

RESPONSE

Encouraging Debate on the *Uniform Guidelines* and the Disparate Impact Theory of Discrimination

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Abstract

This response summarizes commentaries on the M. A. McDaniel, S. Kepes, and G. C. Banks (2011) article, which argued that the *Uniform Guidelines on Employee Selection Procedures* are a detriment to the field of personnel selection. Several themes were present in the commentaries. No compelling arguments were presented to dispute the assertion that mean racial differences in job-related attributes will be with us for a long time. However, compelling arguments were made that the disparate impact theory of discrimination is a more central issue for personnel selection than the *Uniform Guidelines*. Similarly, arguments were presented that the assessment of adverse impact is problematic and that expert witness testimony needs improvement. Areas in need of further investigation were also identified. Finally, the role of the Society of Industrial and Organizational Psychology (SIOP) in guiding regulatory, legislative, and court actions was considered.

We were motivated to write the focal article because of our frustration with professionally developed employment tests being judged to be “bad tests” because they show mean racial differences and do not meet the arcane and scientifically inappropriate *Uniform Guidelines on Employee Selection Procedures*. We had the possibly delusional idea that all would be better if the *Uniform Guidelines* were extensively revised or possibly rescinded. We received 11 commentaries that in part support our positions and in part disagree. We hope that this article, the focal article (McDaniel, Kepes, & Banks, 2011), and the set of commentaries in this issue of *Industrial and Organizational Psychology: Perspectives on Science and Practice* will encourage additional

constructive discourse concerning the *Uniform Guidelines*, adverse impact, and related issues. We organize our presentation along a few themes.

Mean Racial Differences in Job-Related Attributes Are Not Going Away Soon

The focal article argued that the mean racial differences in job-related attributes are not going away anytime soon. No commentators provided any compelling evidence or arguments to the contrary. Consistent with the position of the focal article, Barrett, Miguel, and Doverspike (2011) asserted that we can expect such differences for at least the next 100 years. Jacobs, Deckert, and Silva (2011) noted that “eliminating group differences is not possible for many effective predictors.” We offer that it is best to recognize that mean racial differences in job-related attributes

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exist, do not seem to be going away, and need to be addressed.

Only two commentaries expressed sentiments contrary to our position regarding mean racial differences. Hanges, Aiken, and Salmon (2011) stated that the “gap between advantaged–disadvantaged groups is not intractable,” but in our opinion, the commentators did not offer much support for their position. We also note that our focal article never argued that the mean racial differences are intractable; it argued that they would be with us for some time into the future and that one should not necessarily assume that interventions will minimize them; and that, unfortunately, there is the potential for an increase in the mean racial differences (Ceci & Papierno, 2005).

Oddly, Brink and Crenshaw (2011) cited McKay and McDaniel’s (2006) findings on mean racial differences in job performance in an attempt to discredit the argument that mean racial differences in job-related attributes are not going away any time soon. A careful reading of the McKay and McDaniel paper indicates that mean racial differences in job performance tend to be exaggerated in samples subject to range enhancement and when test scores have been race normed (McKay & McDaniel, 2006). In the absence of temporally correlated practices related to range enhancement study artifacts and race norming, there is no reason to expect a temporal decline in mean racial differences in job performance. Indeed, the best way to reduce mean racial differences in job performance is to focus on high validity selection procedures without any consideration of race in screening and hiring. Although fewer non-Asian minorities would be hired under this approach, there would unlikely be any meaningful mean racial differences in job performance. We believe that it is a disservice to pretend that mean racial differences in job-related attributes do not exist (or are substantially shrinking). Rather, we must recognize the problem and attempt to stimulate useful dialogue on how the issue might be addressed.

Two Adverse Impact Themes

There are two themes in the commentaries concerning adverse impact. One relates to the measurement of adverse impact (e.g., Barrett et al., 2011; Jacobs et al., 2011; Mead & Morris, 2011) and the other, perhaps more importantly, concerns the disparate impact theory of discrimination as a more central problem for personnel selection than the *Uniform Guidelines* (e.g., Barrett et al., 2011; Dunleavy, Aamodt, Morgan, Gutman, & Cohen, 2011; Jacobs et al., 2011; Sharf, 2011). Each theme will be addressed in turn.

Measuring and Accurately Communicating Information Concerning Adverse Impact

Concerning the measurement of adverse impact, Jacobs et al. (2011), Mead and Morris (2011), and Barrett et al. (2011) addressed problems with statistical tests to assess adverse impact. It was argued that the 4/5th rule, which is explicitly addressed in the *Uniform Guidelines*, or statistical significance tests, which are used more frequently by federal agencies and the courts, have shortcomings that make them nonoptimal to assess the presence of adverse impact accurately (Barrett et al., 2011; Jacobs et al., 2011; Mead & Morris, 2011; Morris & Lobsenz, 2000; Roth, Bobko, & Switzer, 2006). Moreover, different methods often produce differing results, and at least one of them usually indicates the presence of adverse impact (Barrett, Doverspike, & Young, 2010; Barrett et al., 2011; Dunleavy & Gutman, 2009).

As a result, plaintiff’s “experts,” in Tonowski’s (2011) view, can be sure to find evidence of adverse impact. Then, such experts can claim that the selection test is not valid or that a better alternative test exists (Barrett et al., 2011). Also, Sackett (2011) and Jacobs et al. (2011) raised important concerns over expert testimony. We agree with Barrett et al.’s (2011) assertion that even the elimination of the 4/5th rule from a revised *Uniform Guidelines* would not solve the problem. What would then? This question brings us to the second

theme regarding adverse impact in the commentaries: the disparate impact theory of discrimination as *the* central problem rather than the *Uniform Guidelines* per se (e.g., Barrett et al., 2011; Dunleavy et al., 2011; Sharf, 2011).

The Real Problem Is the Disparate Impact Legal Theory of Discrimination

We are swayed by the commentators who argue that the real problem is the disparate impact theory of discrimination, which argues that the use of any employment test which has adverse impact will be considered to be discriminatory unless the test has been validated. It is defined in the *Uniform Guidelines* and has 30 years of relevant court decisions and was incorporated into the Civil Rights Act of 1991 (Barrett et al., 2011; Jacobs et al., 2011; Mead & Morris, 2011; Sharf, 2011). The disparate impact theory of discrimination is particularly disastrous for personnel selection practice because there will likely be mean racial differences in job-related attributes for at least another 100 years (Barrett, 2010; Barrett et al., 2011). It is time that we acknowledge this unfortunate fact. Otherwise, “we are imposing a requirement that will prevent testing from becoming increasingly better” (Jacobs et al., 2011). Commentators argued persuasively that rewriting the *Uniform Guidelines* will have little impact on the disparate impact theory of discrimination and its consequences for the practice of personnel selection.

Commentaries argued for a change of the overly simplistic definition of adverse impact (Jacobs et al., 2011) or its elimination from laws and regulations through legislative or court action (Barrett et al., 2011; Dunleavy et al., 2011; Sharf, 2011). As noted by Dunleavy et al. (2011), such a court action would essentially acknowledge that *Griggs v. Duke Power* (1971) and *Albemarle v. Moody* (1975) were misguided case law. Although one may wish for such a ruling by the Supreme Court (Sharf, 2011), Barrett et al. (2011) cited a recent unanimous Supreme Court decision (*Lewis*

v. City of Chicago, 2010) that reaffirmed disparate impact as a viable legal theory of discrimination. We thus presume that personnel selection will continue to be handcuffed by the disparate impact theory of discrimination. A reversal of such a theory would require the Supreme Court or the U.S. Congress to acknowledge the existence of stable mean racial differences in job-related attributes (Barrett et al., 2011). Given the political pitfalls surrounding this, it is unlikely (Outz, 2011). Still, Sharf (2011) gives us hope that the Supreme Court will abolish the disparate impact theory of discrimination.

Revising the *Uniform Guidelines* to Be Scientifically Acceptable

Several commentators have convinced us that revising the *Uniform Guidelines* will not fix our problems. The legislative and case law equating adverse impact with discrimination is the main issue that is detrimental to personnel selection. Commentaries noted that revising the *Uniform Guidelines* is a major effort (Dunleavy et al., 2011; Jacobs et al., 2011; Outz, 2011; Tonowski, 2011) and could make a bad situation worse (Barrett et al., 2011). Related to the topic of revision are assertions that the *Uniform Guidelines* are not a scientific document and were never really meant to be a scientific document (Outz, 2011; Sackett, 2011; Sharf, 2011). Still, as most commentaries asserted, the current state of the *Uniform Guidelines*, and the associated federal and case law, is undesirable (Dunleavy et al., 2011; Hanges et al., 2011; Jacobs et al., 2011; Mead & Morris, 2011; Sackett, 2011; Sharf, 2011).

Science Marches On!

Some commentaries questioned the knowledge of the focal article authors, the need for better statistical procedures (e.g., Jacobs et al., 2011; Mead & Morris, 2011) and alternative approaches to validity evidence (Mead & Morris, 2011). They stated concerns about the state of

our statistical procedures for generating cumulative knowledge (Brink & Crenshaw, 2011) and an observation that the field does not yet have complete knowledge with respect to cognitive ability and mean racial differences (Hanges et al. 2011).

In response, we concur that McDaniel, Kepes, and Banks are not (yet) omniscient. Similarly, we concur that the scientific field of personnel selection has not discovered all knowledge. We concur that the application of meta-analysis to validity coefficients is not a “magic wand” (Brink & Crenshaw, 2011) but note that it has substantially advanced the state of knowledge in personnel selection, is quite valuable in guiding practice, and that the application of meta-analytic methods is critical to evidence-based practice in management and most any scientific discipline (Briner & Rousseau, 2011; Le, Oh, Shaffer, & Schmidt, 2007). We fully support efforts to develop and use the most appropriate statistical techniques and to advance our knowledge in any area of science including validity evidence, selection methods, and mean racial differences. We concur that there remains room for expansion of our knowledge concerning cognitive ability but observe that we do know a lot and what we know is really quite useful. We also recognize that we do not have perfect knowledge concerning mean racial differences and how to mitigate them but what we do know is really quite depressing.

We found little common ground with the fulmination offered by Brink and Crenshaw (2011). We highlight a few of the many points on which we differ. First, the commentary is largely based on discredited behaviorist assumptions incorporated into the *Uniform Guidelines* (Schmidt, Hunter, & Pearlman, 1981). Unfortunately, the commentary appears ideologically driven, in part, because it assumes that it is acceptable for governmental officials to manipulate and deny research findings to advance political goals. We argue that the enforcement of scientifically incorrect regulations is bad public policy and is detrimental to the practice of personnel

selection. The commentators argue that validity generalization research concerning selection methods (e.g., interviews) is “rather useless for practitioners.” Our perspective is that knowledge of typical validities for selection methods and the presence and effects of moderators (e.g., structured vs. unstructured interviews) has had substantial positive impact on practice (Briner & Rousseau, 2011). Finally, although we recognize that a finding of adverse impact is dependent on multiple factors (e.g., selection ratio), the magnitude of mean racial differences in job-related attributes is clearly a major determinant of adverse impact. In our view, the Brink and Crenshaw commentary does little to advance constructive debate.

SIOP’s Role

Several commentaries addressed the role of SIOP with respect to the *Uniform Guidelines*. Tonowski (2011), chief psychologist of the U.S. Equal Employment Opportunity Commission,¹ concurred that SIOP’s inaction with respect to the *Uniform Guidelines* is counter to SIOP’s mission. Reynolds and Knapp (2011) offered suggestions for SIOP’s greater involvement in the federal regulatory process. They note limitations on what SIOP can do with respect to issues raised and highlighted some relevant SIOP activities. We are encouraged by SIOP’s recent activities and by Reynolds’ and Knapp’s (2011) suggestions for what could be done in the future. We continue to argue that SIOP can and should be substantially more active with respect to the *Uniform Guidelines* and related issues. We also found Dunleavy et al. (2011) and Outtz’s (2011) suggestions for SIOP’s role in educating regulatory agencies and courts worthy of attention.

Encouraging Constructive Debate

Employment selection procedures do not cause mean racial differences in job-related attributes. Rather, employment

1. Although his comments do not necessarily reflect the opinions of the EEOC.

selection procedures measure such differences. Rather than accepting clear facts, employment tests have become the whipping boy in our federal regulations and court systems. Our focal article and this response to the 11 commentaries have sought to foster constructive debate. Most of the commentaries have contributed positively to the debate. We encourage individuals and professional organizations to continue this debate until detriments to the professional practice of personnel selection have been neutralized.

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