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Equality or Lasting Inequality?

Jan H. Blits and Linda S. Gottfredson

In 1981, with little publicity and no public debate, USES (the United States Employment Service), a branch of the U.S. Labor Department, recommended that state Employment Service agencies no longer report job candidates' scores on its employment tests in relation to all other candidates, but only in relation to those of the same race. Under this plan, referred to as "race-norming," or (with euphemistic blandness) as "within-group scoring," black applicants are ranked relative only to other blacks, Hispanics only to other Hispanics, and "others" to all but blacks and Hispanics. Rather than being ranked on the basis of a common standard or measure, candidates taking USES's cognitive and psychomotor ability tests are assigned percentile scores according to their standing within a norm or a comparison group of their own race and are then referred to public and private employers on the basis of those percentiles. Employers are often unaware that candidates' scores have been so adjusted. This sleight-of-hand gives bonus points to members of groups that score on average lower than other groups. It offsets average differences in scores among groups and thus eliminates the adverse impact that normally occurs when employment testing is used, as was indeed its sole purpose. Forty states now use race-norming for at least a portion of their job referrals.

In 1986, the U.S. Justice Department challenged the referral plan on the ground that it constitutes illegal and unconstitutional racial discrimination against non-Hispanics and non-blacks, and therefore should be abandoned. Under the pressure of this challenge, the Labor Department agreed not to extend the referral system until a panel of the NAS (National Academy of Sciences) completed "a thorough, scientific evaluation" of it and made a recommendation to the Department. The NAS panel has now completed that study and recommends "the continued use of score adjustments for black and Hispanic applicants

in choosing which applicants one should refer to an employer."

If the Labor Department decides to implement the panel's recommendation, its decision will have widespread effects on employment policy and practice throughout the United States. Because ability tests are generally the best single predictor of job performance, as the panel itself suggests, race-norming the test results for millions of workers will greatly affect the economy of the nation, the composition of its work force, and the relative economic well-being of different groups of job seekers. But even more profound will be the effect on the way Americans think about the basic issues involved in racial equality.

Twenty years ago, Americans would have rejected the notion of race-norming without hesitation. Critics usually attacked employment tests as being unfair precisely because tests were thought to treat blacks and other minorities differently from whites. The assumption was that equality of opportunity for individuals, the traditional American touchstone of fairness, would produce equality of results for groups. Yet, large group differences remain even when tests are racially unbiased and people are treated alike regardless of race, as the NAS points out. Many people – including members of the panel – have been attempting to redefine fairness so that it emphasizes equal group results rather than equality of individual opportunities. As this new emphasis has slowly but surely gained ground, discussions of fairness in employment testing in particular and of racial equality in general have become increasingly muddled.

The NAS panel has added considerably to this confusion. In an Interim Report on race-norming, published in 1988, it did not take an explicit stand on the issue, but rather offered what it called an "impartial" framework within which race-norming should

be considered and judged. Yet, what it offered was not an impartial framework at all, but a quasi-Marxist framework. By ignoring, distorting, and obscuring the most important issues, this framework confused the founding liberal principles of our nation with their exact opposites and supported only one possible outcome in the debate – the one that its Final Report adopts. The Final Report, ostensibly more balanced, is largely concerned with technical issues of testing. Its examination of these issues is shaped by the Interim Report's distorted framework, particularly its conclusion – which becomes the Final Report's tacit premise – that the individual is subordinate to the group.

Our concern here is twofold. First, we are concerned that, despite several recent Supreme Court decisions on civil rights, the NAS's distortions of our nation's fundamental principles will receive the imprimatur of science and will appear to legitimate not only the practice of race-norming, but the questionable justification for it that groups rather than individuals possess rights. Second, we are concerned that, with tragic irony, race-norming will augment and make permanent the very inequality that it is intended to eliminate.

The NAS's Confusion

Like many others in today's jumbled debate, the Interim Report misuses key terms, thereby tacitly redefining them. It constantly speaks of "equality of opportunity" when it really means "equality of results" and of "equity" (with its heavy overtones of fairness and justice) when it means "equality," which may or may not be just. In this way, it takes advantage of the traditional American concern for equity (fairness) through equal opportunities for individuals, using it to promote the very different goal of equality of results across group lines.

The language in which the Interim Report presents alternative perspectives also subtly but effectively elevates some above others. When the Report speaks of classical economic theory, it invariably speaks of it in the past tense, and it always refers to its fundamental principles not as principles but merely as "premises," "assumptions," or "presumptions." By contrast, whenever it mentions the need for economic redistribution, which it often does, it uses the present tense and describes the need not only as a "conclusion," but one of which "many Americans" have become "convinced."

Having redefined equity in terms of group equality, the Interim Report then emphasizes the need

to find a workable balance, or appropriate trade-off, between the conflicting goals of economic efficiency and racial balance ("group equity") in the work-place. From an economic perspective, it argues, employment procedures should contribute to efficiency and productivity. Its section on economics is entitled "The Economic Perspective: Efficiency." Yet, when the Report discusses efficiency, rather than present the argument for it, it suggests that we redefine the term. Even as it states that "In the conceptualization described here and used in this report, economic efficiency or productivity is considered at the level of the individual employer," it criticizes that "conceptualization" precisely because it focuses on that level. Although understanding efficiency at the level of the individual employer "seems an appropriate first line of approach to the question, particularly since the subject of analysis involves employment testing...time has shown the limitations of the classical economic approach of equating private gain and public good." It offers further criticism of the classical economic approach, on the grounds that:

There could be social costs attached to the very use of ability tests that are masked by the approach taken here. Selection based on test scores implies that those persons with the lowest scores will rarely be referred for jobs. Although the number of people who are unemployed might not change, widespread test-based selection would tend to place the same individuals perpetually at the bottom of the totem pole, creating a class of citizens with little chance of employment. An economic rationale for supporting policies that increase the employment of minorities and others outside the economic mainstream could be made on the grounds of better utilization of human resources or encouraging investment in human capital even in the face of some decrement of efficiency at the level of individual employers.

Since, according to the Interim Report, America's current economic context calls for redistribution rather than the more efficient production of economic goods, economic efficiency or productivity should be redefined in terms of redistribution. Far from posing them as counterweights, as it claims to do, the Report in the end suggests that economic redistribution is really a part of economic efficiency. The trade-off between them becomes no trade-off at all, as "group

equity" becomes an important component of efficiency.

Having already elevated group equality as a component of—indeed a principal standard for—efficiency, the Interim Report goes on to demote efficiency in its traditional sense by belittling the considerable effects of race-norming at the level of the individual employer, first characterizing losses as large as 13 percent in performance as "little," and then, in its Conclusions, as "very little." It also considers efficiency at the employer level in the narrowest possible way. It never considers whether the economic losses might extend beyond the short-term losses in worker productivity to be expected from hiring less qualified minorities—for example, whether obvious dual standards might lead to a progressive and pervasive degradation of morale and of hiring and performance standards among majority and minority employees alike.

**Twenty years ago, Americans would
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But most insidious of all, the Interim Report's framework ignores or denigrates the principles of classical liberalism, grounding its so-called neutral framework on a philosophical theory that is hostile to individual rights. It takes as its starting point not the "self-evident truth" of the Declaration of Independence that all humans are born with certain inherent rights ("life, liberty, and the pursuit of happiness"), but rather "the important insight of early social science" that economic arrangements decisively determine the central values of a society. The Report then suggests that respect for individual freedom is nothing more than a relic of America's nineteenth-century free-market economy. Such respect may have suited America when it was undergoing great economic and geographical expansion. But it can have little or no relevance or validity in the context of contemporary America, the Report suggests, when the central economic issue has become the redistribution, rather than the production, of wealth. That contemporary American economic policy continues to be guided by respect for individual freedom shows not that the nation has retained timeless principles, but that "the nineteenth-

century formulation of capitalism has had—and retains—an important hold on the American mind."

The Interim Report tacitly denies that individual rights are inalienable or irreducible. In place of the liberal principle, upon which the nation was founded, that every person is born with certain inalienable rights which government is established to protect, it offers the Marxist conclusion that individual rights reflect the operations and conditions of the classical free-market system. Rights, according to this view, are derivative, not fundamental. They have no objective or independent existence. They are neither universal nor permanent, but merely an historical phenomenon. Contrary to what the Declaration states, they are not rooted in the nature of man, nor can their protection be the standard for just government. They are only the product of law, not its foundation or standard.

It is no wonder that the Interim Report seldom speaks of rights, and never mentions them in their own name. When it speaks for itself, it speaks of economic interests. When it speaks of rights, it does so in the name of law. ("Rather than encouraging a search for efficient trade-offs, as might have been done if the economic perspective held sway, the courts have adopted an analytical framework that pits an employer's right to make a profit against the rights of minority group members to more equitable treatment.") The Report never mentions a person's right to be hired on his or her own merit, not even when it discusses the law. As they are wholly derivative, individual rights are in no sense inviolable. While the Report cautions, if only ambiguously, that race-conscious employment practices should not "unduly trammel the interests of majority-group job seekers," it never says a word about violating their rights. One cannot accept the Interim Report's framing of the issues surrounding race-norming without at the same time rejecting both the importance of economic efficiency and the primacy of individual rights.

If the Interim Report undermines all serious objections to race-norming by distorting, ignoring, and discrediting them, the Final Report, picking up where the Interim Report leaves off, attempts to justify race-norming on the basis of a specious scientific argument. The NAS panel faced the difficulty that the tests in question are useful in selecting a more productive work-force and they are not biased against minority group members. As the Final Report acknowledges, the tests do not underpredict job performance for blacks; if anything, they slightly favor blacks by overpredicting their performance. As a

result, the panel had to find a scientific justification for race-norming other than the bias or irrelevance of tests. Undaunted, it claims to have found one in the very nature of a selection system that favors people with high scores over those with low scores.

Because such a selection system chooses higher scorers over lower scorers, it necessarily favors those who are above a cut-off rather than those who are below it. But because no test is perfect, some candidates who score somewhat below a cut-off may in fact be capable of performing the job at least at a minimally acceptable level, while others who score somewhat above it may prove incapable of such performance. There will be "false negatives" among the marginal scorers below the cut-off and "false positives" among those above it.

**Race-norming will make permanent
the very inequality that it
is intended to eliminate**

More blacks than whites fall in the category of "false negatives" and more whites are "false positives." These disproportions have nothing to do with race per se, but arise from the fact that more whites have scores above the cut-off and more blacks have scores below it. As the panel itself points out, "These effects are a function of high and low test scores, not racial or ethnic identity." Yet, even though it concedes that the tests are unbiased and that the disproportion of blacks among "false negatives" arises from their lower scores and not from racial identity, the panel claims that "the disproportionate impact of selection error provides scientific grounds for the adjustment of minority scores." It concludes that the disproportions in false predictions provide a scientific justification for benefitting test takers whose scores, if anything, already overpredict their job performance. The panel, cloaking itself in the mantle of science, argues for a group-centered "remedy" to an outcome that the panel itself admits is not rooted in group membership, but instead affects all marginal scorers alike, regardless of race. Early in the Final Report, the panel writes that "In hindsight it is clear that many of the advocates of early [ability] testing allowed their scientific judgment to be influenced by contemporary racial and ethnic biases and by unexamined assumptions about the proper social order." The same may be said of the panel itself.

Given the NAS's need to strain for both a theoretical and a scientific justification for race-norming, one wonders why USES recommended race-norming in the first place. The answer lies in the combined effects of years of Executive branch orders and guidelines and subsequent Supreme Court decisions, which, by applying an adverse impact, or a group-centered definition of discrimination, have virtually forced employers to adopt the race-conscious use of tests in order to retain testing itself.

The Pressure to Race-Norm

Beginning in 1971 with the Supreme Court's *Griggs v. Duke Power Co.* decision, adverse impact (the hiring or promotion of proportionately fewer minorities) became prima facie evidence of discrimination. *Griggs* was the first racial case to reach the Court under Title VII of the 1964 Civil Rights Act. Title VII (Equal Employment Opportunity) forbids discriminatory practices in employment, but authorizes employers to use "professionally developed ability tests" in selecting workers, provided the tests are not designed, intended, or used to discriminate because of race, color, religion, sex or national origin. While the testing provision prevented the Supreme Court from declaring that adverse impact alone renders an employment test illegal, the Court interpreted the scope of the provision as restrictively as possible. Paying "great deference" to the EEOC's (Equal Employment Opportunity Commission) 1970 Guidelines for demonstrating the validity of a test, it ruled that the testing provision did not authorize general ability tests, but only tests that measure the applicant's ability to perform a particular job. Any test which adversely affects blacks is illegal under Title VII, the Court announced, unless the employer can prove that it has a manifest relationship to the performance of the particular job in question.

Under *Griggs*, no discriminatory treatment or intent need be shown, since adverse impact alone was deemed sufficient to create a prima facie presumption of illegality. An employment practice can be completely race-neutral or unbiased on its face – as are standardized aptitude tests and educational credentials – and applied to all applicants alike regardless of race, but still held to be discriminatory under *Griggs* if it has adverse impact and is not demonstrated to be specifically job-related.

By adopting the adverse impact standard for discrimination and interpreting Title VII's testing provision so narrowly, *Griggs* turned the judicial focus of discrimination claims in employment from

issues of fairness or justice to technical questions such as the identification of the relevant pool of applicants, the statistical significance of disparate results, and, above all, the validation (the demonstration of job-relatedness) of particular tests.

The *Griggs* legacy has posed two formidable problems for employers. First, the Guidelines are almost impossible to satisfy inasmuch as they represent not a reasonable minimum legal standard for judging test validity, but a scientific ideal to which it was once thought that professionals should strive in developing tests. The Guidelines adopted the APA's (American Psychological Association) 1966 Standards for test development and administration, even though the APA itself warned that those Standards were never intended to be, and were not well-suited to become, rules of law. The Guidelines go beyond the 1985 APA Standards in requiring employers to conduct a separate validation study for each and every job and work-setting in which a particular test is used, as well as for each race or other population subgroup of job applicants. Validation studies of this kind are not only difficult and expensive (frequently costing \$100,000 or more per job), but they are often impossible to conduct in practice. In recent years, some courts have recognized the nearly impossible burden of the now-outmoded Guidelines and have discarded some of their requirements. Yet, while this is an improvement in one sense, this development has at the same time increased the uncertainty of employers concerning the standards to which they might be held because judicial deference to the Guidelines has varied from court to court and from case to case.

**An invitation to dinner promises
not equality of opportunity
but satisfying results**

The second formidable problem posed by *Griggs* is that its group-centered definition of discrimination virtually assures that test use will lead to prima facie presumptions of discrimination, since even unbiased and job-related tests tend to have adverse impact. Their use typically makes employers vulnerable to adverse-impact litigation, forcing upon them the exceedingly difficult and expensive burden of proving the job-relatedness of their tests. (Whether the Supreme Court's recent *Wards Cove v. Antonio*

decision will ease this burden, as many expect, remains to be seen.)

Not surprisingly, then, following *Griggs* and its progeny, almost all employment litigation has been decided in favor of the plaintiffs. This judicial climate has caused a dramatic change in the use of employment tests. Some employers abandoned tests altogether rather than go to the expense of conducting test validation studies which, in any case, were no guarantee for successfully countering charges of discrimination. Others, wishing to retain some of the benefits of testing, sought refuge in the so-called "bottom line" defense, which combined tests and equality of end results. This approach typically involved a multi-step procedure in which tests were used in an initial stage to screen out applicants who fell below some minimum cut-off score. The final selection then compensated for the adverse impact of the first stage by giving preferential treatment to the minorities who remained after the initial cut. Overall racial balance – equality at the bottom line – would, it was thought, bar an adverse impact claim and thus preclude the necessity of validating the tests.

In 1982, the Supreme Court rejected the bottom line defense, holding that adverse impact scrutiny should be applied not only at the final selection but at every step of the selection process. That case, *Teal v. Connecticut*, involved a two-step process to select employees for permanent promotion to supervisory positions in the state welfare department. On the first step, 54 percent of the black candidates (26 of 48) and 77 percent of the white candidates (205 of 259) passed a written examination, making the passing rate for blacks 68 percent of that for whites. Yet, on the second step, 11 blacks and 35 whites were promoted, giving blacks an overall passing rate 170 percent of that for whites, as 23 percent of the original 48 black candidates were promoted compared with only 13.5 percent of the original 259 whites. The Court ruled that this was discrimination against blacks. The Court's rejection of the bottom-line defense left employers with little choice but to abandon tests altogether or else to use them in a race-conscious way.

Despite the enormous expense and legal liability now associated with employment testing, many employers are reluctant to abandon testing because of its proven effectiveness in selecting a significantly more productive work-force, especially at the entry-level. By adopting race-norming, employers believe they can realize some of the benefits of testing and at the same time avoid the onerous requirements of the

federal Guidelines. Among the various race-conscious uses of tests, race-norming is particularly attractive to employers because it enables them to select the best workers from each racial group and to avoid the difficult, risky, and expensive burden of proving the validity of their tests. So long as private employers avoid adverse impact at every step of the selection process, which race-norming does, they are free to use whatever selection device (rational or otherwise) they choose.

Lasting Inequality

By eliminating competition across racial lines, race-norming repudiates the language and the legislative history of Title VII and the 1964 Civil Rights Act, which, even the NAS panel concedes, call for color-blind employment practices. More than that, it repudiates the fundamental principles of the American regime and of liberalism itself. With the advent of race-norming, liberalism comes full circle. It returns to the anonymity and the arbitrary inequality of medieval feudalism, which it was intended to replace.

Liberalism, with its fundamental principles of individual freedom and equality, arose in opposition to medieval feudalism's group-centered concept of justice. Consisting in an elaborate structure of distinct and fixed ranks or orders, feudal society was based on the primacy of the group, not of the individual. Which group someone belonged to – serfs, free villains, clergy, burghers, nobles, or any of the numerous subdivisions within each of these groups – made all the difference in every aspect of life. In contrast to liberalism's emphasis on a common standard of justice for all, under feudalism there were no common rights or common justice. Because the group rather than the individual was the primary unit, a person's rights and disabilities were determined by one's membership in a group. Even courts of law differed from group to group. Serfs were tried under one code of law and before one judicial tribunal; lords another; burghers a third; and clergy a fourth. Criminal punishments not only differed from group to group, but could be imposed on entire groups as such. Whole towns and villages – the guilty and innocent alike – were sometimes collectively punished.

Group membership, which was permanent, was determined solely by birth. Regardless of abilities or talents, individuals were born into the rank they would occupy for the rest of their lives. A man was a serf because he was born a serf; a lord because he was born a lord. Lineage was destiny. Even membership

in a particular guild (such as shoemaking or weaving) often depended on a person's birth.

In feudal society, people enjoyed neither freedom nor equality. The arbitrary conditions of birth limited opportunities, and no one could be the equal of anyone except another member of one's own group. Between members of different ranks or orders there was no common measure (except in the eyes of God), and therefore no possibility of equality.

Liberalism sought to replace the arbitrary conditions of birth with the common nature with which all people are born. It replaces the arbitrary and the fixed with the natural and the free. Because the purpose of government is to protect the rights of individuals, just government rests on the principle that no one should be limited in life by the condition of his or her birth. Just government requires equality of opportunity for individuals. Because everyone is born with the same basic rights, everyone is entitled to be judged on the basis of individual merits, limited only by one's natural abilities, talents, and motivation.

Not content with equal opportunity for individuals, proponents of race-norming demand equal results for groups. Yet what they would actually achieve would be just the opposite of what they seek. Under race-norming, blacks as a group might enjoy parity with whites. By design, race-norming promises racial balance in the work force. Yet, in spite of this, under race-norming, blacks and whites as individuals could never be equal. Race-norming would perpetuate the very inequalities it seeks to remove. Instead of narrowing inequality, it would make equality impossible, for blacks, never competing with whites, could never be compared with them. Because blacks would compete only with other blacks, they could be the equals only of other blacks. Instead of being comparable, members of different races would become different in kind.

Race-norming represents a giant step backwards in the struggle for human dignity and equality. It would restore feudalism's group justice ("group equity," the NAS calls it). Lineage, once again, would become destiny, as a person's rights and standing in society would be determined by the arbitrary conditions of birth.

The New Segregation

The adverse impact approach to racial discrimination, which the Supreme Court first adopted in *Griggs* and which the NAS panel takes for granted, assumes that rights belong to groups as groups rather than to their individual members. Whether a person has been

discriminated against is determined not by reference to the individual, but by reference to his or her group. Membership in the group determines an individual's injuries and claims. On the one hand, individuals in similar circumstances have similar claims only if they belong to the same racial group, and, on the other, no individual can claim to be a victim of discrimination unless he or she can show that others in the group were also victims. It is the group, not the individual, which is thought to bear rights.

The panel suggests that class action suits provide a precedent for the adverse impact approach. Yet the two are the exact opposites of each other. In a class action, individuals become class members by having similar claims. In a disparate impact claim, members are not grouped together because they have similar claims. Rather, they have similar claims because they are grouped together. The group is not an aggregation of individuals, but a fundamental entity in itself.

Race-norming returns us to the anonymity and the arbitrary inequality of medieval feudalism

Adverse-impact justice is depersonalized justice. Just as the harm suffered must be corporate harm, so the responsibility borne is corporate responsibility. According to the traditional notion of justice, an individual should be held responsible only for what the person himself did. Guilt implies causality. No one should be punished for what someone else (or no one) did. Yet, in adverse impact claims, employers can be held responsible for effects which they did not cause and over which they may have had no control. Just as group membership determines rights and injuries, so group statistics determine responsibility and guilt.

With the adoption of the adverse impact approach, the group as group necessarily eclipses the importance of its individual members. And, as discrimination becomes defined in terms of statistical results, the judicial focus shifts from equality of opportunity for individuals to equality of results for groups. This is evident in the way *Griggs* turned Title VII on its head. Whereas Title VII ("Equal Employment Opportunity") is plainly concerned with opportunities, the *Griggs* Court declared that "Congress directed the thrust of the Act to the consequences of employment practices" (the Court's emphasis). And whereas Title

VII is concerned with individuals, not groups ("It shall be...unlawful...to discriminate against any individual...because of such individual's race..."), the Court never mentioned the word "individual" (except in two footnotes when it could not possibly avoid it) and spoke instead only of groups. What Title VII proscribes, it said, is "precisely and only" discriminatory preference "for any group."

If the *Griggs* Court never mentioned individual rights, neither did it support its adoption of the adverse impact approach with any specific references to the language or the legislative history of Title VII, or to any legal precedent or even a legal theory. Instead, it relied entirely on a child's fable. "Congress has now provided," it announced, "that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox." In the fable, a miserly fox invites his neighbor the stork to dinner, but serves the meal in a shallow plate, preventing the stork, whose long beak is an obstruction, from enjoying it. The fable is cleverly chosen, for it completely obscured the very distinction in question — that between opportunity and results. An invitation to dinner promises not equality of opportunity, but satisfying results. No guest, no matter what his ability, should leave dissatisfied with his portion. The standard for hospitality is not the fairness of the host, but the pleasure of his guest. "Resort[ing] again to the fable," the *Griggs* Court concluded that Congress had "provided that the vessel in which the milk is proffered be one all seekers can use." For, it explained, by enacting Title VII, "Congress has now required that the posture and condition of the job-seeker be taken into account." According to the Court, Title VII, in short, has mandated race-conscious employment practices because it requires equal results. Lest equality of opportunity be "merely" equality of opportunity (as the Court infelicitously put it), employment testing must guarantee equality of results.

One may hope that the new majority on the Supreme Court would prohibit race-norming, for it is no exaggeration to warn that race-norming threatens a return to the infamous "separate but equal" doctrine of *Plessy v. Ferguson* (1896). In that case, the Supreme Court found it no infringement of equality to group individuals by race: "[A] statute which implies merely a legal distinction between the white and colored races...has no tendency to destroy the equality of the two races," the Court declared. Likewise, under race-norming, while blacks and

whites would work side-by-side, they would be judged separately, though guaranteed equal group results. No Court would ever openly return to the phrase "separate but equal," for everyone recognizes that "separate" always meant "unequal." A new euphemism would be needed. But if history is any guide, there is no reason to doubt that one will be forthcoming. "Newspeak" is not new to the rhetoric of racial discrimination. An accurate phrase for what the panel seemingly intends would be "mingled but unequal." Though physically mingled, black and white workers would be judged on unequal bases. For blacks as a group, the result would be "separate but equal," for blacks as individuals, "mingled but unequal." Racial balance among groups of workers might be achieved, but at the price of permanent social inequality among the workers themselves.

READING SUGGESTED BY THE AUTHORS

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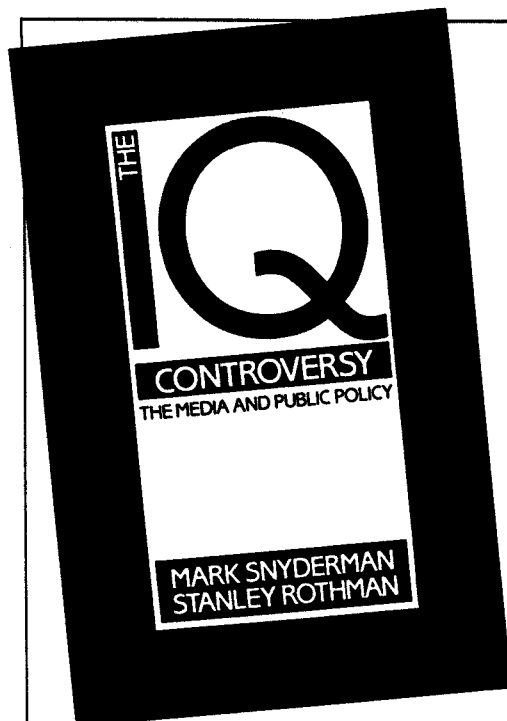
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Jan H. Blits teaches in the University Honors Program at the University of Delaware and was previously Secretary of the Navy Distinguished Fellow at the U.S. Naval Academy. He has published two books and numerous articles on educational and political philosophy.

Linda S. Gottfredson is associate professor of educational studies at the University of Delaware and co-director of the Project for the Study of Intelligence and Society. She has published in personnel psychology, counseling psychology, and sociology on issues of testing, inequality, and fairness in education and employment.



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