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The Use of Labor Statistics and Analysis in Title VII Cases:  
*Rios, Chicago* and Beyond

Marc Rosenblum †

Title VII litigation often requires reference to economic ideas. The author examines three economic paradigms commonly employed in Title VII cases: labor force, labor market, and demographics. He discusses these concepts in terms of both establishing a prima facie case and fashioning a remedy. An examination of recent cases shows that courts have often applied the concepts incorrectly. The author argues for greater consistency in the use of these ideas.

Title VII of the Civil Rights Act of 1964¹ seeks to rectify discrimination in employment based on race, color, religion, sex, or national origin. Such discrimination contributes to economic inequality and various social problems. Unambiguous enforcement of Title VII is necessary both to assure optimum utilization of the nation’s manpower resources and to maintain social stability.

Employment practices and patterns that affect groups of persons are subject to measurement by economic statistics. Until recently, however, little attention has been given to the proper application of such statistics in Title VII cases. This has been due, in part, to the fact that the incidence of discrimination in most cases has been so clearcut that it was easily established, by whatever standard the court applied. Many recent and ongoing cases are less clearcut than the early pattern-and-practice suits, or than situations in which minority group members were excluded from either entire job categories or all employment. To an increasing degree, the use of labor statistics will be required to sort out and interpret the evidence in such class or group cases.² As Finkelstein noted in a related context, "Every

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². See text accompanying note 31 infra.
successful use of technical information by the law has had to travel the path from strangeness to indispensability.  

This article focuses on variations in past judicial treatment of labor statistics in Title VII cases. While a number of courts have handled with increasing sophistication the varied mix of economic and demographic factors confronting them in this area, others have either failed to consider or incorrectly applied data regarded as relevant by economists who deal with employment problems.

The article will examine labor statistics and their major components—labor force and labor market data—to the extent that each type of information plays a role in employment discrimination law. Each component will be defined, described, and discussed in a Title VII-related framework. The guidelines and principles provided by such statistics have been all but ignored by the courts.

Detailed attention is given to two recent rulings, Rios v. Steamfitters, Local 638, and United States v. City of Chicago. Each serves as a prototype of the use of economic concepts and labor statistics: Rios in a positive and proper manner, City of Chicago in a deficient and improper one. Rios has been a model for subsequent decisions within the Second Circuit, particularly for cases in which it is necessary to modify the basic labor force

3. Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966). Bernoullian logic and probability theory were applied to jury selection procedures, reaching conclusions at variance with Supreme Court decisions that were arrived at without sophisticated mathematical analysis. See also Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harv. L. Rev. 387 (1975). Multiple regression and analysis of variance, both advanced statistical techniques, offer expanded ability to analyze wage differentials and "facilitate the truth-finding process." Cf. Wade v. Mississippi Cooperative Extension Serv., 528 F.2d 508 (5th Cir. 1976) (evidence developed by multiple linear regression accepted in partial proof of plaintiff's case). The Fifth Circuit in Wade also reached a nonstatistical finding of discrimination, admitting it was hesitant to affirm the district court without "... evidence beyond the statistical facts and analysis that would support an inference of discrimination." Id. at 517.

4. For example, the court in Kirkland v. New York State Dep't of Corrections, 520 F.2d 420 (2d Cir.), rehearing en banc denied, 531 F.2d 5 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3263 (Oct. 5, 1976), distinguished between public sector and private sector employees. Such a distinction does not exist in the framework of labor market analysis. To the extent that the decision was influenced by this consideration, it is ill-founded.

5. This omission contrasts with the Court's detailed discussions of employment testing techniques and procedures. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The testing process as part of selection procedure, and the validity of employment tests, are related to (but outside the scope of) economic analysis of employment patterns. Industrial psychologists have played active roles in Title VII litigation from its outset, while economists have only more recently been utilized as experts.

6. 400 F. Supp. 983 (S.D.N.Y. 1975), on remand from 501 F.2d 622 (2d Cir. 1974). The author served as consultant and expert for plaintiff in the remand phase of this case.

7. 411 F. Supp. 218 (N.D. Ill. 1976), appeal argued, No. 76-1113, 7th Cir., June 14, 1976. Subsequent to the preparation of this article, the district court issued a revised order. The previously decreed hiring formula was suspended, permitting the City of Chicago to hire police officers from a roster containing 25.8 percent black and Spanish surnamed men and 23.9 percent women. U.S. v. City of Chicago, 14 FEP Cases 458, 461-62 (N.D. Ill. Sept. 7, 1976), aff'd, 14 FEP Cases 462 (7th Cir. Jan. 16, 1977).
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comparison to reflect additional relevant factors. City of Chicago, on the other hand, strikingly illustrates the judicial confusion that can ensue over determining the appropriate relief in a case in which other issues predominate, but in which a remedial quota must still be fashioned.

The article concludes that, following the examples of these cases, broader and more uniform judicial sensitivity to principles of labor economics is required to preclude a further tangle of inconsistent Title VII decisions. Since the range of Title VII remedies includes imposition of numerical employment patterns, a uniform and consistent interpretation of those patterns by the courts is essential to avoid the morass of disparate outcomes that could otherwise result.

I

THE QUESTION OF PROPORTIONALITY IN EMPLOYMENT DISCRIMINATION

Labor statistics can play two roles in a Title VII case. First, they may contribute to a prima facie showing of discrimination. Second, they may aid in the fashioning of a remedy.

Although Title VII speaks of intentional discrimination, courts have consistently held that all that is required to establish violation of the law is that the employment practice not be accidental. A number of cases have referred to statistical analyses to establish employer misconduct. In fact, statistics are generally the most telling evidence in a Title VII case. This view was expressed clearly by Judge Celebrezze in Senter v. General Motors Corp.

Statistical evidence is an important tool for placing seemingly in-offensive employment practices in their proper perspective. Proof of overt racial discrimination is seldom direct. An employee is at an inherent disadvantage in gathering hard evidence of employment discrimination, particularly when the discrimination is plant wide in scope. It is for this reason that we

9. Special expertise to assist with complex issues is available to a district court, and has been used in Title VII contexts to determine several years' back pay for a large plaintiff class and to administer union membership programs. Similarly, a Special Master can be appointed under Rule 53 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636 (1970), to analyze labor statistics and make appropriate recommendations.
generally acknowledge the value of statistical evidence in establishing a prima facie case of discrimination under Title VII. 14

Once the plaintiff has presented a prima facie case, the burden shifts to the defendant to rebut. 15 Statistical evidence of discrimination may be rebutted in one of two ways. First, the statistics can be shown to be misleading. Second, the employer can establish non-discriminatory reasons for its policies. 16

Users of statistics in a Title VII context must confront two basic problems. First, the relevant comparison group must be defined. The group might consist of the aggregate pool from which employees are drawn, or it might be refined to consist, for example, of persons holding specific credentials (provided that access to those credentials is not impeded by practices that violate Title VII). The concept of a relevant comparison group will be developed at length in Part II of this article.

Second, the degree of disparity necessary to make out a prima facie case must be defined. No authoritative statement can be made on this subject for two reasons. First, no court has directly addressed the question. Second, it is likely that in any close case plaintiff would not rely solely on statistics, but would present some corroborative evidence. Thus, a prima facie case might be established even where the statistical disparity is marginal.

Once a prima facie case has been established, some remedy must be fashioned. The basic philosophy of Title VII suggests that under discrimination-free circumstances a proportional distribution of people to employment by race and sex would ensue. The ultimate aim of an employment discrimination remedy is to restore injured workers to the "rightful place" they would have held in the world of work, absent illegal behavior on the part of an employer or union. When necessary, courts have imposed specific formulae to achieve greater proportionality between white and non-white workers in pursuit of this aim. 17 Labor statistics are particularly useful in designing such a quota.

There are, however, two problems inherent in the use of quotas as

14. Id. at 527 (citations omitted).
17. The rightful place or make-whole concept was first enunciated in Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). This case permitted plant-wide rather than departmental seniority to be used by blacks who were inhibited from transferring to better jobs by rules restricting seniority carryover. As a result, the union had to merge with another union. Other effects of this rule on unions have been: (1) to require a union to revise its standards for admission to membership, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); (2) to require a union to admit a specific number of minority apprentices immediately, United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1972), cert. denied, 412 U.S. 939 (1973); and (3) to require a union to modify its transfer rules, Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), cert. granted, 96 S. Ct. 2200 (1976). See generally Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1964).
remedies. First, it is uncertain that quotas are legal. Section 703 (j),\(^{18}\) which governs this question, reads:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Most circuits have decided that hiring and employment quotas are permissible.\(^{19}\) The courts have clearly been less inhibited in fashioning numerical relief following passage of the 1972 amendments to Title VII, and the defeat of two Senate attempts to prohibit the use of quotas.\(^{20}\) Further, there is a growing consensus that the limitation of section 703(j) cannot be used to immunize prior illegal behavior from remedy, particularly considering the positive authority of section 706(g) to fashion appropriate equitable relief. Since late 1975, a series of decisions has both clarified the use of quotas, and, within the Second Circuit, established a “two-fold test” governing their imposition which is narrower than previous rulings within that circuit.\(^{21}\)


\(^{19}\) All circuits except the Fourth and Tenth have held that quotas are permissible; and the Fourth recently rejected a specific plan (but not the principle) from which an appeal was taken. Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). Cases in other circuits are: Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Patterson v. Newspaper & Mail Deliverers Union, 514 F.2d 767 (2d Cir. 1975), cert. denied, 96 S. Ct. 3198 (1976); Pennsylvania v. O’Neill, 473 F.2d 1029 (3d Cir. 1973); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970); Southern Illinois Builders Ass’n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. N.L. Indus., 479 F.2d 354 (8th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

However, the Supreme Court’s recent holding in McDonald v. Santa Fe Trails, 96 S. Ct. 2574 (1976), that the Civil Rights Act of 1871, 42 U.S.C. § 1981 (1970), guarantees equal treatment to white workers, makes the proscription of all quotas distinctly possible.


\(^{21}\) The Second Circuit’s “Kirkland test” was formally articulated by Judge Smith: it permits temporary quotas only when “a clear-cut pattern of long-continued and egregious racial discrimination” exists; but “the effect of reverse discrimination must not be . . . concentrated upon a relatively small, ascertainable group of non-minority persons.” EEOC v. Sheet Metal Workers Local 638, 532 F.2d 821, 828 (2d Cir. 1976). The test was first used in Kirkland v. New York State Dept’t of Correctional Servs., 520 F.2d 420 (2d Cir.), rehearing en banc denied, 531 F.2d 5 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3236 (Oct. 5, 1976). See also Chance v. Board of Examiners, 534
The Supreme Court has recently granted certiorari in two cases that focus on quotas in employment. It is to be hoped that the court will make clear its position on their legality.

The second problem associated with the use of quotas is that of their specific design. Perhaps a consensus regarding rational, uniform methods of utilizing statistical data must await final confirmation that quantitative measurement for the purpose of fashioning quotas is permissible. From a labor economist’s perspective, however, the issue of how to employ statistical techniques is as vital as the decision to use them. Overlooking these problems has caused judicial inconsistency. While a certain amount of variance is allowable as within the trial court’s discretion to fashion equitable relief, proper use of labor statistics would create at least some predictability in this area of the law.

II

THE SCOPE OF ECONOMIC CONSIDERATIONS

Three distinct statistical concepts can be employed in Title VII litigation: labor force statistics; labor market statistics; and demographic statistics. Labor force statistics focus on the supply of workers and their characteristics. Labor market statistics focus on the area (in terms of geography and skills, among other things) from which employers fulfill labor needs. Demographic analysis focuses on the characteristics of the aggregate population.

A. Labor Force

The labor force is shaped by a variety of individual decisions. These decisions involve the question of whether to participate in the labor force and can be influenced by a number of factors, including age, sex, education, health, wealth, and the job status and income of other family members. For

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22. Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), cert. granted, 96 S. Ct. 2200 (1976); United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), cert. granted, 96 S. Ct. 2200 (1976). In the Rodriguez case, the questions presented were: (1) did the court of appeals properly rely on undifferentiated statistical evidence in entering a finding of liability in favor of plaintiff; and (2) does the mere imbalance in racial composition of employees in particular job classifications justify the court’s disregard of the legal standard for proof of an individual claim of discrimination. In the T.I.M.E.-D.C. case, the question was: are statistical reflections of a present disparity in proportion of white versus minority employees “dispositive” in pattern or practice suits under section 703 of Title VII, where the court of appeals has found that the employer has made a “laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignments.”
example, an individual with family support obligations might make decisions about participation in the labor force without reference to the availability of work. The aggregate of such decisions determines the composition of the labor force.\textsuperscript{23}

In a Title VII context, the labor force can be categorized by different racial groups or by sex. If necessary, the labor force can be further qualified, either by occupation (e.g., school teacher or pastry chef), or by geographic area.

It is important to distinguish between the total labor force, including the military, and the civilian labor force.\textsuperscript{24} This difference can affect proportionality, as skills, residence, and ethnic affiliation are likely to be distributed differently in the armed forces than in the civilian sector.

The civilian labor force consists of all nonmilitary persons, 16 years or older, who are either at work or seeking a job.\textsuperscript{25} "Seeking a job" means having made an overt effort to find a job within the preceding four weeks.\textsuperscript{26} This effort is defined broadly: it can be either direct, through contact with employers (the plant gate, inquiry letters, answering ads, etc.), or indirect, through private employment agencies or state manpower services for example.

This definition excludes two classes of people from the labor force. First, there are people who would like employment but are precluded by the primacy of other factors not related to work itself. Thus, people who cannot take jobs because of family obligations or illness are not considered to be in the labor force.

The second excluded group consists of those people who do not seek jobs. Failure to seek jobs can be either positive (those who do not want work) or negative (those who do not perceive jobs as available and have given up trying to find one).\textsuperscript{27} This latter category, known as "discouraged workers," is the subject of continuing debate among labor economists. There is evidence to support the position that many of these persons would work if economic conditions permitted, and that they should be counted as unemployed members of the work force.\textsuperscript{28}

In no Title VII case to date has evidence which counted discouraged

\textsuperscript{23} For example, the entire U.S. labor force numbered 97.7 million persons in October, 1976, including all categories of age, sex, and race. 23 EMPLOYMENT & EARNINGS, Nov. 1976, at 19.

\textsuperscript{24} U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REPORT NO. 313, CONCEPTS AND METHODS USED IN MANPOWER STATISTICS FROM THE CURRENT POPULATION SURVEY 5 (1967). This difference can affect proportionality, as armed forces membership, residence, and ethnic affiliation are likely to be distributed differently.

\textsuperscript{25} Id. at 4-5.

\textsuperscript{26} Id. at 5.

\textsuperscript{27} Id.

\textsuperscript{28} Vietorisz, Mier, & Giblin, Subemployment: Exclusion and Inadequacy Indexes, 98 MONTHLY LAB. REV. 3 (May 1973); Rosenblum, Discouraged Workers and Unemployment: A Further Analysis by Color, 1974 PROCEEDINGS OF THE AMERICAN STATISTICAL ASS'N, SOCIAL SCIENCE SECTION 416 (1975).
workers as part of the labor force been admitted. One possible reason for this general reluctance to include discouraged workers in the labor force is that statistics on discouraged workers are published only for the entire United States, rather than by area.\textsuperscript{29} But this is an inadequate justification, because statistical techniques allow calculation of the impact of discouragement for a given area.

The use of the concept of labor force is best understood through example. Suppose that in a particular Title VII suit the relevant comparison group was made up of men between the ages of twenty and thirty-five who had not gone beyond high school.\textsuperscript{30} The number of minority group members of the labor force who fit that description would be compared with the number of non-minority members of the labor force who fit that description to yield a proportion which would be the yardstick for the suit. This is the proportion of minority workers that it would be reasonable to expect to find on the defendant’s payroll were it completely free of discrimination.

Incidents of discrimination against individuals or small numbers of persons are less amenable to proof by statistical analysis than are incidents of discrimination against groups. Statistical proof was held not relevant, for example, where two candidates were qualified for promotion, the male was selected, and the female claimed that her being bypassed constituted a prima facie case of sex discrimination.\textsuperscript{31} The Court in Harper v. Trans World Airlines, Inc.\textsuperscript{32} emphasized this distinction between individuals and groups, saying:

\begin{quote}
[S]tatistical evidence derived from an extremely small universe, as in the present case, has little predictive value and must be disregarded.\textsuperscript{33}
\end{quote}

Discrimination against individuals is generally more purposeful than discrimination against groups. Judgments about groups are likely to be based on preconceptions of the attributes of members, without regard to either differences between the individual and the group or the absence of differences from group to group.\textsuperscript{34}

Some Title VII cases require that the concept of labor force be em-

\textsuperscript{29} This is because data on discouraged workers are gathered solely through the national interview system of the Bureau of Labor Statistics. See, e.g., 22 EMPLOYMENT & EARNINGS, Jan. 1976.
\textsuperscript{30} See section B, infra, for a discussion of the impact of the concept of labor market on shaping the relevant comparison group.
\textsuperscript{31} Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976). See also Morita v. Southern Cal. Permanente Medical Group, 12 EPD ¶ 11161 (9th Cir. 1976); Chicano Police Officers Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975), vacated, 96 S. Ct. 3161 (1976); Ochoa v. Monsanto Co., 473 F.2d 318 (5th Cir. 1973); Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975).
\textsuperscript{33} 525 F.2d at 412.
\textsuperscript{34} The distinction may be made between overt and statistical discrimination. In the latter, an employer is likely to stress the facially neutral aspect of his employment policies, and attribute any disparate impact to other factors.
ployed in a rather qualified form. These are cases involving different occupational or hierarchical categories within a particular firm, where it is often not necessary to refer to outside benchmark data. Typically, the overall proportion of minority employees in the firm is consistent with that in the area's labor force.\textsuperscript{35} Such intra-labor force comparisons are particularly useful when transfer or seniority provisions are in issue. For example, in \textit{United States v. Bethlehem Steel Corp.}\textsuperscript{36} all workers in a steel mill constituted the comparison group in a case in which it was alleged that blacks were restricted to less desirable departments. Sometimes the comparison group is even further circumscribed. This was the case in \textit{Head v. Timken Roller Bearing Co.}\textsuperscript{37} which was a seniority and transfer case where only part of the entire firm was utilized as the comparison group.\textsuperscript{38}

The basis of comparison in a case does not determine its complexity. Intra-labor force analysis covering an entire plant can be quite complex,\textsuperscript{39} while a comparison of company or union to area labor force patterns might be fairly simple. In general, comparisons between a firm and other labor market units do permit a wide base of data to be used and a detailed body of evidence to be developed.

\textbf{B. Labor Market}

Labor market statistics deal with the demand for labor by employers, and the matching process of labor supply to that demand under varying wages and terms of employment. There is no single labor market, except as an abstract concept. Rather, there are thousands of separate markets, based on specific requirements of single employers, or of all employers within a defined location or industry.

Labor markets can be conceptualized in terms of a worker’s (a) occupation, (b) location, (c) union affiliation, and (d) education, training, and skills. All these factors operate side by side. Few employers seek simple “labor” without any regard for qualifications.

Most labor markets are defined by a broad job category, at the very least.\textsuperscript{40} For example, a construction contractor preparing to build houses

\begin{itemize}
\item \textsuperscript{35} \textit{See}, \textit{e.g.}, James v. Stockham Valves \& Fittings Co., 394 F. Supp. 434 (N.D. Ala. 1975), \textit{appeal docketed}, No. 75-2176, 5th Cir., May 6, 1975.
\item \textsuperscript{36} 446 F.2d 652 (2d Cir. 1971).
\item \textsuperscript{37} 486 F.2d 870 (6th Cir. 1973). \textit{See also} \textit{United States v. Hayes Int'l Corp.}, 456 F.2d 112 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), \textit{cert. denied}, 404 U.S. 1006 (1971).
\item \textsuperscript{38} \textit{See also} Gamble v. Birmingham S.R.R., 514 F.2d 678 (5th Cir. 1975); Gilmore v. Kansas City Terminal Ry., 509 F.2d 48 (8th Cir. 1975); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
\item \textsuperscript{39} \textit{See}, \textit{e.g.}, \textit{United States v. United States Steel Corp.}, 520 F.2d 1043 (5th Cir. 1975), \textit{cert. denied}, 97 S. Ct. 61 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).
\item \textsuperscript{40} \textit{State Div. of Human Rights v. Killian Mfg. Corp.}, 35 N.Y.2d 201, 318 N.E.2d 770, 360 N.Y.S.2d 603 (1974), \textit{appeal dismissed}, 420 U.S. 915 (1975), was a case where the employer \textit{did}
with a view of the Golden Gate Bridge might seek employees in the labor market who were: (a) bricklayers, (b) in the San Francisco area, (c) members of the appropriate local unions, and (d) journeymen. Thus, the labor market is the "area" (defined comprehensively) within which employers seek persons to fill their job needs, and within which applicants will consider job offers. The breadth and inherent flexibility of this definition creates the potential for conflict in interpretation, especially in the near absence of language in Title VII referring to labor markets.

The only reference to the labor market in the text of Title VII appears in section 703(h), limiting the definition of "unlawful employment practice":

[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system, to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Until recently, there had been no judicial interpretation of "work in different locations." In Russell v. American Tobacco Co., however, the Fourth Circuit stated that:

[T]he labor market is the most important criterion for determining whether a company's employees work in different locations. If the labor for each plant is recruited from different geographical areas, or if one plant requires labor possessing different skills from the labor employed at another company plant, it is obvious that the company cannot draw from the same labor market to man its plants.

Of course, specific labor markets may differ in geographic scope and number of workers. For example, the market for college presidents or research scientists is national in scope. In contrast, the labor market for secretaries or dishwashers may be Standard Metropolitan Statistical Area (S.M.S.A.), a local city, a community, or even a neighborhood. But once the labor market is specified, its profile can be ascertained. That is, it is possible to determine the percentages of men and women, or of minorities, in a given labor market. This profile can be compared with the equivalent profile of the civilian labor force. This comparison shows whether the labor market itself is restricted on the basis of race or sex. If the comparison shows no imbalance, no violation is observed to have occurred, at least statistically.

Two recent cases help to further clarify the labor market concept. In

seek simple labor. Although the work was unskilled and turnover of workers frequent, the company had never employed a black or Hispanic person until charged with discrimination.

42. 528 F.2d 357 (4th Cir. 1975), cert. denied, 96 S. Ct. 1666 (1976).
43. Id. at 362.
Green v. McDonnell Douglas Corp., the court rejected an allegation of racially discriminatory hiring practices:

[A]ppellant showed . . . that defendant’s nonwhite work force never exceeded 6.4% of the total, while 14% of the St. Louis Standard Metropolitan Statistical Area was nonwhite. No showing was made indicating what percentage of job applicants qualified for positions with defendant were black. In United States v. ILA, a comparison by race of the work distribution to overall population was rejected in favor of comparing the work distribution to occupational categories within the labor force. The court said, “It is not the racial composition of the community that should control, but the number of Blacks and Whites that make themselves available for longshore work that counts.”

Such occupational data for labor markets have been used to analyze labor organization membership patterns on the basis of race. One commentator called this the “skilled labor question,” noting widespread underrepresentation of minority groups in craft unions. “The inference of racial discrimination drawn from statistical disparities is premised on the assumption that the black population possesses the same cross section of skills as the white population.” But alternatively, the use of statistics may reflect the assumption that the black population could acquire the necessary skills if the impediment of discrimination were removed.

For a wide range of occupations and labor markets, weighing of both disproportionality by race or sex, and skills requirements has become an element of the judicial process. Where minority group persons or women have the required skills or could readily obtain them in the absence of discrimination, employers’ explanations for not hiring them have a hollow ring. On the other hand, where skills are acquired only through a lengthy and formal process such as graduate or professional education, underrepresentation of minorities is better characterized as an aggregate result of past practices. For these occupations, proportional representation in a labor market may not be achieved as quickly as for a craft or industrial pursuit.

For certain professional occupations, even recognition of past impediments does not countenance relaxation of accreditation standards. Courts

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44. 528 F.2d 1102 (8th Cir. 1976).
45. Id. at 1105 (emphasis added).
47. Id. at 979.
50. See, e.g., Tyler v. Vickery, 517 F.2d 1089, 1095-96 (5th Cir.), cert. denied, 96 S. Ct.
have also displayed a reluctance to intercede where professional peer judgment is an integral part of the employment relationship.\textsuperscript{51} In contrast, such reticence has been totally absent in cases involving blue-collar and civil service labor markets. The case law thus shows that the standard of proportionality is by no means applied either rigidly or universally.

Besides occupational distribution, the labor market paradigm includes a geographic element. The problem of defining the geographic element of a given market has been approached in various ways.\textsuperscript{52} In \textit{Stamps v. Detroit Edison Co.},\textsuperscript{53} for example, the defendant utility company could not persuade the Sixth Circuit that its electrical service area and not the more narrowly defined labor market represented by the city of Detroit (with higher minority labor force concentration) was the appropriate basis for comparison. Similarly, in \textit{Crockett v. Green},\textsuperscript{54} the Seventh Circuit rejected the City of Milwaukee’s contention that the Milwaukee S.M.S.A., rather than city boundaries, provided the relevant comparison area.

A further aspect of the labor market concept—one which has been misunderstood by the courts—is the concept of labor mobility, the movement by workers within or between labor markets. Labor market data implicitly account for labor mobility, so that the courts need not adjust such statistics further in that regard. Thus, most economists would take issue with the court’s analysis in \textit{Johnson v. Goodyear Tire & Rubber Co.}.\textsuperscript{55}

Goodyear’s geographic and age limitations conveniently ignore the recognized mobility of today’s black labor force. . . . [A] black individual of rural Texas today . . . may be an active participant in the Houston labor pool tomorrow.

Goodyear’s limited and selective interpretation of the “relevant” statistics overlooks previous judicial precedent. In Griggs v. Duke Power Company, the Supreme Court relied on statistics for the entire state of North Carolina. Even more compelling, in United States v. Georgia Power Company, our court considered statistics for the South as a whole and the immediate Atlanta area. \textit{The utilization of these statistics implicitly recognizes the mobility of today’s labor force . . . .

\textsuperscript{56}


\textsuperscript{52} For a proposed model for determining the geographic element of an employer’s labor market, see Gastwirth & Haber, \textit{Defining the Labor Market for Equal Employment Standards,} 99 MONTHLY LAB. REV. 32 (March 1976).


\textsuperscript{54} 534 F.2d 715, 718 (7th Cir. 1976).

\textsuperscript{55} 491 F.2d 1364 (5th Cir. 1974).

\textsuperscript{56} \textit{Id.} at 1371 (footnotes omitted, emphasis added).
Judge Gewin misconstrued labor mobility by confusing the entire state with the labor market relevant to certain jobs at Goodyear. Rather, the court should have been concerned with the percentage of each group by race, as reflected by Houston labor market statistics, which already accounts for the opportunity for geographic mobility.  

Further, the court incorrectly applied the precedents. The cases relied upon by the Goodyear court, Griggs v. Duke Power Co. 58 and United States v. Georgia Power Co., 59 did not employ labor market statistics, but rather, educational achievement (high school graduation) statistics. Statewide statistics on high school graduation were not used in Griggs to account for labor mobility, but merely to determine whether a diploma requirement disproportionately affected blacks. Nor, in fact, did Griggs properly compare data. The court should have ascertained how many of Duke's employees came from the geographic area within which the company operated, and (assuming that number to represent most of its labor force) made the educational comparison that way.

The use of area or statewide education data to define the labor market is quite different from their use to describe one feature of that market or one related factor having a bearing on the market's operation. Application of Griggs in Goodyear illustrates that the apparent simplicity of labor market concepts is illusory.

Another problem in defining the labor market involves occupational category; it arose in a recent Fourth Circuit case 60 in which the court ruled that the appropriate racial comparison for a plant's supervisory work force was the proportion of nonwhites in that occupational category in the S.M.S.A., rather than the proportion of all black workers in the area. Though this is consistent with the analytical methods discussed above, it fails to examine the extent to which present nonwhite underrepresentation in the supervisory category reflects prior exclusionary practices.

This distinction between aggregate practices of employers in a labor market and the result of a particular employer's treatment of minorities or women is a thorny one. To date, no court has gone so far as to shape and impose upon a single employer a remedial quota which looks beyond the current labor market conditions to reflect historical patterns of discrimination, and to impose it on that employer. Such a quota would, however, be the next logical step after retroactive seniority; 61 it would encompass all those who were previously discouraged from applying for supervisory posi-

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57. In this case, the distinction would not have affected the outcome. Goodyear's violation of Title VII was established independently by evidence on discriminatory educational requirements and employment tests.
59. 474 F.2d 906 (5th Cir. 1973).
tions by exclusionary practices. Whether this would be preferential treat-
ment contrary to Section 703(j) is a question which must ultimately be
answered by the Supreme Court.

C. Demographic Comparisons

Population statistics are used as another means of expressing the per-
centage of minority group persons in an employer or a union’s labor market
area. In a secondary or supportive sense, population figures are valuable
background for confirming labor force and labor market information. They
can and do help describe social patterns and groupings in particular areas or
communities. The courts, however, have often employed population statistics
incorrectly.

The first use of population statistics in Title VII litigation occurred in
United States v. Plumbers Local 73. In that case, where the union was
totally white, the size of the black population residing within the union’s
jurisdictional area was cited for purposes of illustration.

The first comparative use of population statistics came in Parham v.
Southwestern Bell Telephone Co. Holding intra-firm racial disproportion
to be a violation of law, rather than prima facie evidence of discrimina-
tion, Judge Bright added in a footnote:

This court takes judicial note of the fact that 21.9 percent of Arkansas’ 1960
population of 1,786,272 were blacks.

Thereafter the practice of using demographic statistics became routine.

Inconsistencies in the application of demographic statistics quickly ap-
peared. In United States v. Ironworkers Local 86, the court rejected the
union’s characterization of statistical evidence as a “numbers game.” It also
rejected the union’s contention that the trial court erred in utilizing statistics
only for the City of Seattle, when the union’s jurisdictional area extended
beyond city limits. This approach is, of course, wholly contrary to the way
the statistics were used in Plumbers Local 73.

Over time, the variety of methods utilized for population comparisons

63. Id. at 161. Compare this case, in which no specific quota was approved and the order was
limited to “hiring all qualified journeymen,” with United States v. Sheet Metal Workers Local 10, 6
FEP Cases 1036 (D.N.J. 1973). In the latter case, the population proportion became the basis for the
union’s goal, which was to be reached by increasing minority apprenticeships by at least twenty-one
per year.
64. 433 F.2d 421 (8th Cir. 1970).
65. Most courts eschew this position in favor of a prima facie finding of discrimination, thus
shifting the burden of explaining this disparity to the defense. E.g., Bush v. Lone Star Steel Co.,
66. 433 F.2d at 544 n.4.
67. 443 F.2d 544 (9th Cir. 1971).
68. See text accompanying note 62, supra.
became almost endless. Among the examples are: (1) by county;\(^{69}\) (2) "the surrounding population";\(^{70}\) (3) \textit{both} labor force and population;\(^{71}\) (4) ratios of applicants to persons "in the community";\(^{72}\) (5) population in the relevant market area (implying a specific exclusion of labor force);\(^{73}\) (6) "minority population in the employer's service area" (explicitly excluding the applicant/hire ratio);\(^{74}\) (7) population in the S.M.S.A. (specifically excluding labor force in the "city and county of Denver");\(^{75}\) (8) remedial quota with no basis, population or labor force indicated;\(^{76}\) (9) explicitly not population, labor force only;\(^{77}\) (10) population of both the city and the S.M.S.A. cited, leading to "wildly differing conclusions";\(^{78}\) (11) population of the city, county, \textit{and} S.M.S.A., but limited to ages eligible for appointment as firefighters.\(^{79}\) While this list is by no means complete, it demonstrates the total absence of consistency in making population comparisons, either to determine the existence of employment discrimination or to fashion relief from it.

From an economic perspective, labor force and labor market data are preferable to demographic figures. First, the population contains many persons, of all races, who are either uninterested in or incapable of employment. Since Title VII (as opposed to other titles of the Civil Rights Act of 1964) deals with employment discrimination, evidence should focus on persons with at least some connection to the work force. Demographers partially recognize this distinction in the "dependency ratio", a comparison of persons below adult age (presumably requiring support) with those who are of an age to support themselves. In mature industrial societies, for example, this ratio is lower than in developing nations. But demographers utilize this ratio for other purposes, and not as a proxy for labor market or labor force data.

Second, additional racial variance exists between population and labor force according to location. The interaction between demographics and labor force participation is complex, affected by the age, occupation, and


\(^{72}\) Mims v. Wilson, 514 F.2d 106, 111 (5th Cir. 1975).

\(^{73}\) Gilmore v. Kansas City Terminal Ry., 509 F.2d 48, 52 (8th Cir. 1975).

\(^{74}\) Jones v. Tri-County Elec. Cooperative, 512 F.2d 1, 2 (5th Cir. 1975).


\(^{78}\) Hester v. Southern Ry., 497 F.2d 1374, 1379 (5th Cir. 1974).

educational characteristics of each labor market area. In some cases, overall racial percentages and extent of disproportionality in jobs may not be affected by these factors. More likely, however, a difference of up to several percentage points could appear. In addition, these differences are dynamic rather than fixed or stable.

Third, population comparisons do not, without further scrutiny, automatically reveal discrimination. As Professor Fiss has noted:

This use of racial statistics does not imply that racial discrimination should be reduced to or equated with racial imbalance. There are other causes that may explain the identical statistical consequences—absence or low numbers of Negroes. For example . . . lack of requisite skills . . . or a lack of interest of blacks in working for an employer.

This does not imply that disproportionality should be ignored. Examination, however, should focus on the direct factors—employment-related measures, for example—and not be once removed by secondary comparisons with the overall population.

Fourth, national data on the number of persons in the labor force by age, sex, and race are compiled by the United States Bureau of the Census on a monthly basis, whereas population statistics lock the courts into data derived primarily from the decennial census. Reliance on data collected decennially precludes judicial recognition of worker mobility during intervening years, and presents questions regarding the timeliness of data.

Although labor force and labor market data from the decennial census suffer the same weakness, other labor statistics are available from federal, state, and local government manpower agencies on a more frequent basis.

A study of case law reveals only one argument in favor of demographic data. In cases dealing with employment in the public sector, courts have

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80. League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976). The city's Mexican-American population was 25.8%, and Mexican-Americans constituted 21.5% of the labor force. Since only 4.5% of Santa Ana firefighters and 9.2% of police officers were Mexican-American, the disparity, using either standard, made out a prima facie case. At what point would the labor force-population gap become relevant, if the proportion of employed class members expanded? No court has yet faced that situation, although it is almost inevitable that the question will soon arise as to where the threshold is beyond which an inference of discrimination may be drawn.


82. The notion that blacks as a group would be uninterested in working for an employer who did not have a reputation for racial discrimination is not especially convincing. Even evidence that few minority group persons applied for jobs (one defense against a prima facie statistical imbalance) could be shown to be a pretext, or to be induced by the employer's treatment of minorities.


looked to the general population served by the public employees to justify the use of demographic statistics. As the court in *Officers for Justice v. Civil Service Commission of San Francisco*<sup>85</sup> pointed out:

> [A]ll citizens profit when the city achieves a racially integrated police force of qualified individuals who are knowledgeable of the diverse problems of different ethnic groups and who are not prey to destructive hostility from minorities who feel excluded from full participation in city government life. Clearly, the general harmony of the community is enhanced by the city’s obtaining a police force representative of its population.<sup>86</sup>

While most courts have not relied explicitly on this reasoning, and one court has specified a labor force, rather than a population, comparison,<sup>87</sup> the common pattern in police and firefighter cases has been to use population data as a basis for comparison.<sup>88</sup>

No similar distinction between persons served by the worker and those employed or eligible for jobs is made in private industry. Thus, a single clearcut standard for Title VII decisions would best be achieved with a labor force measure in all instances.

This section has examined some of the problems encountered in the analysis of employment practices, given the variety of permissible approaches under Title VII. In many instances, inaccurate or insufficient quantitative measurement of economic information has occurred. The simplistic practice of using demographic data to make employment-related comparisons should be avoided in Title VII cases. Labor force and labor market characteristics provide optimum criteria grounded in logic, to both assess the extent of discrimination and fashion relief.

### III

**Rios and City of Chicago**

*Rios*<sup>89</sup> and *City of Chicago*<sup>90</sup> are two recent cases in which courts were confronted with the difficult problem of fashioning quota relief to rectify

and while the census cycle will be reduced to five-year intervals beginning in 1985, frequency will remain a problem with population data.

86. Id. at 1330-31.
Title VII violations. In both cases, the courts faced intransigent defendants. Both decisions rely heavily on the use of labor statistics and measurement techniques. The courts, however, fashioned very different remedies.

The quotas fashioned by the Rios court are based on a detailed analysis of the labor market and the work force within it. This analysis was founded on sound labor economics. The court in City of Chicago, on the other hand, fashioned a multiple-quota plan that cannot withstand economic analysis. City of Chicago has been argued on appeal before the Seventh Circuit. Judicial approval of the remedy fashioned by the district court could generate a series of chaotic and inconsistent rulings that would muddle rather than clarify the use of labor statistics in determining equitable relief.

A close examination of these two cases provides an insight into the use and abuse of labor statistics.

A. Rios v. Steamfitters Local 638

The trial court in Rios ordered Local 638 to increase its minority membership to thirty percent over several years in order to overcome the effects of past discrimination. On appeal, the Second Circuit upheld the quota remedy, but remanded to the lower court for a reassessment of the thirty percent figure. Judge Mansfield, writing for the majority, stated:

However, we believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas, between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable "reverse racial discrimination," which is not. The court provided some guidance for establishing the requisite "precise standards":

[R]eliable statistics with respect to the labor force provide a more accurate basis for arriving at an appropriate non-white percentage goal than does the information relied on by the district court, which included not only males forming the labor force, but females, children, retired persons and others who would not, absent discrimination, have been the source of union members or apprentices.

Thus, the use of labor statistics became the central issue in the proceedings upon remand. To determine the proper quota, the district court consid-

91. Id.
94. Id. at 633.
95. Id. at 633. The district court had not spelled out the source of its 30 percent figure, but the appellate court felt that the lower court may have been influenced by the 1970 Census of the population in the union's jurisdictional area and by a goal of 28% "minority" steamfitters set by a proposed New York City affirmative action law. Id. at 632.
ered a series of labor force and labor market comparisons which, in cumulative scope and detail, made a substantial contribution toward establishing a synthesis of legal and economic perspectives. The original goal of thirty percent was modified to twenty-six percent.\textsuperscript{96} The factors considered by the district court in determining this figure included:

1. **Labor Force and Location**

The court selected Local 638's seven-county jurisdictional area as the appropriate labor market. The labor force (utilizing figures from the 1970 census) was comprised of the black, Spanish-language, and white workers living in this area. The court also took the necessary intermediate step of combining the black and Spanish-language groups into a plaintiff class. A further adjustment was made to reflect the fact that some Spanish-language persons are black.\textsuperscript{97} Without this adjustment, a "double count" would have occurred, overstating the minority population by 11.6%.\textsuperscript{98}

2. **Educational Achievement**

The comparison was limited to workers whose educational achievement was four years of high school or less. Since U.S. census data indicated that 91.8% of plumbers and pipefitters (the most similar occupational group tabulated by the census) had a high school education or less, a comparison with workers of all educational levels would have included persons clearly removed from the relevant occupational category.\textsuperscript{99}

3. **Census Undercount**

The court further adjusted the underlying demographic data for "census undercount." This adjustment was required because of the omission of some persons from the decennial census; disproportionately more minority group people are missed than whites.\textsuperscript{100} This undercount adjustment was then applied to the labor force data.

\textsuperscript{97} In determining the number of Hispanic persons, the court used the "Spanish Language" data rather than the "Spanish Origin" figures because "responses by individuals indicating that they are of Spanish Origin are particularly subjective and the Spanish Origin statistics reported by the Census are based upon only a 5% sampling, rather than the 15% sampling utilized to derive the Spanish Language data." 400 F. Supp. at 985 n.4.
\textsuperscript{98} It now appears that this special problem, the double-count of dark-skinned Hispanics as both black and Spanish, has been defined out of existence. The EEOC revised its race/ethnic categories in April, 1976. Under the new definitions, the category "Negro" is changed to "Negro (not of Hispanic origin)," and excludes persons of Hispanic origin who might otherwise be counted as black by virtue of their race. The category "Hispanic" now includes all persons from a Spanish-culture origin, regardless of race. EEOC Records & Reports, 41 Fed. Reg. 17601 (1976).
\textsuperscript{99} The opposite might also apply where educational achievement can be shown to be job-related. Compare the use of educational achievement as a clarifying element with the Supreme Court's holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971).
\textsuperscript{100} 400 F. Supp. at 987. Cf. EEOC v. Sheet Metal Workers Local 638, 401 F. Supp. 467 (S.D.N.Y. 1975), modified, 532 F.2d 821 (2d Cir. 1976), which specifically excluded census under-
4. Labor Mobility

The court considered an additional factor, labor mobility. In this context, mobility refers to the geographic patterns and conditions under which people would travel to obtain work within a labor market. Mobility arose as an issue in *Rios* since the union's work was distributed unevenly by county within the jurisdictional area, concentrated more intensively in counties where minority group residence was higher. If the court had extended the proportionality argument to union membership by county of residence and work load, the plaintiff's remedial quota would have been higher, almost 32 percent. The court, however, accepted the union's contention that craftsmen customarily travel the length of their jurisdictional area to obtain work.

5. Discouraged Workers

Discouraged workers were not taken into account in the court's ruling, even though, like the undercount group, they were disproportionately non-white. Inclusion of discouraged workers as part of the labor force comparison in *Rios* would have increased the quota only negligibly (less than one percent). From the standpoint of accurate use of labor statistics, however, the adjustment would have been valid.

*Rios* stands for the proposition that labor statistics can and should be properly employed by the courts in Title VII litigation. This position was reiterated by the Second Circuit as its standard in *Patterson v. Newspaper Deliverers Union* 104 EEOC *v. Sheet Metal Workers Local 638* 105 and *EEOC v. Operating Engineers Local 14* 106.

B. United States v. City of Chicago

This case illustrates a situation in which the court adopted a statistical remedy—requiring that police officer hiring be based on a numerical count as a "tradeoff" or "balance" to the Spanish language definition of Hispanic workers. 401 F. Supp. app. at 493 n.1.

101. This is not an idle question. In *Timken Co. v. Vaughan*, 413 F. Supp. 1183 (N.D. Ohio 1976), the district court ruled that since residents of Mansfield (with a larger minority population) did not commute to Bucyrus (site of Timkin's plant) in large numbers, Mansfield could be omitted from the labor market on which hiring goals for Timkin were based. The fact that many people commuted in the opposite direction was noted but rejected: "The number of people commuting from Bucyrus to Mansfield does not indicate that the reverse will be true." *Id.* at 1191. The illogic of Judge Contie's decision speaks for itself.

102. Mobility within a labor market is also dependent on available transportation to a work site and on residence patterns of workers. With differential access to job locations, the distribution of persons seeking employment will vary even within the same market area. This is treated as a "given" in the labor market, and a practice falling beyond the purview of Title VII.

103. See text accompanying note 28.


LABOR STATISTICS IN TITLE VII CASES

goal—without reference to methods of labor statistics proper and necessary for determining Title VII relief.

After finding that the City of Chicago had engaged in "sexual and racial discrimination in the selection, promotion and assignment of police officers within the Chicago Police Department," the court imposed a hiring quota, to remain in effect until modified. The court's order stated:

In all of the circumstances we have concluded that a hiring standard of 16% females, 42% black and Spanish surname males and 42% other males should be imposed on the Chicago Police Department until further order of the court.

In reaching this conclusion we are not without substantial support. If Judge Marshall's reference to "substantial support" was intended to mean that there is precedent for the use of quotas, the cases he cited are more than ample for that purpose. But in terms of the specific hiring order, there is no basis for this ruling if the guiding standard is to be close congruence between labor force statistics and the actual remedial quota. Furthermore, the opinion omits (or gives no indication of having considered) available information on all relevant characteristics of the population in question.

City of Chicago departs from the "labor statistics-sensitive" standard advanced by this article in several additional areas.

1. Women

The court was candid in saying that its decision was arbitrary and imprecise:

The problem is different insofar as a future remedy for women is concerned.

Here we have virtually no prior experience with which to work. First, there are bona fide age limits for employment in specific occupations and, in some cases, there are educational requirements. Second, the prop-

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108. Id. at 229-30.
109. Id. at 242. An open-ended hiring quota differs somewhat from other affirmative action plans in that it applies solely to the appointment of new workers without reference to the existing racial balance, and modifies that balance only in conjunction with the number of appointments and rate of turnover. The opinion indicated that 83% of Chicago police officers were then white, 16% black, and 1% Hispanic. Id. at 234.
110. Id. at 242. The court cites nine cases, headed by Rios.
111. This analysis recognizes the enormity of Judge Marshall's task, in that issues unrelated to the questions under discussion here comprised much of the case. By implication, the court was reluctant but felt compelled to fashion some remedy, however loosely drawn (in statistical terms), consistent with Title VII's larger objective: "No court . . . should become an employment review board. Our function should be to . . . set reasonable standards. . . ." Id.
112. Id.
113. The opinion does not specify the age range of eligibility for appointment as a police officer, although customarily 30 to 35 years is the upper limit. In Washington v. Davis, 96 S. Ct. 2040 (1976), the Supreme Court did not explicitly rule on age or geographic recruiting area as that case turned on other issues. The district court in Washington had determined that the comparison group in terms of age was 20 to 29-year-old blacks, those eligible for appointment. 348 F. Supp. 15,
ortion of women in the population is markedly different from the proportion in the labor force. Moreover, labor force participation varies substantially for females in different age groups, and is undergoing significant change from the proportions of even a few years ago.\textsuperscript{114}

The use of population figures in this case, as in \textit{Peltier v. City of Fargo},\textsuperscript{115} makes no allowance for women who are not in the labor force and have no intention of seeking work as police officers or otherwise. While the correspondence between male population and male labor force participation is greater, there is no reason why relevant comparisons for each age group of either sex cannot be made as necessary.

2. \textbf{Double Counting}

As both women and nonwhites are included in the court's order, there is a question of double counting. The sixteen percent quota for women, without reference to race, is analogous to the combined minority group situation in \textit{Rios}.\textsuperscript{116} Since nonwhite females are covered along two dimen-

\textsuperscript{16} (D.D.C. 1972). The Court of Appeals found the question of geographic recruiting area (District of Columbia or 50 mile radius) immaterial, but seemed to accept the age limit. 512 F.2d 956, 960 n.24 (D.C. Cir. 1975). Writing for the Supreme Court majority, Mr. Justice White's brief reference to comparisons emphasized the Court's view (like the court of appeals below) that these considerations were not fundamental to the case.

\textsuperscript{114} . . . the fact that the racial distribution of recent hirings and of the Department itself might be \textit{roughly equivalent} to the racial makeup of the \textit{surrounding community, broadly conceived}, was put aside as a 'comparison [not] material to this appeal.'

\textsuperscript{96} S. Ct. at 2046 (emphasis added). In the context of questions raised by this article, the phrase, "the surrounding community, broadly conceived," is especially ambiguous and subject to virtually any interpretation.

Lower courts are divided on the age question and educational requirements. The Supreme Court decision in \textit{Washington} (on fifth amendment grounds, not Title VII) accepts verbal ability tests as job-related for police although lower courts have until now been largely divided—especially for other, non-police occupations and in Title VII actions.

Test 21, which is administered generally to prospective government employees, concededly seeks to ascertain . . . verbal skill; and it is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. \textit{Id.} at 2050.


\textsuperscript{114} In an earlier decision in the same case the court combined misapplication of all these principles by comparing the number of women Chicago police officers (approximately 1%) with the "number of persons eligible by residence for employment," which the court took to be all women residing in the city. This was stated to be "50% or more" of Chicago's population.

Under a logical application of labor force analysis, the correct proportion would be the number of women in the Chicago labor force—of the age specified as eligible for appointment, and who satisfy bona fide educational requirements—in comparison with the entire Chicago labor force. The imbalance would clearly not be of the magnitude of 50 to 1. United States v. City of Chicago, 385 F. Supp. 543, 548 (N.D. Ill. 1974).

\textsuperscript{115} 396 F. Supp. 710 (D.N.D. 1975).

\textsuperscript{116} See note 97 \textit{supra} and accompanying text.
sions of the statute, quotas including them must reflect their presence in both categories. Furthermore, there is no indication in the court's opinion that the double-count problem for black and Hispanic males was considered.

3. An Open-ended Standard for Ratio Determination

The court was also unhappy with the fact that departmental policy had permitted an imbalance to develop (40% minority group persons, 17% minority group police officers) whereas during the 1960s, the force had included minority officers in proportion to the size of the black labor force in Chicago. Judge Marshall wrote: "It is most regrettable that the progress of the '60's was lost in less than 10 years. Hopefully the damage can be mended as quickly."

Whatever the circumstances, previous affirmative action plans specified an end result to be achieved. But once that quota of minority workers was reached, the defendant was usually obliged merely to make a "good faith" effort to maintain adequate nonwhite employee representation, but remained under no special injunction to do so.

Similarly, the order in City of Chicago does not state an ultimate ratio that would satisfy the court. If the court envisioned an eventual distribution of police officers similar to the hiring ratio, it clearly will have to retain jurisdiction for a long time. Indeed, by inference, that is the court's final goal: "In the mid 1960's the overall racial profile of the Department reflected the City served, at least insofar as total employment was concerned." If Chicago's minority groups increased their demographic share, the quota could be modified upward. This amounts to a shifting standard of comparison, found nowhere else in Title VII case law. Only if such a shift were made on the basis of retrospective change, reflecting demographic shifts already observed (rather than future changes), would the practice fall within present judicial interpretation of the Act.

117. Assume, for the sake of this illustration, that 40% of the female Chicago labor force is nonwhite. The minority male goal of 42% would thus be reduced by 6% to reflect that 40% of the women appointed will be black or Hispanic (6% = 40% of 16%). The end result would be 42% minority persons of both sexes, 10% non-minority women, 48% non-minority men. If the court chose, the female proportion could be increased to 16% non-minority, in effect making the female total 22% and keeping the minority figure proportional.

At present, the court's order could possibly infringe on Section 703(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (1970), if an appeals court regarded a more-than-proportional quota as a form of reverse discrimination (even though the appeals court might regard a proportional quota as permissible).

119. Id. at 242.
121. See Rios v. Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974).
122. The composition of Chicago's police will depend on attrition of the present force, as well as the hiring done in line with the court-determined ratio.
123. 411 F. Supp. at 244.
124. Retaining cases indefinitely for this purpose would place a burden on district courts. It
This section has analyzed *Rios* and *City of Chicago* from the standpoint of labor force analysis, statistics, and methods of calculation. In *Rios*, the combination of legal and economic reasoning provided a sound basis for determining a proper ratio for craft union membership. *City of Chicago* is deficient in terms of the standards of economic analysis outlined above. If upheld on appeal, it might engender a tangle of inconsistent affirmative action decisions.

**IV**

**BEYOND Rios AND City of Chicago**

The use of quantitative methods in Title VII enforcement, particularly the use of labor statistics in shaping comparisons and setting quotas, has been uneven. Application of economic analysis as an evidentiary tool has lagged behind judicial reliance on the psychologist's measurement of test validation.\(^\text{125}\) While many cases have focused on numerical comparison of hiring procedures and employment test practices, courts have nonetheless appeared more reluctant to make analogous judgments about the work force. For example, the court in *United States v. Hayes International Corp.*, understandably sensitive to the difficulty of quantitative analysis, said: "While we abjure any desire to become involved in a numbers game, statistics such as these do have some relevance in a Title VII pattern and practice suit."\(^\text{126}\)

But, as this article suggests, Title VII law has reached the stage where many remaining questions do involve "a numbers game." Labor statistics and analysis are at the heart of proportional employment practices. For example, the Supreme Court's remand of *EEOC v. Jersey Central Light & Power Co.*,\(^\text{127}\) in light of *Franks v. Bowman Transportation Co.*,\(^\text{128}\) suggests that once seniority rosters are adjusted to reflect constructive credit given to minorities deprived of seniority by discriminatory practices, labor statistics might be necessary to shape affirmative action layoff procedures.\(^\text{129}\) To decide the order in which workers are to be laid off, the courts must focus on

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\(^{126}\) 456 F.2d 112, 120 (5th Cir. 1972).

\(^{127}\) 96 S. Ct. 2196 (1976), vacating and remanding Jersey Cent. Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (3d Cir. 1975).

\(^{128}\) 424 U.S. 727.

\(^{129}\) Where no previous discrimination was present, a collective bargaining agreement is considered bona fide under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970), and company-wide seniority is a legitimate basis for making layoffs. Where the present effects of prior discrimination are visible, however, the bona fide protection of 703(h) is removed, and the court will award constructive seniority to victims of discrimination based on the date they were refused employment. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).
internal labor force and occupational comparisons. This is different from a hiring case in one important way: a judicial order governing layoff would be shaped to reflect the minority proportion of employees to be retained, as well as the subsequent makeup of the work force.\textsuperscript{130} Because of the economic uncertainty surrounding layoff and recalls, no time sequence could be fixed for the procedure similar to one that might be attached to a remedial hiring order.

Outside of a remedial context, however, the possibility of accounting for future changes in labor force or labor markets is beyond the purview of Title VII. This distinction was expressed by Judge Mansfield for the Second Circuit in \textit{Rios}:

The district court's role in prescribing non-white goals must at all times be limited to eradication of past discrimination. To prescribe a goal based on an anticipated future increase in the non-white percentage of the population or the work force would be to cross the line from lawfully remedying the effects of past discrimination to an unlawful attempt to maintain a future non-white percentage.\textsuperscript{131}

The drive to end employment discrimination will require greater reliance on numerically defined remedies and more care that they are properly utilized. Evidence of disproportionality often indicates unlawful imbalance,\textsuperscript{132} but sometimes lacks meaning and suffers from misapplication.\textsuperscript{133} This was most aptly stated by Judge Seels:\textsuperscript{134}

One caveat is in order; while figures do not lie, statistics rarely speak for themselves. Human perception of mathematical precision is often imperfect. The meaning of objective statistical data is a gloss provided by men—subjects with their own point of view—and hence subjective.

\begin{itemize}
\item \textsuperscript{130} One proposal is for a class to be constructed statistically, composed of those minority group workers who would have had seniority if not discriminated against earlier, including even those who were deterred from applying because of the employer's labor market. \textit{Note, First Fired Layoffs and Title VII,} 88 HARV. L. REV. 1544, 1557-60 (1975). In \textit{Franks v. Bowman Transp. Co.}, 424 U.S. 747 (1976), the Supreme Court limited constructive seniority to persons who had actually been refused employment.
\item \textsuperscript{131} 501 F.2d at 633.
\item \textsuperscript{132} \textit{E.g., Tumer v. Fouche,} 396 U.S. 346 (1970).
\item Within the past year, several courts have focused on the "applicant flow standard," that is, the disparity between the proportion of minority \textit{applicants} and those hired. This bypasses labor force and labor market data. The central assumption of such a standard is that all applicants are uniformly qualified, so that a firm should not have to reject proportionally more minority applicants in order to employ an equal number. Where applicant homogeneity is lacking, this standard may be inaccurate. \textit{Hester v. Southern Ry.}, 497 F.2d 1374, 1379 (5th Cir. 1974); \textit{Payne v. Travenol Laboratories,} 12 FEP Cases 770 (N.D. Miss. 1976); \textit{Hill v. Western Elec. Co.,} 12 FEP Cases 1175, 1179-80 (E.D. Va. 1976). Where applicant flow data is deemed suspect (duplication of employment applications) a trial court's rejection of such data in favor of labor force comparison has been upheld. \textit{Robinson v. Union Carbide Corp.}, 538 F.2d 652 (5th Cir. 1976).
\end{itemize}
Nevertheless, this article is not a brief for despair, but a call for definitional uniformity, procedural judgment, and statistical acumen. For a court to find that the black population available for work is *somewhere between 13 percent and 43.3 percent*\(^\text{135}\) may be sufficient to impose a membership goal and referral quota where union membership is only one percent black, but it surely invites challenge in less absolute situations. Title VII remedies will only be fashioned on a rational basis when courts become more sensitive to the principles of labor economics and statistics.