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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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1. 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:

[T]hroughout 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.

2. Ronald Kutscher, Associate Commissioner for Economic Growth and Employment at the Labor Department's Bureau of Labor Statistics, stated, "The movement of jobs is clearly in the direction of those requiring more education." Spencer Rich, *Economic Fortunes Fading For America's Less-Educated; Prime Blue-Collar Jobs Evaporating*, WASH. POST, June 2, 1988, at A1. See also Torsten Husen, *The School in the Achievement-Oriented Society: Crisis and Reform*, reprinted in EDWARD STEVENS

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

& GEORGE H. WOOD, JUSTICE, IDEOLOGY, AND EDUCATION: AN INTRODUCTION TO THE SOCIAL FOUNDATIONS OF EDUCATION 132, 133 (1987) ("Competition for employment increasingly revolves around such school records as grades, test scores, and degrees."); Jarolimek, *supra* note 1, at 22-23 ("[E]ducation in the postindustrial society is the prerequisite to survival."); ROBERT J. PARELIUS & ANN P. PARELIUS, THE SOCIOLOGY OF EDUCATION 66 (2d ed. 1987) ("Jobs that promise the maintenance of a middle-class lifestyle often require a college diploma, and many require an advanced degree as well.").

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 & ISIAH 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.⁹ 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-

mance of females in their freshman year of college, and *overpredicts* such academic performance for males." *Id.* (emphasis added). The *Sharif* court noted that "absent discriminatory causes, [the likelihood] that women would consistently score 60 points less on the SAT than men is nearly zero." *Id.* at 362. Therefore, when colleges and universities overemphasize SAT scores in their admission policies, women are adversely impacted. To combat this discriminatory effect, "researchers recommend that college admissions counselors use a combination of high school grades and test scores because this combination provides the highest correlation with freshman grades." *Id.* at 354. In addition, "the National Association of College Admissions Counselors' (NACAC) Code of Ethics requires member institutions to refrain from using minimum test scores as the sole criterion for admission . . ." *Id.* See also GABRIEL & SMITHSON, *supra* note 6, at 2. "In spite of the repeatedly demonstrated lack of correlation between women's performance in classwork and their scoring on the Scholastic Aptitude Test, admissions boards continue to use SAT scores to deny admission to some women and to disqualify others from financial support." *Id.*

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.¹¹ In today's competitive global market "no nation can afford to waste half of its human resources"¹² However, while not a new phenomenon,¹³ sexual discrimination in education has only recently gained recognition as a major problem in need of redress.¹⁴

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.¹⁵ 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."¹⁶ The administrative enforcement of Title IX rests with the Office for Civil Rights, Department of Education (OCR).¹⁷ The OCR's

tional programs. Society has a fundamental commitment to provide nondiscriminatory access to educational opportunities. Allocating such opportunities by means of a test that discriminates against women undermines that principle.

Id. at 811 (footnotes omitted).

11. See generally *supra* note 8.

12. BOGART, *supra* note 9, at 2.

13. See BOGART, *supra* note 9, at 213 (noting that sexual harassment has been a persistent problem in education); BARBARA A. BROWN ET AL., WOMEN'S RIGHTS AND THE LAW; THE IMPACT OF THE ERA ON STATE LAWS 302-04 (1977) (discussing long history of discrimination against women in both the public and private educational settings); MICHELE A. PALUDI, IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 2 (1990) (recognizing that women have always had to face sexual discrimination); MYRA P. SADKER & DAVID M. SADKER, SEX EQUITY HANDBOOK FOR SCHOOLS 5 (1982) ("[A]s far back as 1946, studies documented the extensive sex bias in textbooks."). See generally Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet To Go*, 10 CAP. U. L. REV. 447 (1981).

14. See MARGARET A. BERGER, LITIGATION ON BEHALF OF WOMEN 6 (1981) (noting the long history of discrimination against women but stating that "the concerted effort to achieve equal rights for women through the use of the courts has a far more recent history"); BOGART, *supra* note 9, at 1 ("Sex discrimination is seen as a legitimate issue and concern, in contrast to the almost total lack of awareness earlier.").

15. "In 1972, the provisions ultimately enacted as Title IX were introduced in the Senate by Senator Bayh during debate on the Education Amendments of 1972." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524 (1982). During the debate, Senator Bayh stated, "[T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds." 118 CONG. REC. 5803 (1972). See also 117 CONG. REC. 39, 252 (1971) (statement of Rep. Mink) ("[I]nstitutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which [women] are denied equal access.").

16. 20 U.S.C. § 1681(a) (1972).

17. BILLIE W. DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASS-

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-

MENT ON CAMPUS 19 (2d ed. 1990) (Title IX administered by the Office for Civil Rights).

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.

19. See BERGER, *supra* note 14, at 45 (noting a total lack of implementation by the agency required to enforce Title IX); MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* 83 (1987) ("Title IX sanctions are indirect and their effectiveness is limited."); SADKER & SADKER, *supra* note 13, at 1 ("Years after the passage of Title IX of the Education Amendments of 1972, sex bias and discrimination still permeate school life."); Elaine D. Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281, 292 (1987) (Termination of federal funding is a limited avenue for bringing a claim of discrimination.); see also *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The Court stated that the remedy under Title IX is "severe and often may not provide an appropriate means [of enforcement] . . ." *Id.* at 705. The Court also noted that under the similar enforcement provisions of Title VI, "Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort . . ." *Id.* at 706 n.38 (citing 110 Cong. Rec. 7067 (1964) (statement of Sen. Ribicoff)). Senator Ribicoff stated, "Personally, I think it would be a rare case when funds would actually be cut off." *Id.*

20. 441 U.S. 677, 689 (1979).

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.²² Further, in *Franklin v. Gwinnett County Public Schools*,²³ the Supreme Court recently held that damage remedies may be used in cases brought to enforce Title IX.²⁴

The legislature has also broadened the application of Title IX. In 1986, Congress enacted the Civil Rights Remedies Equalization Act,²⁵ which abrogates the states' Eleventh Amendment immunity in actions alleging a violation of Title IX.²⁶ In 1988, the Civil Rights Restoration Act²⁷ further broadened the scope of Title IX by applying Title IX on an institution-wide basis rather than on a program-specific basis.²⁸ 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.

23. 112 S. Ct. 1028 (1992).

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.

25. 42 U.S.C. § 2000d-7 (1986).

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).

27. 20 U.S.C. § 1687 (1988).

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.²⁹ 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.³⁰ 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.³¹ As discussed above, a number of testing devices adversely impact women in education.³² 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."³³ 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

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. 345, 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).

31. Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 554 (1987).

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.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.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*.³⁶ The plaintiff in *McDonnell Douglas* claimed that an employer had discriminated against him because of his race in violation of Title VII.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.³⁸ As a result, the Court enunciated a three-

34. Schneider, *supra* note 31, at 553. However, unlike a case where direct evidence of discriminatory motive is available, disparate-treatment cases allow the plaintiff to infer the discriminatory intent from circumstantial evidence. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."). See also Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1227-28 (1981) (discriminatory intent in disparate-treatment case may be inferred).

35. See Schneider, *supra* note 31, at 554.

36. 411 U.S. 792 (1973).

37. *Id.* at 794. Specifically, the plaintiff claimed that McDonnell Douglas Corp.'s hiring procedure was discriminatory. *Id.*

38. *Id.* at 800.

prong test to be applied in disparate-treatment cases.³⁹

First, the plaintiff has the initial burden of establishing a prima facie case of discrimination.⁴⁰ 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."⁴¹ However, a prima facie showing does not amount to a final finding of discrimination.⁴²

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.⁴³ However, the burden that shifts to the employer is one of production, not persuasion.⁴⁴ The Court made

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.

Id.

In a discriminatory firing situation the elements of a prima facie case would be somewhat different. A plaintiff would have to show: (i) that he was a member of a protected class; (ii) that he was qualified; (iii) that, despite his adequate performance of the job, he was fired; and (iv) that the position remained open and the employer took applications for the position. *See SCHLEI & GROSSMAN, infra* note 44, at 473 (Five-Year Cumulative Supplement). "Courts do not rigidly apply the *McDonnell Douglas* test, but fashion its elements to the facts of a particular case. For example, prima facie case requirements have been adapted for religious discrimination cases, discipline cases, and cases involving an academic setting." *Id.* (citations omitted).

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*, 450 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*,⁴⁵ when it emphasized that the employer is not required to show that its reasons were nondiscriminatory by a preponderance of evidence.⁴⁶ Rather, the employer need only "articulate some legitimate, nondiscriminatory reasons for the employee's rejection."⁴⁷ The plaintiff has the ultimate burden of proving intentional discrimination under a disparate-treatment analysis.⁴⁸

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.⁴⁹

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.*, 555 F.2d 1251, 1255 (5th Cir. 1980) ("[W]e 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 (8th Cir. 1980) ("The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason exists factually.").

45. 450 U.S. 248 (1981).

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.⁵⁰ Instead, the focus is on the consequences of the complained-of practice.⁵¹ The leading case involving disparate-impact analysis is *Griggs v. Duke Power Co.*⁵² The *Griggs* Court enunciated a three-prong test for cases using disparate-impact analysis.⁵³ Although *Griggs* involved a Title VII claim of discrimination,⁵⁴ courts have subsequently applied the *Griggs* analysis to other anti-discrimination statutes.⁵⁵

In *Griggs*, the employer used an aptitude test to determine whether persons were qualified for certain jobs.⁵⁶ The plaintiffs brought a Title VII action claiming racial discrimination.⁵⁷ The district court and the court of appeals found that the adoption of the tests was not racially

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).

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

55. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 592 (1983) (claims brought under Title VI's regulations subject to *Griggs* disparate-impact analysis); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 (10th Cir.) (Title VII disparate-impact treatment allowed in Title IX cases), *cert. denied*, 484 U.S. 849 (1987); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) (Title VII disparate-impact analysis may be used in ADEA case); *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (applying *Griggs* disparate-impact analysis to Title IX litigation); *Reilly v. Prudential Property & Casualty Ins. Co.*, 653 F. Supp. 725, 729-33 (D.N.J. 1987) (using Title VII disparate-impact analysis in ADEA case); *Popko v. City of Clairton*, 570 F. Supp. 446, 451 (W.D. Pa. 1983) ("ADEA plaintiff, like a plaintiff under Title VII . . . may prevail if he or she can prove . . . disparate impact").

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

57. *Id.* at 426.

motivated.⁵⁸ Therefore, the employer's hiring and promotion criteria were not actionable under Title VII.⁵⁹ The Supreme Court granted certiorari and reversed the lower courts' holdings.⁶⁰ The Court stated that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."⁶¹

In *Connecticut v. Teal*,⁶² 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.⁶³

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.⁶⁴ This is usually done through the introduction of statistical analysis tending to show that minorities or women have been adversely affected.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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.*

62. 457 U.S. 440, 446 (1982).

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.*

66. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650-51 (1989).

67. *Id.*

general area who possess the skills needed for the position. Simply using figures from the general population will usually be insufficient.⁶⁸ 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.⁶⁹

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."⁷⁰ 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?⁷¹ The Supreme Court put that question to rest, albeit momentarily, in *Wards Cove Packing Co., Inc. v. Atonio*.⁷² 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."⁷³ However, Congress overturned this portion of *Wards Cove* when it enacted the Civil Rights Act of

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). "[I]f 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.

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

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.*

72. 490 U.S. 642 (1989).

73. *Id.* at 649.

1991.⁷⁴ “The new law shifts the burden of demonstrating business justification squarely back onto the defendant.”⁷⁵

Another area that caused confusion was determining what the defendant needed to show under the second prong of the analysis.⁷⁶ *Griggs* held that an employer could justify its hiring practice by showing it was a “business necessity.”⁷⁷ 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.”⁷⁸ 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*.⁷⁹ 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.⁸⁰ 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.⁸¹ Nevertheless, it is clear that something more than the limited showing enunciated in *Wards Cove* is needed.⁸²

74. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991). That section states:

(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)).

77. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

78. *Wards Cove Packing Co. Inc. v. Atonio*, 490 U.S. 642, 659 (1989). *See also* LARSON, *supra* note 75, at 19.

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

83. *Connecticut v. Teal*, 457 U.S. 440, 447 (1982).

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.⁹⁷ 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.*⁹⁸ 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"⁹⁹ The Court expressly recognized that minority groups had historically been discriminated against.¹⁰⁰ 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.¹⁰¹ Moreover, women, like racial minorities, have tra-

The article discusses the difficulty of proving an intent to discriminate in these types of situations. *Id.*

97. *Id.* at 807-08.

98. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* involved a Title VII case of race discrimination. Title VII reads in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

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

42 U.S.C. § 2000e-2 (1964) (emphasis added).

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

100. *Id.* at 434. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *Id.*

101. See *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 n.4 (6th Cir. 1975). Although *Laugesen* was an ADEA case, the court noted the importance of the immutable char-

ditionally experienced discrimination in education.¹⁰² Further, the Supreme Court has acknowledged the similar discriminatory treatment of women and blacks. For example, in *Connecticut v. Teal*,¹⁰³ 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."¹⁰⁴ 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*,¹⁰⁵ to conclude that the same substantive standards should be applied for sex discrimination under Title VII and Title IX.¹⁰⁶ The

acteristics 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).

103. 457 U.S. 440 (1982).

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.

Id. at 897 (quoting H.R. REP. NO. 554, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 2462, 2512).

would create inconsistency in Title IX enforcement mechanisms and present a baseless distinction between sex discrimination in employment and sex discrimination in education."¹¹² 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 Act¹¹³ (ADEA), have answered in the affirmative.¹¹⁴ 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."¹¹⁵

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.

114. *See, e.g.*, *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (disparate impact is proper in ADEA case); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983) (applying Title VII's disparate-impact analysis to ADEA claim); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318, 1323 (11th Cir. 1982) (disparate-impact analysis may be possible); *Geller v. Markham*, 635 F.2d 1027, 1034 (finding disparate-impact in ADEA case), *cert. denied*, 451 U.S. 945 (1981) (2d Cir. 1980); *Reilly v. Prudential Property & Casualty Ins. Co.*, 653 F. Supp. 725, 729 (D.N.J. 1987) (allowing the use of the disparate-impact test in ADEA case); *Popko v. City of Clairton*, 570 F. Supp. 446, 451 (W.D. Pa. 1983) ("ADEA plaintiff, like a plaintiff under Title VII . . . may prevail if he or she can prove . . . disparate impact"). *But see* *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986). "The adverse impact analysis developed in Title VII cases cannot be extended easily to age cases." *Id.* at 1428 (citing *Cunningham v. Central Beverage Inc.*, 486 F. Supp. 59, 62-63 (N.D. Tex. 1980)).

115. *Borden's, Inc.*, 724 F.2d at 1394 (citing *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (9th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 & n.9 (9th Cir. 1981)); *See also Reilly*, 653 F. Supp. at 729 ("Because the provisions of the ADEA parallel those of Title VII, many courts have applied the principles of Title VII to cases involving age discrimination.") *Id.* (citing *Dreyer v. ARCO Chem. Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987)); *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.*, 789 F.2d 253, 256 (3d Cir. 1986); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Douglas*,

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-

656 F.2d at 532; *Rodriguez v. Taylor*, 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978)).

116. See *supra* note 114.

117. See SCHLEI & GROSSMAN, *supra* note 44, at 503. See also Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination In Employment Act*, 42 FLA. L. REV. 229 (1990). Kaminshine notes the widely held belief that "Congress intended the ADEA to prohibit a narrower brand of discrimination than that prohibited by Title VII . . ." *Id.* at 299. See generally Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 OHIO ST. L.J. 349 (1980); Donald R. Stacey, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMPLOYEE REL. L.J. 439 (1985); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Analysis*, 34 STAN. L. REV. 837 (1982). Cf. *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986). "The adverse impact analysis developed in Title VII cases cannot be extended easily to age cases." *Id.* at 1428.

118. 29 U.S.C. § 623(f)(1) (1988).

119. *Markham v. Geller*, 451 U.S. 945, 945-49 (1981) (Rehnquist, J., dissenting from denial of certiorari). See also Kaminshine, *supra* note 117, at 301.

The treatment by courts of identical language in the Equal Pay Act of 1963 further supports this view. The Equal Pay Act states in pertinent part:

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex.

neutral factors confines the statute to a disparate-treatment model of discrimination.¹²⁰ 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."¹²¹ 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.¹²² However, unlike women and minorities,¹²³ there is a lack of historical discrimination against persons in ADEA's protected class.¹²⁴ The Supreme Court has opined that the aged do not

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*, 452 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).

122. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971).

123. See *Connecticut v. Teal*, 457, U.S. 440, 447 (1982) (recognizing historical discrimination against both blacks and women).

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,"¹²⁵ and old age is not an immutable characteristic.¹²⁶ The overwhelming majority of lower courts that have accepted disparate-impact proof in ADEA cases¹²⁷ mandate the same treatment for Title IX litigants, given Title IX's broader scope.¹²⁸ 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 1964¹²⁹ 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.¹³⁰ Further, the Supreme Court has often looked to Title VI for guidance when construing Title IX.¹³¹ 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*.¹³² In *Guardians*, the Supreme Court held that "the Court of Appeals erred in requiring proof of intent."¹³³ In a complicated and convoluted opinion,¹³⁴ 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.

131. *See Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1032 (1992) (noting that Title IX and Title VI case law has evolved along parallel lines); *Grove City College v. Bell*, 465 U.S. 555, 566 (1984) ("Title IX was patterned after Title VI"); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514 (1982) (Title IX designed after Title VI); *Cannon v. University of Chicago*, 441 U.S. 677, 697-98 (1979) (prior interpretation of Title VI dispositive on similar issue under Title IX).

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.¹³⁵ 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.¹³⁶ The Title VI regulations upon which the claim is premised, however, must evince a prohibition on discriminatory effects.¹³⁷ In *Guardians*, the Court noted that the Title VI enforcing agency had promulgated regulations prohibiting disparate-impact discrimination.¹³⁸ 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 (1985) (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).

138. *Guardians*, 463 U.S. at 592.

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

The similarity in language between the two statutes¹⁴⁰ and the Supreme Court's reliance on Title VI when interpreting Title IX¹⁴¹ have led most lower courts to look for guidance from *Guardians*.¹⁴² In *Sharif v. New York State Education Department*,¹⁴³ a Title IX claim of sex discrimination was brought against the New York State Education Department.¹⁴⁴ The plaintiffs argued that the defendant's policy of depending solely on SAT¹⁴⁵ scores in granting scholarships disparately affected female students in violation of Title IX and its implementing regulations.¹⁴⁶ After noting that the Supreme Court had not decided whether

139. *Id.* It is a long-standing policy of the Supreme Court to give deference to regulations promulgated by the agency responsible for enforcement of the statute in question. *See, e.g.,* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 74 (1986) (Marshall, J., concurring) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)) (administrative guidelines of Title VII promulgated by EEOC entitled to great deference); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."); *Lukhard v. Reed*, 481 U.S. 368, 381 (1987) (administrative interpretation entitled to deference); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) ("[T]he administrative interpretation of [a statute] by the enforcing agency . . . [is] entitled to great deference.") (quoting *Griggs*, 401 U.S. at 433-34); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (administrative guidelines entitled to great deference); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) (administrative construction entitled to deference).

140. *See supra* note 130.

141. *See supra* note 131.

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).

143. 709 F. Supp. 345 (S.D.N.Y. 1989).

144. *Id.* at 360.

145. SAT stands for Scholastic Aptitude Test.

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

disparate impact was applicable to Title IX cases, the district court looked to Title VI and the *Guardians* opinion for instruction.¹⁴⁷ The district court found that the regulations promulgated under Title IX, which should be accorded deference,¹⁴⁸ were as comprehensive as those relied on in *Guardians*.¹⁴⁹ Like the Title VI regulations, the Title IX regulations reviewed by the district court prohibited policies that had a discriminatory effect.¹⁵⁰ Therefore, the court held that the plaintiffs could base their claim on the disparate impact of the defendant's practice.¹⁵¹

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 360-61.

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.

152. 678 F. Supp. 517 (E.D. Pa. 1987).

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.¹⁵⁹ A minority of lower courts have applied the substantive standards of Title VII disparate-impact treatment directly in Title IX litigation.¹⁶⁰ These courts have focused on the identical objective of the two statutes: the prohibition of sex discrimination.¹⁶¹

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.¹⁶² Courts taking this approach have relied on the Supreme Court's interpretation of Title VI, after which Title IX was patterned.¹⁶³ Other courts may allow disparate-impact treatment when the Title IX regulations do not specifically require a showing of intent.¹⁶⁴

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.¹⁶⁵ Requiring proof of intentional discrimination does injustice to the statute's broad purpose.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ Those interests, combined with the similar objectives of the two statutes,¹⁶⁹ and the important goal of affording women equal educational opportunities,¹⁷⁰ 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 IX¹⁷¹ 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.

sentative Mink, *supra* note 15. See generally *Civil Rights—Disparate-Impact Doctrine*, *supra* note 6, at 807.

171. See *supra* note 131.

