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The *Uniform Guidelines*: Better the Devil You Know

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We agree with McDaniel, Kepes, and Banks' (2011) conclusions that the *Uniform Guidelines on Employee Selection Procedures* (Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor, & Department of Justice, 1978) is inconsistent with scientific knowledge and professional practice. We also agree that findings based upon a quantitative analysis of disparate impact should not trigger legal action. We do not agree, however, that the *Uniform Guidelines* should be extensively revised as a response to scientific inconsistencies. We would argue that (a) the *Uniform Guidelines* was meant to assist federal agencies with the investigation of firms to ensure proportional representation among protected groups and was not intended as a representation of the state of knowledge today or in the mid-1970s, (b) the real problem with the *Uniform Guidelines* is the disparate impact theory of discrimination, which over the past 30 plus years has been endorsed by the courts and by the legislature in the Civil Rights Act of 1991 and thus will not be eliminated by rewriting the *Uniform Guidelines*, and (c) allowing for validity generalization-based approaches is unlikely to change the outcomes of court cases if in rebuttal plaintiffs can simply propose the existence of alternative selection procedures with less disparate impact.

Thus, a revision of the *Uniform Guidelines,* inevitably involving the United States Department of Justice, could result in even more distortions of scientific findings in the field of industrial–organizational (I–O) psychology than those existing in the current version and without solving the fundamental, underlying problems encountered in defending valid assessments against claims of disparate impact. Instead, we propose that legislation is needed that amends Title VII to remove the disparate impact theory of discrimination entirely. Given such action lies outside of the control of the Society for Industrial and Organizational Psychology (SIOP), we believe the only action SIOP should take is a revision of its 2003 *Principles for the Validation and Use of Personnel Selection Procedures* with the addition of peer-reviewed references and a clear statement decrying the armchair presentation of statements with regard to alternative selection devices.

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The Purpose of the *Uniform Guidelines*

As originally drafted in the 1970s, the purpose of the *Uniform Guidelines* was to assist federal agencies with the investigation of firms to ensure proportional representation among protected groups. The *Uniform Guidelines* was not written as a scientific document, nor was it ever intended to be a scientific document. Therefore, we believe that asking SIOP to play a role in revising the *Uniform Guidelines* will not solve the problems that exist. SIOP has its own scientific document (*Principles*) available for researchers and practitioners to rely on, and it is more important to ensure this document is kept up to date with the scientific literature.

The *Uniform Guidelines* is most often relied upon by the courts and organizations in reference to the 80% rule used to determine if there is evidence of disparate impact. However, the 80% rule has become largely obsolete as courts are now allowing a wide range of statistical techniques and approaches to establish disparate impact (*Howe v. City of Akron*, 2010; *Isabel v. City of Memphis*, 2005; *United States v. City of New York*, 2010). If one approach does not demonstrate evidence of disparate impact, plaintiffs can easily find another approach that does. Further, what we can be sure of is that it does not matter what selection procedure is used, plaintiffs' experts will testify it has disparate impact, is not really valid, and a better procedure existed (Barrett, Doverspike, & Young, 2010).

Disparate Impact Theory of Discrimination

The real problem is that the *Uniform Guidelines* is not alone in subscribing to the disparate impact theory of discrimination. The courts and the Civil Rights Act of 1991 also endorse disparate impact theory as an approach to demonstrating illegal discrimination against protected groups.

The disparate impact theory of discrimination has three separate components. First, the plaintiff must show evidence of disparate impact using the 80% rule or some type of statistically significant finding. Second, in response to a finding of disparate impact, the defendant must then try to show the test is valid. Third, even if the defendant demonstrates the test is valid, the plaintiff may then show that there is an equally valid alternative selection procedure available with less adverse impact.

One of the problems with the disparate impact theory of discrimination is that we have numerous, often complex statistical techniques being used to demonstrate disparate impact. Researchers do not agree on which statistical methods are appropriate. A new version of the *Uniform Guidelines* would not alter the fact that it is relatively easy for a plaintiff's expert to find some numerically-based approach to demonstrate disparate impact, even if the 80% rule was eliminated from inclusion in a new *Uniform Guidelines*.

In addition, knowledge, skills, and abilities (KSAs) in our society are not equally distributed across various groups, such as age, gender, and race. This leads to findings of disparate impact. Thus, we are bound to continue to find evidence of disparate impact as long as groups differ in mean level of KSAs. This allows plaintiffs to continue to rebut defendants' evidence of test validity using only anecdotal evidence.

Although scientific evidence concerning educational differences as a cause of disparate impact may have no legal significance (Barrett, 2010; *United States v. City of New York*, 2009), we argue that it does have professional significance. Therefore, we propose that researchers should collaborate and engage in a professional discussion of ethnic group differences in test scores. The best evidence to date indicates there will be disparate impact for at least the next 100 years (Barrett, 2010). But that evidence and the actual reasons for disparate impact appear to be of little concern to the courts. However, it should be of concern to researchers attempting to understand the basis for disparate impact.

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Plaintiffs' Arguments Over Alternatives

For an assessment or consulting firm today, and its public or private sector clients, perhaps the second most troubling sections of the *Uniform Guidelines* are the sections dealing with the investigation of alternative selection devices. For example, the *Uniform Guidelines* state that ''Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines.'' The seemingly innocuous call to consider alternatives has led to the current state where plaintiffs' experts can simply claim that some hypothetical alternative would have resulted in less disparate impact with equal validity; such simple claims, often presented without any collaborating evidence, can overturn or negate even the best designed selection battery (*Ricci v. Destefano*, 2009).

The assertion of alternatives has become more common in recent years as this approach has found success in the courts. Even if the *Uniform Guidelines* was changed to allow for the argument that intelligence tests were a priori valid in most situations, such a change would have little value if such a claim could be rebutted by a simple assertion of the existence of devices with less disparate impact and equal validity.

Let Sleeping Dogs Lie or Better the Devil You Know

As time has passed, the *Uniform Guidelines* has become less relevant and obsolete as a result of revisions to the Civil Rights Act and a series of court cases. It is our opinion that the long-term solution to the core problems with the *Uniform Guidelines* would be legislation that amends Title VII to remove the disparate impact theory of discrimination. However, the U.S. Supreme Court recently disagreed with an appellate court's opinion that disparate impact theory was a variant of disparate treatment theory. The Supreme Court held that the appellate court was mistaken, thereby reaffirming two distinct legal theories of discrimination (*Lewis v. City of Chicago*, 2010). In commenting on the two theories of discrimination, a unanimous Supreme Court (*Lewis v. City of Chicago*, 2010) stated that ''some claims that would be doomed under one theory will survive under the other, that is the product of the law which Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.'' Nor is it SIOP's responsibility to rewrite the *Uniform Guidelines*.

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