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Cooper G & Sobol R B. Seniority and testing under fair employment laws: a general approach to objective criteria of hiring and promotion.

Harvard Law Rev. 82:1598-679, 1969.

[Columbia Univ., Sch. Law, New York, NY and Univ. Michigan Law Sch., Ann Arbor, MI]

The article analyzes patterns of race discrimination in employment in the late 1960s, with special emphasis on the implications of seniority systems and standardized "intelligence" and "aptitude" tests, and identifies the discriminatory impact of these practices. An approach is proposed to interpreting and applying Title VII of the Civil Rights Act of 1964 to enable successful legal challenge of such practices. [The *Social Sciences Citation Index*® (SSCI®) indicates that this paper has been cited in over 130 publications.]

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It is fairly unusual for an article from a law review to be noted this often in the social sciences literature. That pleases us, but it is ironic. We did not set out to reach sociologists or psychologists, but rather courts. Unlike most work of law professors, this article did not analyze past judicial decisions. Instead, it tried to catch an issue on the rise, to influence the way that the issue was handled.

The article deals with one of the more important legal-public policy issues of its time—how the employment discrimination provisions of the Civil Rights Act of 1964 were to be interpreted and enforced. Some naively believed that discrimination in employment—one of the key subjects of the act—might just die away when confronted with the majesty of federal legislation.

The problem was that discrimination did not stop; it went below the surface and behind pretexts. Blacks did not have, and were not getting, the good jobs. But there was always an excuse. The more we looked into the matter, the clearer it became. Either some way

had to be found to interpret the act to give it the power to cope with these excuses, or the act would be a dead letter.

There were ample warnings of how easily an act such as this could be negated by evasive employers. State laws against employment discrimination had been on the books for years. A study of the cases decided under those laws revealed a sorry pattern of ineffectuality. An aggrieved person had to prove discriminatory intent: when the employer said that John was better than Jack, how could a court second-guess the employer's appraisal of employee qualifications?

Along with other civil rights lawyers, we began to examine how the federal act might be made more effective than its state predecessors had been. Several ideas suggested themselves. First, the nature of the discrimination was based on class—not that Jack was treated worse than John, but that a certain group of people was treated worse than another group, and therefore, a class or group approach to enforcement was essential. Second, subjective appraisals had to give way to objective evaluations. Third, these objective evaluations had to relate to actual job needs.

This article was an attempt to develop an enforcement theory based on these three ideas. It argues for an "effect-oriented" approach to evaluating discrimination rather than the "intent-oriented" approach followed by earlier laws. Because it was the first attempt to fully develop and elaborate this approach, the article received a lot of attention. The major cases, beginning with the decisions of the US Court of Appeals in the *Local 189* case¹ and the US Supreme Court in the *Griggs* case,² all embraced this new approach, and for many years it dominated employment discrimination litigation.

Even today, although a more employer-friendly Supreme Court has shifted interpretation of the law back to an intent-oriented approach in some situations,³ the "effect" approach still holds sway as a general matter. With that proposition established, it may be that our article has now found its ultimate niche—in the world of social sciences literature rather than that of legal action.

1. *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969) (seniority systems).

2. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (standardized testing).

3. *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977) (seniority systems).