Grove City College v. Bell, 465 U.S. 555, 564 (1984) (first alteration in original) (quoting both North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) and United States v. Price, 383 U.S. 787, 801 (1966)). The legislative history also evinces Title IX's broad scope. Senator Bayh, discussing the scope of Title IX, stated, "[Title IX is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers ... ."

118 CONG. REC. 5806-07 (1972) (emphasis added).
124. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam). See also Kaminshine, supra note 117, at 306. The author stated:

The policy argument against the inclusion of disparate impact under the ADEA rests on two related claims: that age discrimination is different and less invidious than discrimination based on race, and that the underlying
have a "history of purposeful unequal treatment," and old age is not an immutable characteristic. The overwhelming majority of lower courts that have accepted disparate-impact proof in ADEA cases mandate the same treatment for Title IX litigants, given Title IX's broader scope. However, before declaring a victory for Title IX plaintiffs, it is important to consider the other significant federal statute that impacts this area.

Title VI of the Civil Rights Act of 1964 is the other major anti-discrimination statute. Title VI is particularly relevant when interpreting Title IX because the language of Title IX mirrors that of Title VI. Further, the Supreme Court has often looked to Title VI for guidance when construing Title IX. Therefore, a review of the Court's treatment of Title VI actions is essential to a full analysis of Title IX issues.

The principal Title VI case involving the disparate-impact issue is Guardians Association v. Civil Service Commission. In Guardians, the Supreme Court held that "the function of disparate impact as developed in race cases does not apply in the age setting.

Id. 125. Murgia, 427 U.S. at 313.
126. Id. at 313-14. See also Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986) (quoting Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) (noting that age, unlike race, sex and national origin, is not an immutable characteristic)).
127. See supra note 114.
128. See supra note 121 and accompanying text.
129. 42 U.S.C. § 2000d (1964). Section 601 of Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Id.
130. Title VI is identical to Title IX except that the phrase "on the basis of sex" in Title IX was substituted for "on the ground of race, color, or national origin" in Title VI. See id. and supra text accompanying note 16.
132. 463 U.S. 582 (1983). "The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . ." Id. at 584.
133. Id.
134. See Franklin, 112 S. Ct. at 1035. In Franklin Justice White, who wrote the
Court found that Title VI itself required proof of intent. However, a majority of the Court, writing in separate opinions, ruled that a showing of discriminatory impact will suffice to establish liability when the litigant brings suit under Title VI’s implementing regulations, rather than the statute itself. The Title VI regulations upon which the claim is premised, however, must evince a prohibition on discriminatory effects. In Guardians, the Court noted that the Title VI enforcing agency had promulgated regulations prohibiting disparate-impact discrimination. Justice White, writing for the majority, gave deference to the regulations and stated, “I discern nothing in the legislative history of Title

Guardians opinion, noted “the difficulty of inferring the common ground among the Justices in that case . . . .” Id.

135. Guardians, 463 U.S. at 584 n.2.
136. Id. See also Alexander v. Choate, 469 U.S. 287, 292-94 (1986) (reaffirming that disparate-impact claims may be brought under Title VI regulations); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1044-45 (7th Cir. 1987) (A disparate-impact claim can be made under the regulations of Title VI, but, absent a showing of intentional discrimination, no relief can be obtained under the title itself).

Footnote two of the Guardians opinion summarizes the differences of the Justices in that case. Guardians, 463 U.S. at 584 n.2. Footnote two reads in full:

The five of us reach the conclusion that the Court of Appeals erred by different routes. Justice Stevens, joined by Justice Brennan and Justice Blackmun, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid. Justice Marshall would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is necessary. I agree with Justice Marshall that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming, arguendo, that Title VI, in and of itself, does not proscribe disparate-impact discrimination.

Id. (citations omitted).

137. Id. See also Podberesky v. Kirwan, 764 F. Supp. 364 (D. Md. 1991), rev’d on other grounds, 956 F.2d 52 (4th Cir. 1992). “Although in Guardians the Court did hold that regulations promulgated under Title VI can give rise to claims of disparate impact, Podberesky has cited no regulations in his complaint or otherwise attempted to prove any regulatory disparate impact claim.” Id. at 378 (citations omitted).

The regulations that the Court relied on in Guardians that evidenced a prohibition of discriminatory effects were 24 C.F.R. § 1.4(b)(2)(i) of the Department of Housing and Urban Development and 29 C.F.R. § 31.3(c)(1) of the Office of the Secretary of Labor. Guardians, 463 U.S. at 587 (citing Guardians Ass’n v. Civil Serv. Comm’n, 466 F. Supp. 1273, 1285-87 (S.D.N.Y. 1979)) (Supreme Court did not cite the regulations directly, but merely referred to the district court’s use of them.). 24 C.F.R. § 1.4(b)(2)(1) (1992), states that a participant in a federally funded program may not “utilize criteria or methods of administration which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program . . . .” Id. (emphasis added). 29 C.F.R. § 31.3(c)(1) (1992) states that a recipient of federal funds “may not (directly or through contractual or other arrangements) subject an individual to discrimination . . . .” Id. (emphasis added).

... that is at odds with the administrative construction of the statutory terms.\textsuperscript{139} Therefore, a disparate-impact claim may be brought under the Title VI regulations.

The similarity in language between the two statutes\textsuperscript{140} and the Supreme Court's reliance on Title VI when interpreting Title IX\textsuperscript{141} have led most lower courts to look for guidance from Guardians.\textsuperscript{142} In Sharif v. New York State Education Department,\textsuperscript{143} a Title IX claim of sex discrimination was brought against the New York State Education Department.\textsuperscript{144} The plaintiffs argued that the defendant's policy of depending solely on SAT\textsuperscript{145} scores in granting scholarships disparately affected female students in violation of Title IX and its implementing regulations.\textsuperscript{146} After noting that the Supreme Court had not decided whether

\begin{itemize}
\item \textsuperscript{140} See supra note 130.
\item \textsuperscript{141} See supra note 131.
\item \textsuperscript{142} See Pfeiffer v. Board of Sch. Directors, 917 F.2d 779 (3rd Cir. 1990). The Pfeiffer court acknowledged the relationship in the interpretations of Title IX and Title VI and held that "we believe that the standard adopted for Title VI actions in Guardians Ass'n should be required in Title IX cases." Id. at 788 (deciding case on other grounds). See also Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1193 (S.D.N.Y 1988), aff'd, 882 F.2d 621 (2d Cir. 1989) (adopting Guardians approach in Title IX claim of discriminatory effect); Sharif v. New York State Educ. Dept., 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (relying on Guardians in Title IX case of disparate-impact discrimination); Haffer v. Temple Univ., 678 F. Supp. 517, 539 (E.D. Pa. 1987) (citing Guardians in holding that Title IX claimant may use disparate-impact analysis under Title IX regulations).
\item \textsuperscript{143} 709 F. Supp. 345 (S.D.N.Y. 1989).
\item \textsuperscript{144} Id. at 360.
\item \textsuperscript{145} SAT stands for Scholastic Aptitude Test.
\item \textsuperscript{146} Sharif, 709 F. Supp. at 360. The plaintiffs introduced testimony from expert witnesses indicating that the SAT "underpredicts academic performance of females in their freshman year of college, and overpredicts such academic performance for
\end{itemize}
disparate impact was applicable to Title IX cases, the district court looked to Title VI and the *Guardians* opinion for instruction. The district court found that the regulations promulgated under Title IX, which should be accorded deference, were as comprehensive as those relied on in *Guardians*. Like the Title VI regulations, the Title IX regulations reviewed by the district court prohibited policies that had a discriminatory effect. Therefore, the court held that the plaintiffs could base their claim on the disparate impact of the defendant's practice.

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males." *Id.* at 354. The plaintiffs also submitted statistical evidence that New York's practice of basing scholarships exclusively on SAT scores invariably caused more males than females to receive academic scholarships. *Id.* at 355.

147. *Id.* at 360-01.

148. See *supra* note 139.

149. *Sharif*, 709 F. Supp. at 361. The *Sharif* court referred to a number of Title IX regulations which supported its conclusion. *Id.* The opinion cited 34 C.F.R. §§ 106.21(b)(2), 106.22, 106.23(b), 106.34(d), 106.37(b), 106.52, and 106.53(b). Section 106.21(b)(2) states, "A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex . . . ." Section 106.22 states, "A recipient . . . shall not give preference to applicants for admission . . . if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart." Section 106.23(b) states, "A recipient . . . shall not recruit primarily . . . at educational institutions . . . which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex . . . ." Section 106.34(d) states, "Where use of a single standard of measuring skill . . . in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect." Section 106.37(b) states, "A recipient may administer or assist in the administration of scholarships . . . which requires that awards be made to members of a particular sex . . . ; provided, that the overall effect . . . does not discriminate on the basis of sex." Section 106.52 states, "A recipient . . . shall not administer . . . any test . . . for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex . . . ." Section 106.53(b) states, "A recipient . . . shall not recruit primarily . . . at entities which furnish as applicants . . . predominately members of one sex if such actions have the effect of discriminating on the basis of sex . . . ." (Emphasis added).

Using the rationale of *Sharif*, supported by *Guardians*, a Title IX plaintiff should be able to use disparate-impact proof of discrimination if her claim is based on any of the above cited Title IX regulations.

150. *Sharif*, 709 F. Supp. at 361. For a detailed examination of the regulations reviewed by the *Sharif* court see *supra* note 149.

151. *Id.* The district court then applied the disparate-impact analysis to the plaintiffs' case and held that a prima facie case had been shown. *Id.* at 362. The court found the plaintiffs' statistical evidence, showing that women were far less likely than men to obtain scholarships based on SAT scores, to be convincing. *Id.* The court then opined that the plaintiffs could have won under the second stage of the analysis because the defendants failed to show an educational necessity for its practice. *Id.* However, the court stated that even if the defendants prevailed at that stage, they would have lost under the third part of the analysis. *Id.* at 363-64. The court found that there were alternatives to relying solely on SAT scores, for example, the defendants could have also factored in high school grades. *Id.*
The court in *Haffer v. Temple University*\(^{152}\) used a similar approach, although possibly somewhat broader than that taken in *Sharif*. In *Haffer* the defendants argued that Title IX only prohibited intentional discrimination.\(^{153}\) However, the district court promptly dismissed that argument.\(^{154}\) The court reasoned that, similar to the Title VI regulations at issue in *Guardians*, the Title IX regulations in the case sub judice did not impose an intent requirement.\(^{155}\) Specifically, the district court stated that the "Title IX regulations . . . do not explicitly impose an intent requirement."\(^{156}\) The court's language implied that disparate-impact treatment applies not only to Title IX regulations that are phrased in terms of "effects," but also to regulations that do not specifically require intent. The district court's reference to *Guardians*\(^{157}\) may indicate that the court did not intend to broaden the scope of disparate-impact analysis in this manner.\(^{158}\) However, this change in language, from requiring a regulation to prohibit discriminatory effects to requiring a mere showing that the regulation does not specifically impose an intent requirement, may allow greater latitude to Title IX disparate-impact plaintiffs.

These cases illustrate the trend of allowing disparate-impact proof to establish sex discrimination in Title IX cases. However, the reliance on Title VI and *Guardians* by these courts may limit "effects" analysis to those claims brought under Title IX's regulations, which prohibit practices that disproportionately impact women.

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\(^{153}\) *Id.* at 536. The defendant claimed that because there was no evidence of intentional discrimination, its conduct was not actionable under Title IX. *Id.* at 536-37. It is important to note that the plaintiffs in *Haffer* alleged violations of both Title IX and its implementing regulations. *Id.* at 539. Moreover, proof of discriminatory effect suffices to establish liability when suit is brought to enforce the regulations rather than the statute itself. *Id.* The case focused on the University's alleged sexual discrimination in its disparately-impacting treatment of women in the intercollegiate programs. *Id.* at 521.  
\(^{154}\) *Id.* at 539-40.  
\(^{155}\) *Id.* at 539.  
\(^{156}\) *Id.* (emphasis added).  
\(^{157}\) *Id.*  
\(^{158}\) The court did not hold that Title IX is broader than Title VI. The district judge stated that, "As there is no reason that a Title IX plaintiff should have a higher burden of proof than a Title VI plaintiff, I hold that plaintiffs need not prove discriminatory intent to succeed on their claim." *Id.* at 539-40 (citing both Cannon v. University of Chicago, 441 U.S. 677 (1979) and Chowdhury v. Reading Hosp. & Medical Ctr., 677 F.2d 317 (3d Cir. 1982), cert. denied, 463 U.S. 1229 (1983)).
IV. CONCLUSION

The lower courts, confronted with the question of whether disparate-impact analysis is applicable to Title IX cases of sex discrimination in education, have all answered in the affirmative. A minority of lower courts have applied the substantive standards of Title VII disparate-impact treatment directly in Title IX litigation. These courts have focused on the identical objective of the two statutes: the prohibition of sex discrimination.

The majority of courts have extended disparate-impact analysis to those cases in which the plaintiff has brought a claim based on Title IX regulations expressly prohibiting those policies which have a discriminatory effect on women. Courts taking this approach have relied on the Supreme Court's interpretation of Title VI, after which Title IX was patterned. Other courts may allow disparate-impact treatment when the Title IX regulations do not specifically require a showing of intent.

The better approach is that taken by those courts that apply Title VII's substantive standards outright in Title IX litigation. Congress enacted Title IX to prohibit sexual discrimination in education. Requiring proof of intentional discrimination does injustice to the statute's broad purpose. Title IX prohibits sexual discrimination. Title IX has no language suggesting that only intentional discrimination is forbidden. Under the rules of construction enunciated by the Supreme Court, if Congress had intended such a limitation, it could easily have done so.

Further, the important interest in eradicating the effects of societal discrimination that led the Supreme Court to recognize disparate-impact analysis in Title VII cases is also present in Title IX actions. Those interests, combined with the similar objectives of the two statutes, and the important goal of affording women equal educational opportunities, highlight the need to afford Title IX as broad a reach as Title VII.

159. See supra notes 105-09, 142-55 and accompanying text.
160. See supra notes 105-09 and accompanying text.
161. See supra notes 105-09 and accompanying text.
162. See supra notes 142-55 and accompanying text.
163. See supra notes 142-55 and accompanying text.
164. See supra notes 152-57 and accompanying text.
165. See supra note 15.
166. See supra note 121 and accompanying text.
167. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982). Congress can easily limit the scope of a statute through language showing a clear intent. Id. The fact that it did not is an indication that it did not intend to limit the scope. Id.
168. See supra notes 100-04 and accompanying text.
169. Both Title IX and Title VII prohibit sex discrimination. See supra notes 16, 98 and accompanying text.
170. See comments of Senator Bayh, supra note 5. See also statements of Repre-
However, the Supreme Court's reliance on its interpretation of Title VI when construing Title IX\(^\text{171}\) will likely result in its adoption of the *Guardians* disparate-impact approach in cases involving Title IX claims. Therefore, plaintiffs bringing a disparate-impact sex discrimination claim against an educational institution should base their cases on a violation of Title IX regulations prohibiting discriminatory effects.

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\(^{171}\) See supra note 131.