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CHALLENGING DISCRIMINATORY GUESSWORK: DOES IMPACT ANALYSIS APPLY?

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Title VII of the Civil Rights Act of 1964[1] (the "Act") is the first major piece of federal legislation designed to deal comprehensively with the problem of employment discrimination in the American work place. It prohibits discrimination on the basis of race, color, religion, national origin and sex by private and public employers as well as labor organizations and employment agencies. The two theoretical bases upon which the existence of unlawful discrimination may be established are disparate treatment and disparate impact. Both are rooted in section 703(a) of the Act.[2] The disparate treatment theory,[3] the "most easily understood,"[4] postulates that the employer has in-

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1. Civil Rights Act of 1964 §§ 701-18, *as amended*, 42 U.S.C. §§ 2000(e) to (e)-17 (1982).

2. Section 703(a) of the Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Hazelwood School District v. United States, 433 U.S. 299 (1977); Bazemore v. Friday, 478 U.S. 385 (1986).

4. *International Bhd. of Teamsters*, 431 U.S. 324, 335 n.15.

tentionally treated the plaintiff less favorably than others on a prohibited basis. Critical to the success of a disparate treatment claim is a showing of discriminatory intent. By contrast, disparate impact theory[5] requires a showing that the defendant, without business justification, utilized employment practices or procedures that adversely affected the plaintiff as a member of a protected class.[6]

The Supreme Court adopted the disparate impact approach in *Griggs v. Duke Power Co.*,[7] stating that "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[8] The Court noted that "congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," and "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[9]

During the early 1980's, both an intra and inter circuit split developed over whether the nature of the challenged practice should dictate the mode of analysis utilized in deciding whether unlawful discrimination under Title VII has occurred. Specifically, a number of courts held that disparate impact analysis is only applicable where the employment practice being challenged can be isolated or is objective or both.[10] In other words, only the disparate

5. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982).

6. This article, for purposes of consistency and clarity, discusses discrimination only in terms of race. The only situation in which the protected status of the plaintiff might make a difference in analysis would be where the defendant has available to it the bona fide occupational qualification ("BFOQ") defense contained in Section 2000e-2(e) of the Act. The BFOQ defense allows an employer to discriminate on the basis of an individual's protected class status where such discrimination is reasonably necessary to the essence of the business. *See* Western Airlines v. Criswell, 472 U.S. 400 (1985). The availability of this defense in sex, religion and national origin based challenges, however, has no significance in determining which analytical approach is appropriate in deciding the ultimate question whether discrimination exists. The BFOQ defense is not available in race discrimination claims.

7. 401 U.S. 424 (1971). Disparate impact analysis had, of course, been utilized by lower courts before *Griggs*. *See, e.g.*, Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Cal. 1970); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970).

8. 401 U.S. at 432.

9. *Id.* at 431 ("the touchstone is business necessity").

10. *See, e.g.*, Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); Watson v. Fort Worth Bank and Trust Co., 798 F.2d 791 (5th Cir. 1986); Carpenter v. Stephen F. Austin Univ., 706 F.2d 608 (5th Cir. 1983); Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982); Pegues v. Mississippi State Employment Serv., 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983); Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Tally v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981); Spaulding v. University of Wash., 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); Heagney v. University of Wash., 642 F.2d 1157 (9th Cir. 1981); Cunningham v. Housing Auth. of Opelousas, 764 F.2d 1097 (5th Cir. 1985); Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1133 (9th Cir. 1985), *rev'd and remanded*, 109 S. Ct. 2115 (1989); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982); Morre v. Hughes

treatment theory can be utilized to challenge subjective or multifaceted employment practices. Other courts have come to the opposite conclusion.[11] Still others have refused to "enter this labyrinth"[12] because of the evidence presented in the particular cases. This confusion has generated much comment.[13]

On June 22, 1987, the Supreme Court granted certiorari in the case of *Watson v. Fort Worth Bank & Trust Co.*[14] to resolve the conflict. It rendered

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Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983); Rossini v. Ogilvy & Mather, 798 F.2d 590 (2nd Cir. 1986); Emanuel v. Marsh, 828 F.2d 438 (8th Cir. 1987), *vacated*, 108 S. Ct. 2891 (1988); Griffin v. Board of Regents of Regency Univ., 795 F.2d 1281 (7th Cir. 1986); Namenworth v. Board of Regents of Univ. of Wisconsin System, 769 F.2d 1235 (7th cir. 1985), *cert. denied*, 474 U.S. 1061 (1986); Lewis v. NLRB, 750 F.2d 1266 (5th Cir. 1985).

11. *See, e.g.*, Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1974); Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982); Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986); Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982), *cert. denied*, 459 U.S. 873 (1982); Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987), *rev'd and remanded*, 109 S. Ct. 2115 (1989); Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985); Lasso v. Woodmen of World Life Ins. Co., 741 F.2d 1241 (10th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981); Coe v. Yellow Freight System, Inc., 646 F.2d 444 (10th Cir. 1981); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Johnson v. Uncle Ben's Inc., 628 F.2d 419 (5th Cir. 1980), *cert. denied*, 459 U.S. 919 (1977); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986), *cert. denied*, 479 U.S. 910 (1986); Caviale v. Wisconsin Dep't of Health and Social Serv., 744 F.2d 1289 (7th Cir. 1984); Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984); Stewart v. General Motors Corp., 542 F.2d 445 (5th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); Yartzoff v. Oregon, 745 F.2d 557 (9th Cir. 1984); Peters v. Lieuallen, 746 F.2d 1390 (9th Cir. 1984); Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981); Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. 1984); Jones v. Hutto, 763 F.2d 979 (8th Cir. 1985), *vacated on other grounds*, 474 U.S. 916 (1985); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985); Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984), *modified*, 742 F.2d 520 (9th Cir. 1984).

12. *See, e.g.*, McIntosh v. Weinberger, 810 F.2d 1411, 1427 (8th Cir. 1987); Robinson v. Polaroid, 732 F.2d 1010 (1st Cir. 1984); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982); Eastland v. Tennessee Valley Auth., 704 F.2d 613 (11th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984); Latinos Unidos de Chelsea En Accion v. Secretary of HUD, 799 F.2d 774 (1st Cir. 1986).

13. *See, e.g.*, Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL L. REV. 869; Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments, 63* CHI.-KENT L. REV. 1, at 14-17 (1987); Thomson, *The Disparate Impact Theory: Congressional Intention in 1972-A Response to Gold*, 8 Indus. Rel. 105 (1986); Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939 (1985); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment under Title VII of the Civil Rights Act of 1964 after Beazer and Burdine*, 23 B.C.L. REV. 419 (1982); Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); Maltz, *Title VII and Upper Level Employment—A Response to Prof. Bartholet*, 77 NW. U.L. REV. 776 (1983); Rose, *Subjective Employment Practices: Does Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63 (1988); Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975 (1983); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979); Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976).

14. 107 S. Ct. 3227 (1987).

its decision on June 29, 1988.[15] Justice O'Connor delivered the opinion of the Court, concluding that disparate impact analysis may be applied in a challenge to a subjective or discretionary promotion system. All participating justices concurred in this conclusion. At Parts II (C) and (D) of the opinion, however, Justice O'Connor, in an effort to "decide what evidentiary standards should be applied" in such cases,[16] formulated a standard of proof that is a radical departure from the standards set and utilized by the Court in its prior decisions. Chief Justice Rehnquist, and Justices White and Scalia concurred in this approach. Justice Blackmun, joined by Justices Brennan and Marshall, filed an opinion roundly criticizing the plurality's new formulation as "inconsistent with the proper evidentiary standards and with the purposes of Title VII."[17] Justice Stevens filed a separate opinion suggesting that further discussion of the evidentiary standards to be applied in such cases should be post-poned.[18] Justice Kennedy took no part in the opinion.

The plurality's new evidentiary standard threatens to render a plaintiff's success in many such cases virtually impossible. This result may yet be avoided, however, since Justices Stevens and Kennedy expressed no view on the merits of the plurality's resolution of this important issue.[19]

This article initially examines the traditional theories of proof in Title VII cases. It then discusses approaches by lower courts in resolving the competing concerns raised in applying those traditional theories in challenges to subjective selection devices. This article next discusses the Supreme Court's resolution of the problem in *Watson* and suggests a workable alternative resolution that will not undermine the broad prophylactic purposes of Title VII.

15. 108 S. Ct. 2777 (1988).

16. 108 S. Ct. at 2782.

17. *Id.* at 2792.

18. *Id.* at 2797.

19. One could speculate that if Justice Kennedy had participated, he would have tended toward the plurality view of the need for plaintiffs to identify with specificity the employment practices challenged. This conclusion is based on the opinion he authored while sitting on the Court of Appeals for the Ninth Circuit in AFSCME v. Wash., 770 F.2d 1401 (9th Cir. 1985). *AFSCME* involved a challenge to the wage setting practices of the State of Washington as having an adverse impact on women employees of the State who, historically, had received lower wages than men. The district court analyzed the case under both disparate treatment and disparate impact theory, and found that the State had violated Title VII under both. Judge Kennedy rejected the district court's analysis under both theories. Citing Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982), Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 511 (1984), and Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985), *rev'd and remanded*, 109 S. Ct. 2115 (1989), Judge Kennedy noted that "[t]he precedents do not permit the case to proceed upon" a disparate impact theory. 770 F.2d at 1405. He concluded that a compensation system which was "the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory." *Id.* at 1406.

Justice Stevens's view on the issue is less clear, although his opinion for the Court in New York Transit Auth. v. Beazer, 440 U.S. 568 (1979), suggests that he sympathizes with the plurality view that the demands traditionally imposed on defendants in rebutting a prima facie case of disparate impact should not be rigidly applied in all cases. See *infra* text accompanying note 74.

Theories of Proof Under Title VII

The Individual Disparate Treatment Case

In the individual disparate treatment case,[20] the plaintiff's burden is to establish that the employer treated the plaintiff differently than it treated a similarly situated individual and that the difference in treatment was based on a prohibited factor. Upon such a showing, the defendant must come forward with an explanation, a "legitimate nondiscriminatory reason" for the different treatment.[21] Assuming that a legitimate nondiscriminatory reason is proffered, the plaintiff must be given the opportunity to establish to the satisfaction of the court that the reason given was not the true reason, but instead a "pretext" for discrimination.[22] Under the disparate treatment model, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains always with the plaintiff."[23]

In the classic individual disparate treatment case, plaintiffs will establish that they were qualified for and denied an employment benefit while majority group members were provided the desired benefit or while the employer continued to offer the benefit to others. This establishes a prima facie case of intentional discrimination.[24] To rebut this prima facie case, the defendant must present credible evidence of a legitimate nondiscriminatory reason for the denial.[25] The defendant's explanation must be "clear and reasonably

20. Referred to by the Court in *McDonnell-Douglas Corp. v. Green* as the "private, non-class action" case.

21. *Id.* at 802.

22. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

23. *Id.*

24. McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973), sets out a four part test for establishing the prima facie case in individual disparate treatment cases. Under the *McDonnell-Douglas* test, plaintiff must establish:

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and that the employer continued to seek applicants from persons of complainant's qualifications.

Id.

The Court explained further that, because the facts in Title VII cases will necessarily vary, "the prima facie proof" specified above "is not necessarily applicable in every respect of differing factual situations." *Id.* at 802 n.13.

25. What constitutes a legitimate nondiscriminatory reason for apparently discriminatory conduct is generally quite loosely defined by the courts. Practically any reason other than one related to the plaintiff's protected status will suffice. *Burdine*, 450 U.S. 248, 258 (1981), suggests that a legitimate reason is one not linked to race. *See, e.g.*, Parsons v. County of Del Notre, 728 F.2d 1234 (9th Cir. 1984) (person selected better qualified than plaintiff), *cert. denied*, 469 U.S. 846 (1984); McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984) (failure to cooperate with coworkers); Gilchrist v. Bolger, 733 F.2d 1551 (11th Cir. 1984) (poor attendance); Cunningham v. Housing Auth. of Opelousas, 764 F.2d 1097 (5th Cir. 1985) (political patronage), *cert. denied*, 474 U.S. 1007 (1985); Robinson v. Polaroid, 732 F.2d 1010, 1014 (1st Cir. 1984) (good faith exercise of professional judgment); Grano v. Dep't of Dev. of Columbus, 699 F.2d 836 (6th Cir. 1983) (articulated belief in the inferiority of plaintiff's qualifications). Essentially, any reason may suffice to meet the defendant's burden so long as it is nondiscriminatory on its face. All

specific,"[26] because plaintiffs must be given a full and fair opportunity to establish that the reason proffered is pretextual.[27]

The prima facie case may be made in one of two ways. Most often a prima facie case is established by meeting the *McDonnell-Douglas Corp. v. Green*[28] evidentiary pattern which establishes discrimination as the presumptive reason for the adverse employment action. This model operates on the presumption that where all factors obviously related to the employment decision are equal and the race of the comparable individuals is different, race was the factor that controlled the decision.[29] Because the presumption of intentional discrimination is so easily established, it is also easily rebutted by the employer's satisfactory articulation of a legitimate nondiscriminatory reason for the challenged action. At this point, the court, no longer bound by the mandatory inference of intentional discrimination created by the prima facie case, must consider all evidence in determining whether the offered reason is pretextual.[30] The ultimate factual determination that must be made by the court is whether, in light of all the evidence presented, the employer intentionally discriminated against the plaintiff.[31]

The prima facie case can also be established where the plaintiff offers direct evidence that the employer had a discriminatory intent in making the challenged employment decision. In these cases, the *McDonnell-Douglas* analysis is obviously unnecessary since, where direct evidence of actual intent is extant, no presumption of intent is required.[32] Where there is direct evidence of intentional discrimination, the defendant's rebuttal burden is significantly greater. The defendant may not rebut the showing of intentional discrimination by offering evidence of a legitimate nondiscriminatory reason for the challenged action. Instead, the defendant must prove that the decision would not have been different even if there had been no discriminatory intent.[33]

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that is required is that defendant "rais[e] a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. *See generally* Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Dep't of Community Affairs v. Burdine*, 55 TEMP. L.Q. 372, 379 (1982).

26. 450 U.S. at 258.

27. This burden can be met "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

28. 411 U.S. 792 (1973).

29. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

30. *Burdine*, 450 U.S. 248, 255 n.10.

31. *Id.* at 253; Untied States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

32. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) ("[t]he McDonnell-Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination . . ."). *See also* Fields v. Clark Univ., 817 F.2d 931, 934 (1st Cir. 1987); Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3d Cir. 1985), *cert. denied*, 108 S. Ct. 2860 (1988); Blalock v. Metal Trades, Inc., 775 F.2d 703 (6th Cir. 1985); Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985); EEOC v. Wyoming Retirement Sys., 771 F.2d 1425, 1429 (10th Cir. 1985); Nanty v. Barrows Co., 660 F.2d 1327, 1333 (9th Cir. 1981).

33. *See, e.g.*, Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988); Fields v. Clark Univ., 817 F.2d 931 (1st Cir. 1987); Miles v. M.N.C.

The Class Disparate Treatment Case

Disparate treatment theory may also be utilized in cases involving discrimination against a class of plaintiffs. In such cases, as in individual cases, discriminatory intent is an essential element of the plaintiff's proof.[34] In class cases, however, a presumption of intentional discrimination is not so easily established as it is in individual cases where the *McDonnell-Douglas* model is available. The presumption of intent in these cases may be raised only by showing a statistically significant disparity in treatment between members of the protected group and comparably qualified members of a majority group. As in the *McDonnell-Douglas* model, disparate treatment analysis in class cases operates on the assumption that discrimination is the cause if other ready explanations for the disparity are excluded.[35]

Statistical evidence[36] showing gross disparities is generally sufficient to satisfy the plaintiff's prima facie case. The statistical evidence in class disparate treatment cases generally consists of comparisons between the racial composition of an employer's work force and the racial composition of the relevant labor pool from which employees are secured,[37] a more direct comparison of "applicant flow" data showing the actual disparity in selection rates caused by challenged employment practices,[38] or the more sophisticated multiple regression analysis through which estimates of the effect on dependent variables of isolated independent variables is calculated.[39] The existence of statistically significant disparities rules out chance as the explanation for racially stratified employment patterns, and raises a presumption of intentional discrimination.[40] In cases where the statistical showing is less compelling, there may be a need

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Corp., 750 F.2d 867 (11th Cir. 1985); Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc); Blalock v. Metals Trades, Inc., 775 F.2d 703, 711 (6th Cir. 1985); Caviale v. State of Wis. Dep't of Health and Social Servs., 744 F.2d 1289, 1296 (7th Cir. 1984); Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 620 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984); Toney v. Block, 705 F.2d 1364 (D.C. Cir. 1983); Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980).

34. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 n.9 (1984).

35. *See International Bhd. of Teamsters*, 431 U.S. at 358 n.44.

36. For an exhaustive discussion of the use of statistics in employment discrimination litigation, see generally D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980).

37. *See, e.g., International Bhd. of Teamsters*, 431 U.S. 324 (1977).

38. *See, e.g.*, Hazelwood School District v. United States, 433 U.S. 299 (1977).

39. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385 (1986).

40. The Supreme Court has held that a statistical difference in treatment cases reaches the requisite "gross disparity" when the difference between the expected treatment and the actual treatment is greater than two or three standard deviations. Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977); Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1977) ("Absent explanation, standard deviations of greater than three generally signal discrimination."). *See also* Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 821 n.32 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982) ("Statisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations."); Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985); Eastland v. Tennessee Valley Auth., 704 F.2d 613, 618 (11th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); Wheeler v. City of Columbus, Miss., 686 F.2d 1144 (5th Cir. 1982); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 839 (D.C. Cir. 1977).

to bring "the cold numbers convincingly to life" with some direct evidence of individual instances of intentional discrimination.[41] The key in such cases is to establish that discrimination was the "standard operating procedure" of the employer.[42] Because the statistically based prima facie case eliminates the probability that the disparity was caused by chance, traditionally the plaintiff has not been required to identify a particular employment practice that caused the disparity.[43]

Once the prima facie case is made, the proof requirements imposed on a defendant are significantly different from those in individual disparate treatment cases. The employer may rebut the prima facie inference of intentional discrimination only by offering evidence that undermines the plaintiff's statistical showing, or by offering its own more probative statistical analysis that provides a nondiscriminatory explanation for the disparity.[44] Undermining the plaintiff's statistical showing challenges the facts upon which the presumption of intent was founded. Providing a nondiscriminatory explanation renders the presumption invalid by attributing the disparity to a legitimate cause other than race. The defendant's submission of an alternative statistical analysis explaining the alleged nondiscriminatory cause of the disparity then is the point in the process where the cause of the disparity is first revealed and where the court has before it the facts necessary to make the ultimate determination whether intentional discrimination has occurred.[45]

41. *International Bhd. of Teamsters*, 431 U.S. 324, 339 (1977). *See also, e.g.*, Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987); Thompson v. Sawyer, 678 F.2d 257, 283 (D.C. Cir. 1982); Valentino v. United States Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982); Sledge v. J.P. Stevens, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

42. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); Bazemore v. Friday, 478 U.S. 385 (1986).

43. Identification of a particular tool used by an employer is inconsistent with a theory that the employer utilizes a number of tools to effectuate its discriminatory motive, and impractical where plaintiff is unaware of how the motive is being effectuated. Indeed, in *International Bhd. of Teamsters*, the practices included ignoring requests for transfers, giving false or misleading information about requirements, opportunities, and application procedures, and failure to consider or hire blacks on the same basis as whites. 431 U.S. at 338. Recently, the Court supported this notion in Bazemore v. Friday, 478 U.S. 385, 400-01 (1986), stating, "as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail."

44. *International Bhd. of Teamsters*, 431 U.S. at 360 & n.46 ("demonstrating that the Government's proof is either inaccurate or insignificant" or by "provid[ing] a nondiscriminatory explanation for the apparently discriminatory result"). While the courts have never clearly delineated the types or quantum of evidence necessary to meet that burden, it is clear that more than the mere "articulation of a legitimate nondiscriminatory reason," as in individual treatment cases, has been required. *See* Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); *See* Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 71 n.36 (1988).

45. It has been suggested that once the cause of the disparity in treatment cases is disclosed by the defendant, that causative factor, if determined to suffice as a legitimate nondiscriminatory reason for disparate treatment purposes, should also be anlayzed under disparate impact theory.

If a finding of class wide disparate treatment is made, a prima facie case on behalf of each member of the class is established.[46] The defendant, at this stage of the proceedings, as a proved wrongdoer, has a burden as to the claims of individual class members which resembles the burden in individual disparate treatment cases where direct evidence of intent forms the basis of the prima facie case.[47] Once a class member establishes qualification for but denial of the benefit sought, the employer must prove that the denial was for legitimate nondiscriminatory reasons.[48] At this point the individual plaintiff seeking relief on the basis of the "pattern and practice" of discrimination has the opportunity to show that the purported reason for the denial was pretextual.[49]

The Class Disparate Impact Case

The focus of disparate impact theory is on the operation of employment practices that have a discriminatory effect on a protected group. While discriminatory intent is a necessary element in all disparate treatment cases, it is wholly irrelevant[50] in the disparate impact case. In *Griggs v. Duke Power Co.*,[51] where the Supreme Court first articulated its theory of disparate impact, the class of black applicants for jobs with the Duke Power Company challenged the operation of two selection devices utilized by the Company for screening applicants—a high school diploma requirement and a require-

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D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 1.23 (1980); Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982). This suggestion has been noted with interest by the Court of Appeals for the District of Columbia Circuit in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). *See also* Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 884-86; Latinos Unidos De Chelsea En Accion v. Secretary of HUD, 799 F.2d 774, 787 n.22 (1st Cir. 1986).

Analyzing the legitimate nondiscriminatory reasons for racial disparities under disparate impact analysis allows for a complete analysis of the effects of employer practices once those practices are identified and shown to have a discriminatory impact. This approach fails to compel so complete an analysis, however, in those cases where the plaintiff's statistical showing is insufficient to establish a prima facie case of disparate treatment and thereby shift to the defendant the burden of offering an explanation for the disparity.

46. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

47. See *supra* note 33 and accompanying text.

48. The burden on defendant, *after* a finding of discrimination across the class, is to prove as to individual members of the class that the adverse employment decision was made for legitimate nondiscriminatory reasons. This burden has nothing to do with the establishment of class discrimination under the disparate treatment theory, but rather goes to the question of which of the class members, presumptively entitled to relief, will be afforded relief. *International Bhd. of Teamsters*, 431 U.S. at 362. *See also* Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1031 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); Richardson v. Byrd, 709 F.2d 1016, 1021 (5th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983); Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 470 (8th Cir. 1984); Perryman v. Johnson Products, 698 F.2d 1138 (11th Cir. 1983); Dillon v. Coles, 746 F.2d 998, 1004 (3d Cir. 1984).

49. *International Bhd. of Teamsters*, 431 U.S. at 362 n.50.

50. See *contra infra* notes 53 & 99.

51. 401 U.S. 424 (1971).

ment that the applicant pass a written examination. The plaintiffs presented evidence that a disproportionate number of blacks failed both requirements. The Court noted that the Act was designed to eliminate practices that were "fair in form, but discriminatory in operation,"[52] and dispensed with the need to show intent.[53] To establish a prima facie case under the *Griggs* analysis, the plaintiff need only establish that the employer utilized a selection device or combination of devices[54] which operated to exclude disproportionate numbers of qualified minorities.

The plaintiff may establish the required disparate impact through various statistical analyses.[55] Generally, impact sufficient to make out a prima facie case is established by demonstrating with "applicant flow" data[56] that the challenged practice or criteria in fact rejected disproportionately members of the protected group;[57] by showing that the challenged requirement would

52. *Id.* at 432.

53. There was a long history of pre-Act intentional discrimination against blacks at the Duke Power Company, and many commentators suggest that this history of intentional discrimination supported the Court's adoption of disparate impact theory. In so concluding, they have suggested that evidence of an intent to discriminate may be an appropriate prerequisite for applying the disparate impact theory. *See, e.g.*, Furnish, *A Path Through The Maze*, 23 B.C.L. REV. 419, 442 (1982).

However, the *Griggs* court was clear in stating that "good intent does not redeem employment procedures or testing mechanisms that operate as 'built-in-headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. This fundamental aspect of disparate impact analysis, that intent, past or present, is generally irrelevant, has been consistently confirmed by the Court. *See Teal*, 457 U.S. at 454 ("resolution of the factual question of intent is not what is at issue in this case"); *Id.* at 447 n.8 (legislative history of the 1972 amendments to Title VII "demonstrat[ing] that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*"). *See also* Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, at 14-17 (1987); Thomson, *The Disparate Impact Theory: Congressional Intention in 1972, A Response to Gold*, 8 INDUS. REL. 105 (1986); Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939 (1985). *Cf.* Gold, *Griggs' Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. 429 (1985).

54. *See, e.g.*, Gilbert v. City of Little Rock, Ark., 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972, *appeal after remand*, 799 F.2d 1210 (8th Cir. 1986); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988); Green v. U.S. Steel Corp., 570 F. Supp. 254, 274 (E.D. Pa. 1983); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). The Uniform Guidelines on Employee Selection Procedure defines selection procedures to which impact theory may apply as "[a]ny measure, combination of measures, or procedure . . . ." Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. § 1607.16(Q) (1987). *See also* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 50.81 n.63 (1987).

55. *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1326 (2d ed. 1983).

56. Applicant flow analysis determines the effect of selection criteria by analyzing the employer's actual experience. The effect of the challenged criterion is measured as to individuals who were in fact affected by the criterion.

57. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (criticizing tests which "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants").

operate to exclude a disproportionate number of protected group members in the relevant labor pool because such individuals do not meet the requirement;[58] or by comparing the racial composition of the employer's work force to the racial composition of a relevant labor pool.[59] Where a current disparate impact cannot be demonstrated, but current practices have the effect of freezing in place the discriminatory status quo by perpetuating the effects of past discrimination, that effect also is actionable under disparate impact theory.[60]

The statistical comparisons necessary to meet the plaintiffs' burden of demonstrating disparate impact need not rise to the level of statistical

58. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (citing statistics showing that in North Carolina 12% of black males had completed high school, while 34% of white males had done so); Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (citing statistics that a height and weight requirement would operate to exclude 41.13% of the female population and less than 1% of the male population); New York Transit Auth. v. Beazer, 440 U.S. 568, 586 n.29 (1979) (citing *Dothard* in stating that a statistical showing of disparate impact need not always be based on an analysis of the characteristics of actual applicants).

59. *See, e.g., Hazelwood*, 433 U.S. at 308 n.13 (urging the need for greater refinement in plaintiff's statistical proof, but recognizing "the probative force of . . . comparative work-force statistics); NAACP, Boston Chapter v. Beecher, 504 F.2d 1017, 1020-21 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (when widespread minority underemployment is shown to exist in a given occupation, primary selection devices should not be immunized from study by placing an unrealistically high threshold burden upon those with least access to relevant data). *See also* Kilgo v. Bowman Transp., Inc., 789 F.2d 859 (11th Cir. 1986); Chrisner v. Complete Auto Transit, 645 F.2d 1251 (6th Cir. 1981); Fisher v. Procter & Gamble Mfg., 613 F.2d 527, 545 n.35 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981); EEOC v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979); Rogers v. Int'l Paper Co., 510 F.2d 1340, 1344 (8th Cir. 1975), *vacated and remanded on other grounds*, 423 U.S. 809 (1975); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 76 (1979); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 391 (1975); Lamber, Reskin & Dworkin, *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 590 (1983); Shobin, *Probing The Discriminatory Effects of Employee Selection Procedures With Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977). *But see* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 74.41 (1988) (argument made that utilization analysis alone can never prove impact). *Cf.* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1987) (creating an inference of disparate impact based on underutilization and a failure to maintain more probative data; it is clear that a simple workforce/labor market analysis alone is significantly less probative that an analysis of the actual effect of challenged devices on actual applicants). However, this is not to say that general comparative data is wholly irrelevant. Where applicant flow data is unavailable (see *infra* note 140) or unreliable (see *infra* note 249), workforce/labor market analysis may be the most probative evidence that can be brought to bear on the question of disparate impact.

60. *See International Bhd. of Teamsters*, 431 U.S. 349 ("one kind of practice fair in form, but discriminatory in operation, is that which perpetuates the effect of prior discrimination"). This perpetuation theory was widely utilized by the courts during the early development of Title VII law. See cases cited *infra* at note 125. The theory was thrown into relative obscurity after *International Bhd. of Teamsters* clarified the section 703(h) protection from challenge afforded bona fide seniority systems, but lately has shown a slight resurgence. *See, e.g.*, Giles v. Ireland, 742 F.2d 1366 (11th Cir. 1984); United States v. City and County of San Francisco, 699 F. Supp. 762 (N.D. Cal. 1987); Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983). Practices that perpetuate the effects of prior discrimination can also be challenged under disparate treatment theory. *See* Bazemore v. Friday, 478 U.S. 385 (1986).

significance required to establish a prima facie showing in class disparate treatment cases. In impact cases, plaintiffs need not demonstrate gross disparities, but only a substantial or significant impact upon a protected group.[61] Because the central focus in disparate impact cases is on the effects of employment practices and not the intent of the employer, a disparity sufficient to eliminate chance as the cause of the disparity (thereby raising an inference of intent) is not required.[62] Instead, plaintiffs must establish only that the challenged practice produced the observed disparity. It is appropriate, therefore, to require the plaintiff to identify, to the extent possible, the challenged devices and the resultant impact. In all fairness to the employer, a plaintiff should be as specific as possible in identifying that which is alleged to be discriminatory and how it is discriminatory. Once that showing is made, the defendant must justify use of the challenged devices by establishing a "business necessity"—a "manifest relationship to the employment in question."[63]

In *Griggs* and in *Albemarle Paper Co. v. Moody*,[64] the business necessity of the challenged job requirement was analyzed in terms of its job relatedness. Typically, a defendant establishes the job relatedness of a particular selection device through validation of that device. The Uniform Guidelines on Employee Selection Procedures (UGESP),[65] as well as the American Psychological Association Guidelines,[66] recognize three basic methods of test validation: (1) content; (2) construct; (3) and criterion.[67] These three accepted methods of test validation are designed to measure the relationship between performance on a test or other selection device and performance on the job for which the selection device serves as a screen. The defendant may rebut by other means, however, if it is unable to technically validate the challenged selection

61. The Supreme Court decisions in disparate impact cases have not required the use of sophisticated statistical techniques, relying instead on a common sense observation whether the impact shown is substantial or significant. *See generally* Connecticut v. Teal, 457 U.S. 440, 446 (1982); Kilgo v. Bowman Transp., Inc., 789 F.2d 859 (11th Cir. 1986); Maddox v. Claytor, 764 F.2d 1539, 1548 (11th Cir. 1985). The Uniform Guidelines on Employee Selection Procedure contains, as a rule of thumb, what has been called the "fourth-fifths" rule. This rule provides that if the selection rate for the protected group is less than 80% of the selection rate for the majority group, adverse impact may be presumed. Application of the rule will depend on factors relating to the reliability of the data such as the size of the sample and whether the numbers reported are distorted. UGESP, 29 C.F.R. § 1607.4(D) (1987).

62. See *cf. supra* note 40 and accompanying text.

63. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. at 446-47 (1982).

64. 422 U.S. 405 (1975).

65. 29 C.F.R. § 1607.5 (1987).

66. American Psychological Association, Standards for Educational and Psychological Tests, 1974.

67. Content validation requires a showing that the test is representative of the content of the job; criterion validation, a showing that there are significant correlations between test performance and job performance; and construct validation, a showing that the test accurately measures traits possessed by candidates that have been shown to be important to successful job performance. *See* UGESP, 29 C.F.R. § 1607.14 (1987).

device. Validation is but one means of establishing job relatedness, and job relatedness is but one method for establishing business necessity. The UGESP, recognizing there may be situations in which an employer may experience difficulty in applying traditional validation techniques to selection devices, provides that where the principal validation techniques cannot be utilized, the employer should "otherwise justify continued use of the procedure in accord with federal law."[68] This provision recognizes that while validation may be the preferred method of demonstrating job relatedness, the business necessity concept encompasses a broader range of justifications for utilizing devices that result in adverse effects.

How the business necessity standard applies to a requirement that has some logical relationship to job performance but has not been shown to be predictive of ability is unclear.[69] In *Davis v. Washington*,[70] the Supreme Court found error in the court of appeals' reversal of a district court holding that defendant's testing requirement for police officers was job related. The district court held that because the test was "reasonably and directly related to requirements of the police recruit training program," it was sufficiently job related to be upheld under Title VII standards.[71] The court of appeals reversed the district court because the relationship between the test and training school success did not satisfy the requirement of a direct relationship between the test and performance on the job.[72] The Supreme Court, discussing the *Griggs* standard, stated that the district court's conclusion that "a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual job performance as a police officer," was not foreclosed by either *Griggs* or *Albemarle*, and was "the much more sensible construction of the job-relatedness requirement."[73]

68. UGESP, 29 C.F.R. § 1607.6(B)(1) (1987).

69. *See generally* Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987); Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555 (1985). Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981). *Cf.* Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979).

70. 426 U.S. 229 (1976).

71. Davis v. Washington, 348 F. Supp. 15, 17 (D. D.C. 1972).

72. Davis v. Washington, 512 F.2d 956, 959 (D.C. Cir. 1975).

73. 426 U.S. at 251. While *Davis* was brought under the fourteenth amendment and not Title VII, the Court still applied Title VII standards. Courts have followed the *Davis* analysis under Title VII and in other contexts. *See* Aguilera v. Cook County Merit Board, 760 F.2d 844 (7th Cir.), *cert. denied*, 474 U.S. 907 (1985), where Judge Posner affirmed a district court's granting of summary judgment for defendant in a case challenging defendant's requirement of a high school diploma for corrections officers. Judge Posner, after equating the *Griggs* requirement that the challenged device "bear a demonstrable relationship to successful job performance" with "fulfill[ing] a genuine business need," found that the requirement was job related. *See also* United States v. South Carolina, 445 F. Supp. 1094 (D. S.C. 1977); National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972).

The Supreme Court's 1979 decision in *New York Transit Authority v. Beazer*[74] appears to have extended the business necessity defense even further to encompass job requirements that are neither "validated" as job related in the *Griggs* sense nor logically related to job performance in the *Davis* sense, but are logically related to other legitimate employer concerns. In *Beazer*, the Court upheld a job requirement which excluded all narcotics users (including methadone users) from all jobs with the Transit Authority regardless of their safety sensitivity.[75] Plaintiffs challenged the requirement as having a disparate impact on blacks.[76] Utilizing the general language of *Griggs*, the Court reasoned that because the employer's "legitimate employment goals" were "significantly served by" the exclusionary rule, the requirement bore a "manifest relationship to the employment in question."[77] In *Davis* and *Beazer* then, the Court expanded the concept of business necessity beyond the bounds of job relatedness to include consideration of the relationship between the challenged criteria and other legitimate business concerns.

In impact cases then, the defendant is required either to attack the credibility of the plaintiff's showing of effect or to establish the affirmative defense of business necessity. If the defendant fails to meet its burden of persuasion on the business necessity of the challenged practice, or if it fails otherwise to undermine the plaintiff's showing of disparate impact, the plaintiff's prima facie showing of discrimination controls and a finding of discrimination must be made.[78] If the defendant is able to establish the business necessity of the

74. 440 U.S. 568 (1979).

75. *Beazer*, 440 U.S. at 594.

76. Evidence presented was inconclusive, but, in plaintiffs' view, indicated that significantly more blacks than whites were excluded by the rule. The Supreme Court found that a prima facie case had not been established because of inadequacies in plaintiffs' data. Nonetheless, it went on to address the business necessity defense.

77. 440 U.S. 568, 587 n.31.

78. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer must "meet the burden of proving that its tests are job related"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer must "prov(e) that the challenge requirements are job related"); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); Connecticut v. Teal, 457 U.S. 440, 446 (1982) (employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question"); Vulcan Society of New York v. Civil Service Comm. of New York, 490 F.2d 387, 393 (2d Cir. 1973) (defendant's rebuttal burden is one of persuasion); EEOC v. Navaho Ref., 593 F.2d 988, 990 (10th Cir. 1979) (burden of *proof* shifts); Johnson v. Uncle Ben's Inc., 657 F.2d 750, 752-53 (5th Cir. 1980) (defendant's burden is one of persuasion), *vacated*, 451 U.S. 902 (1981), *cert. denied*, 459 U.S. 967 (1982); Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 662-63 (N.D. Tex. 1981) (affirmative defense), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984); Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 868 (11th Cir. 1986) ("the burden of persuasion shifts"); Maddox v. Claytor, 764 F.2d 1539, 1548 (11th Cir. 1985) ("parties alternatively bear burdens of proof by a preponderance of the evidence instead of mere burdens to product"); EEOC v. American Nat'l Bank, 652 F.2d 1176, 1201 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982). *But see* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1333-36 (3d Cir. 1981) (rejecting contention that business relatedness constitutes an affirmative defense); Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (defendant need only come forward with evidence to meet the inference of discrimination raised by the prima facie case).

practice, the plaintiff must be given the opportunity to show "pretext" by demonstrating that there are less discriminatory alternatives that would serve the employer's legitimate purposes equally well,[79] or that the employer used the device with the intent to discriminate.[80]

The Individual Disparate Impact Case

Disparate impact theory has also proved useful to individual plaintiffs. Using selection devices which have an adverse impact on a protected group violates the Title VII rights of every member of that protected group affected by their use. Consequently, individual plaintiffs who can establish discrimination under disparate impact theory are entitled to relief upon a showing that they, individually, were adversely affected by the challenged practice.[81] In all other respects, however, the order and elements of proof in individual disparate impact cases are identical to those in class impact cases.[82]

The Supreme Court in *Connecticut v. Teal*,[83] significantly expanded the usefulness of disparate impact theory in individual cases. By applying disparate impact analysis to the individual components of a selection process, despite the fact that the overall process did not have a discriminatory effect on the protected group, the Court recognized that Title VII is directed at ridding the employment process of non-job-related selection devices that tend to deprive individual members of protected groups of employment opportunities.[84] Therefore, even where the "bottom line" result of a selection process reveals no disparate impact, if an individual component of the process substantially excludes more protected group members than others, a case can be made as to that component.

The remainder of this article will focus on class disparate treatment and disparate impact cases. Individual disparate impact cases, as noted above, are indistinguishable from class impact cases except that the plaintiff must establish the discriminatory practice had an individualized effect. Individual disparate treatment cases are unique because the *McDonnell-Douglas* model controls. In such cases, the selection device used is insignificant until the defendant asserts its legitimacy. Where subjective decisionmaking is offered as the legitimate nondiscriminatory reason for an individual adverse employment deci-

79. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). *See also, e.g.*, Kilgo Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 255 n.7 (8th Cir. 1985); Merwine v. Board of Trustees for State Instits. of Higher Learning, 754 F.2d 631, 639 (5th Cir. 1985), *cert. denied*, 474 U.S. 823 (1985); Lasso v. Woodmen of World Life Ins. Co., 741 F.2d 1241, 1244 n.1 (10th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); Walker v. Jefferson County Home, 726 F.2d 1554, 1559 (11th Cir. 1984); Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 873 (11th Cir. 1986).

80. See *infra* note 99.

81. *See, e.g.*, Coe v. Yellow Freight System, Inc., 646 F.2d 444, 451 (10th Cir. 1981); Lasso v. Woodman of World Life Ins. Co., 741 F.2d 1241, 1248 (10th Cir. 1984).

82. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1290 n.24 (2d ed. 1983).

83. 457 U.S. 440 (1982).

84. *Id.* at 448-51.

sion, courts view such an explanation as suspect.[85] *Texas Department of Community Affairs v. Burdine's* requirement that the legitimate nondiscriminatory reason be presented with sufficient specificity so the plaintiff is afforded the opportunity to show pretext weighs heavily against accepting a purely subjective judgment with no objective explanation.[86] This article therefore will not address challenges to subjective decisionmaking under these two analytical models.

This article also will not address the situation in which there is evidence that an employer has applied its subjective judgment in a discriminatory manner by applying it to various groups differently. In such cases, the disparate treatment model is clearly applicable.[87] Regardless of the nature of the selection device used, the theory of these cases is that the employer in applying it to different groups did not use it in the same manner.

The focus of this article is on challenges to the systemic effects of subjective decisionmaking processes under the class disparate treatment and disparate impact theories. In disparate treatment and disparate impact cases, statistics play a critical role. In such cases, a court generally has sufficient data available to choose the method of analysis. Clearly "either theory may . . . be applied to a particular set of facts."[88] The decision as to which analytical method to use has generally been determined by the plaintiff based on the nature of the available evidence.[89]

Plaintiffs should not be precluded from proceeding under traditional disparate impact analysis simply because the selection device challenged involves the subjective judgment of the employer. By limiting the analytical model in such cases to disparate treatment, the plaintiffs' burden of establishing the prima facie case of discrimination and, ultimately, that unlawful discrimination has occurred is increased, and the defendant's rebuttal burden is significantly decreased. Traditional disparate impact analysis is an appropriate

85. *E.g.*, Uviedo v. Steve's Sash & Door Co., 738 F.2d 1425 (5th Cir. 1984), *cert. denied*, 474 U.S. 1054 (1986); Nord v. U.S. Steel Corp., 758 F.2d 1462 (11th Cir. 1985); Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984).

86. *See, e.g.*, Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985); Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).

87. *See, e.g.*, Davis v. Metro. Dade County, 480 F. Supp. 679 (S.D. Fla. 1979); Stallings v. Container Corp., 75 F.R.D. 511 (D. Del. 1977); Osahar v. Carlin, 642 F. Supp. 448 (S.D. Fla. 1986). *See generally* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978).

88. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). *See also* Wheeler v. City of Columbus, 686 F.2d 1144, 1150 (5th Cir. 1982); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92 (6th Cir. 1982); EEOC v. Ford Motor Co., 645 F.2d 183, 197 (4th Cir. 1981), *rev'd*, 458 U.S. 219 (1982); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 396 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); Wright v. National Archives and Records Serv., 609 F.2d 702, 711 (4th Cir. 1979); Bauer v. Bailar, 647 F.2d 1037, 1042 (10th Cir. 1981); Lynch v. Freeman, 817 F.2d 380, 382 (6th Cir. 1987); Regner v. City of Chicago, 789 F.2d 534, 536 (7th Cir. 1986); Kirby v. Colony Furniture Co., 613 F.2d 696, 702 (8th Cir. 1980); Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. 1984).

89. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. at 307 n.12.

method for allocating fairly the respective burdens of proof and determining whether unlawful discrimination has occurred.

The Differences in Analysis Under Class Disparate Treatment and Disparate Impact Theories

The differences between class disparate treatment theory and disparate impact theory have traditionally been insignificant in determining their applicability to various fact situations. Both theories constitute attacks on the systemic adverse results of employment practices. Under disparate treatment theory, the allegation is that the disparity is the result of employment practices applied in an intentionally discriminatory manner. Under disparate impact theory, the allegation is that the disparity is the result of use of employment practices which, regardless of intent, have a discriminatory effect and cannot be justified by business necessity. Under either theory, the plaintiff has the burden of establishing a class-based disparity. The plaintiff's burden, when relying on statistical evidence to establish a prima facie case of class discrimination, has traditionally been greater under disparate treatment theory than under disparate impact theory. Courts have described the difference in terms of the plaintiff's burden to establish a "gross disparity" under treatment theory and a "marked disparity" under impact theory.[90]

This is a sound approach in light of the difference in the function of proof of a disparity under treatment and impact theories. Under treatment theory, the disparity is used to raise a presumption of intentional discrimination. Because of the significance of a presumption of intentional discrimination, courts are justifiably reluctant to make such a presumption except on the basis of truly convincing evidence. Because the function of proof of a disparity under the impact model is simply to establish the adverse effect of an employer's practices and not to raise an inference of intentional discrimination, the plaintiff traditionally has been required to show only a marked or substantial disparity in the success rates of comparable groups.[91]

90. Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982); Rivera v. City of Wichita Falls, 665 F.2d 531, 535 n.5 (5th Cir. 1982). See *supra* note 61 and accompanying text.

91. In Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 3-4 & n.13 (1987), the author notes that the Supreme Court never refined the concept of disparate impact, and that some lower courts have mistakenly equated "disparate impact" with the "two or three standard deviation" analysis utilized in disparate treatment cases. Standard deviation analysis, however, is intended to identify intentional discrimination—not whether the practice had a disparate impact. Statistical significance is relevant to the issue of intentional discrimination because it negates the possibility that the result being measured occurred by chance. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). Thus, the likelihood remains that the result was intentional. Other courts, he notes, have relied on the "80% rule" of UGESP, 29 C.F.R. § 1607.4(D) (1986), to identify disparate impact. The existence of disparate impact however, in the view of most courts, has been based on a judgment call as to whether the difference was "substantial" or "significant" in a given case. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 98-99 (2d ed. 1983). As Blumrosen suggests, the avoidance of tests of statistical significance is appropriate since the question of whether the result occurred by chance or design is irrelevant to the question of whether the challenged practice operates as a "built in headwind."

The rebuttal burdens placed on the defendants also have been different. In disparate treatment cases, the defendants must rebut the presumption of intentional discrimination by either challenging the accuracy of the plaintiff's statistical case or by providing a nondiscriminatory explanation for the disparity.[92] In disparate impact cases, however, the defendant must either undermine the existence of a disparate result by challenging the accuracy of the plaintiff's statistics or justify the result by establishing the business necessity of the challenged practice.[93] In treatment cases, the rationale is that there can be no business justification for intentional discrimination.[94] The defendant's only recourse is to rebut the presumption of discriminatory intent by showing that the disparities do not exist or that they were caused by legitimate nondiscriminatory factors. It would add nothing to a disparate impact analysis for the defendant to rebut a nonexistent presumption of discriminatory intent by presenting evidence of a legitimate nondiscriminatory explanation. Instead, the defendant must affirmatively justify utilizing a device that results in a prohibited disparity.

Another significant difference between the two theories relates to the plaintiff's showing of pretext. Under impact theory, once the business necessity of the challenged practice is established, the plaintiff is given the opportunity to establish the existence of alternative devices that could minimize the adverse effect and serve equally well the employer's legitimate business concerns.[95] In treatment cases, the plaintiff has the burden of demonstrating that the defendant's offered nondiscriminatory reason is not the real reason, but is instead a cover-up for intentional discrimination. The "pretext" showing in disparate impact cases, that there are alternative, equally effective and less discriminatory practices, is evidence that the court may consider in determining that the business reasons proffered by the defendant do not constitute "business necessity."[96] The Court in *Beazer* cast some doubt on the function of evidence of the existence of equally effective and less discriminatory alternatives when it stated that "the district court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it

92. See *supra* note 44.

93. See *supra* note 63 and accompanying text.

94. An exception applies where the BFOQ defense comes into play (see *supra* note 6), or when there is a call for legitimate affirmative action. *See* Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616 (1987).

95. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (existence of a less discriminatory alternative would be evidence that employer was using its tests merely as a pretext for discrimination).

96. *Id.* at 428; *Dothard*, 433 U.S. at 329. Indeed, if there is an equally effective and less discriminatory alternative decision-making process, it is difficult to conceive how the challenged one could be deemed necessary. *See* Furnish, *A Path Through the Maze*, 23 B.C.L. REV. 419, 423-24 (1982). *See also* Robinson v. Lorillard Corp., 444 F.2d 791, 798 & n.7 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); UGESP, 29 C.F.R. § 1607.3 (1986); Barthelot, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 1023-26 (1982); Player, *Applicants, Applicants in the Hall, Who's the Fairest of them All? Comparing Qualifications Under Employment Discrimination Law*, 46 OHIO ST. L.J. 277, 281 (1985).

was merely a pretext for intentional discrimination."[97] This statement, along with the observation that the Court's impact cases have been decided in a factual context suggesting the existence of intentional discrimination,[98] has led commentators to suggest that the intent of the employer is necessarily relevant in impact cases.[99] The better view, however, particularly in light of the Supreme Court's consistent position that intent is irrelevant in disparate impact analysis, is that the plaintiff's surrebuttal evidence may be considered as undermining the defendant's proof of business necessity, or as converting the analysis to a treatment analysis focusing on the motivation of the employer in choosing a selection process that produces a significant disparity.[100]

97. 440 U.S. at 587.

98. See *supra* note 53.

99. In Maltz, *Title VII and Upper Level Employment—A Response to Prof. Bartholet*, 77 NW. U.L. REV. 776, 780 (1983), the author notes that the Court's description in *Albemarle* of the evidentiary function of plaintiff's proof at this surrebuttal stage and its treatment of the "pretext" stage in *Beazer*, "indicates that once the employer has satisfied the requirements of the effects test itself, the existence of a less discriminatory alternative might support an inference that he is engaging in *intentional* discrimination."

In Furnish, *A Path Through the Maze*, 23 B.C.L. REV. 419, 423 (1982), the author suggests that the rebuttal opportunity provided to plaintiff under impact theory may be viewed as a surrogate method for proving *intentional* discrimination and that this development, along with the broadening of the business necessity defense in *Beazer*, portends the merger of the two theories.

But in Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982), the author concludes that Title VII demands that the employer opt for any available system that has a lesser impact and serves the employer's legitimate job needs. Professor Bartholet never reaches the question of intent because a showing of a less discriminatory alternative would negate defendant's assertion of business necessity.

Similarly in Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 36 CHI.-KENT L. REV. 1, 24 (1987), the author criticizes those courts that have refused to apply impact analysis to subjective decision-making for viewing impact theory as a proxy for showing intentional discrimination, and suggests that Justice Powell's *Teal* dissent is grounded in the mistaken notion that a plaintiff in adverse impact cases makes his case by inference.

Regardless of whether plaintiff can put the question of intent at issue at the "pretext" stage of impact cases, it is clear that intent is of no relevance prior to the point at which the employer establishes the business necessity of the challenge practice. In Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939, 964-65 (1986), the authors state a requirement that plaintiff show that a challenged, but justified, practice is a pretext for intentional discrimination does not warrant the conclusion that intent is an element of adverse impact cases before the surrebuttal stage of the case. Such an approach fails to recognize that Title VII was designed to eliminate those practices that "limit and classify . . . [individuals] . . . in a way which . . . deprive[s] [them] of employment opportunities . . . because of . . . race," or as the court said in *Griggs*, act as "built-in-headwinds" to the full enjoyment of their rights. The weight of authority holds that intent is never put at issue. *See* Player, *supra* note 96, at 281 n.25 ("the current weight of lower court authority appears to analyze the concept of less discriminatory alternatives as part of the necessity concept"). In short, there is nothing to preclude a plaintiff in surrebuttal from demonstrating that a defendant has utilized practices that can be justified by business necessity intentionally to discriminate. There is also nothing that would require such a showing. Plaintiff may either in effect, transform the case into a disparate treatment case by establishing discriminatory intent, or demonstrate alternatives and undermine the claimed necessity of the device.

100. There is no apparent doctrinal objection to converting treatment analysis to impact analysis upon a defendant's establishment of a legitimate non-discriminatory reason that is shown to

A final difference between the two theories is that disparate treatment is typically utilized in situations where no one selection device operates to exclude blacks, but blacks are systematically excluded by a variety of devices that constitute the employer's "standard operating procedure." Clearly, where the decisionmaking process produces racially disparate results which statistics reveal could not have been caused by chance, a court is justified in operating on a rebuttable presumption that racial discrimination caused the disparity.[101] The disparate impact model has typically been utilized where blacks are systematically excluded by the operation of an identifiable and objective selection device. Where the device challenged is objective and identifiable, its effects can be easily measured and its business necessity can be easily analyzed.[102] Because chance is not ruled out as a possible cause of the disparity shown in such cases, establishing a nexus between the challenged practices and the observed result is appropriately required. The need to establish a causal link between challenged practices and their results, however, does not require that impact theory be limited to isolated and specifically identifiable practices.[103] Where an employer utilizes a system of decisionmaking composed of several component parts and which produces a discriminatory result, a trial court may reasonably conclude that the system has caused the result without delving into the individual effects of its several component parts. Any absolute limitation on the use of discrimination theories or any significant modification of those theories based on the nature of the selection devices used serves no useful purpose and is inconsistent with the purposes of Title VII.

Early Analysis of Subjective Selection Criteria

The Dillon-Rowe Days

Early in the development of Title VII, courts were not reluctant to apply disparate impact theory to subjective and multifaceted selection devices. For example, in *United States v. Dillon Supply Co.*,[104] the government presented evidence of "a decentralized system of hiring and assignment which vested broad authority on the supervisors of largely segregated departments and which had no uniform or objective standards for hiring or assignment."[105] The

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have an adverse impact. See *supra* note 45. The converse, converting impact analysis to treatment analysis upon a showing of intent, should be equally non-controversial and should not compel a conclusion that the distinction between the two theories must be blurred. For a complete discussion of this question, see Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1.

101. See *supra* text accompanying note 40.

102. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979).

103. *See* Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985). See also cases cited *supra* at note 54.

104. 429 F.2d 800 (4th Cir. 1970).

105. *Id.* at 802.

government sought to demonstrate that this system operated to perpetuate the effects of past racial discrimination. The district court refused to admit evidence of past discriminatory practices and patterns, and dismissed the action on the ground that the government had failed to establish any present violations.[106] Citing section 703(a)(2) of the Act,[107] the Court of Appeals for the Fourth Circuit reversed the district court's judgment noting that it "should have considered any past specific or general act, practice, policy or pattern of racial discrimination which the proof showed had any present discriminatory effect."[108] The court held that such practices, "even though neutral on their face, may operate to segregate and classify on the basis of race at least as effectively as overt racial discrimination."[109]

Similarly, in *Rowe v. General Motors Corp.*,[110] plaintiffs challenged the system by which individuals were promoted from lower paying hourly jobs to better paying salaried jobs in General Motors' Atlanta Division (GMAD). GMAD required that to be considered for promotion, hourly employees must receive the recommendation of their foreman. The foreman's recommendation was based in large part on his subjective evaluation of the hourly employee's "ability, merit and capacity."[111] Based on statistical evidence showing a "vivid and significant" disparity in the promotion of blacks to salaried jobs,[112] and citing the *Griggs* rationale that "any employment practices which operate to prejudice minority employees must be eliminated and their consequences eradicated,"[113] the Court of Appeals for the Fifth Circuit found that the promotional system utilized by GMAD violated Title VII.[114] The evidence showed clearly that the vague and subjective promotion procedure had a disparate impact on black hourly employees, and constituted a prima facie Title VII violation.

In *Pettway v. American Cast Iron Pipe Co.*,[115] the question before the court was whether selection for supervisory positions based on the subjective judg-

106. United States v. Dillon Supply Co., 314 F. Supp. 956 (E.D. N.C. 1969).

107. *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982) (Court stating that a disparate-impact claim reflects the language of § 703(a)(2)).

108. *Dillion*, 429 F.2d at 804.

109. *Id.*

110. 457 F.2d 348 (5th Cir. 1972).

111. *Id.* at 353.

112. *Id.* at 357.

113. *Id.* at 354.

114. *Id.* at 358-59. The Court noted that the promotion system violated Title VII on several grounds, but particularly because:

> (i) the foreman's recommendation is the indispensable single most important factor in the promotion process;
> (ii) foremen are given no written instructions pertaining to the qualifications necessary for promotion . . . . ;
> (iii) those standards which were determined to be controlling are vague and subjective . . . . ; and
> (v) there are no safeguards in the procedure designed to avert discriminatory practices.

Id.

115. 494 F.2d 211 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979).

ment of superintendents violated Title VII. Despite testimony that only one of approximately 100 supervisors was black, the trial court denied relief.[116] Because this statistical disparity resulted from a system that included both the subjective judgment of supervisors and an objective testing requirement that had been terminated prior to trial, the Court of Appeals for the Fifth Circuit framed the question as "whether selection on the basis of the subjective judgment of all-white supervisors operates independently of the testing to discriminate and helped produce this disparity."[117] The Fifth Circuit remanded the case to the district court on the issue of "the independent effect of subjective evaluation by all-white superintendents."[118]

In *Muller v. United States Steel Corp.*,[119] a case challenging the discretionary system utilized in promoting employees at U.S. Steel, the Court of Appeals for the Fourth Circuit stated, "The law is clear that a plaintiff in a job discrimination case need not prove that the employer had a specific intent to discriminate. It is sufficient that the employer's conduct produced discriminatory results."[120] The court affirmed the district court's finding of discrimination. The finding was based on evidence that the promotion system, which relied on the "uncontrolled discretion" of the general foreman, resulted in no Hispanic employee ever being promoted to a supervisory position. The court went on in its disparate impact analysis to find that the defendant had not established the business necessity of its subjective practice since it had "not shown . . . that efficiency or safety or any other of the company's interests are served by this system which depends on hunch judgments rather than specific criteria."[121]

In *Robinson v. Union Carbide Corp.*,[122] plaintiffs launched a challenge to Union Carbide's system of promoting employees based on the supervisors' subjective evaluation of job candidates. Finding a substantial statistical disparity between the percentage of blacks in the area (approximately 28%) and the percentage of blacks in supervisory or salaried positions (less than 10%), the Fifth Circuit found that plaintiffs had made out a prima facie case of discrimination. Union Carbide's claim that its system of promotion was nondiscriminatory was rejected by the Fifth Circuit. The court noted that supervisory evaluations based on a candidate's " 'adaptability,' 'bearing, demeanor, manner,' 'verbal expression,' 'appearance,' 'maturity,' 'drive,' and 'social behavior' . . . subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice."[123]

116. *Id.* at 240.
117. *Id.* at 241.
118. *Id.* at 243.
119. 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975).
120. *Id.* at 927.
121. *Id.* at 929. The "any other of the company's interests" phrase presaged the expansion of the business necessity defense in *Beazer*. See *supra* note 77 and accompanying text.
122. 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1258 (5th Cir. 1977), *cert. denied*, 434 U.S. 822 (1977).
123. *Id.* at 662 (citations omitted).

Most of the Courts of Appeals, until the Fifth Circuit decision in *Pouncy v. Prudential Insurance Co.*,[124] generally followed the lead set by the courts in *Dillon* and *Rowe*. They recognized the impediment to equal employment opportunity inherent in allowing the unchecked use of subjective decisionmaking processes. The majority of courts evaluated the operation of selection processes which relied upon vague and subjective criteria, not in terms of the employer's intent, but in terms of the impact of such systems on protected groups.[125] Of course some courts refused to apply disparate impact theory to subjective decisionmaking prior to the Fifth Circuit's decision in *Pouncy*. They made no attempt, however, to articulate a rationale for that position.[126] Some of these courts analyzed subjective systems under disparate treatment theory and found discrimination.[127] Others analyzed them under impact theory and found no discrimination.[128]

It was not until the Fifth Circuit rendered its decision in *Pouncy* that the widespread reluctance to find discrimination based purely on the effects of using vague and subjective systems became evident. *Pouncy* has been relied on for the proposition that disparate impact theory cannot be utilized in challenges to the discriminatory effect of subjective procedures, but that

124. 668 F.2d 795 (5th Cir. 1982).

125. *See, e.g.*, Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033 (1974); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977); Rogers v. Int'l Paper Co., 510 F.2d 1340 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973); Grant v. Bethlehem Steel, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976); Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970); Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981); Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); Rule v. I.A.B.S.O.I., Local Union No. 396, 568 F.2d 558 (8th Cir. 1977); Johnson v. Uncle Ben's Rice, Inc., 628 F.2d 419 (5th Cir. 1980), *vacated and remanded*, 451 U.S. 902 (1981), *cert. denied*, 459 U.S. 967 (1982); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

126. *See, e.g.*, Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981); Young v. Edgcomb Steel Co., 363 F. Supp. 961 (M.D. N.C. 1973); Wilkins v. University of Houston, 654 F.2d 388, 394 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982), *vacated*, 459 U.S. 809 (1982); Heagney v. University of Wash., 642 F.2d 1157 (9th Cir. 1981).

127. *See, e.g.*, Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982); Sledge v. J. P. Stevens & Co., 585 F.2d 625, 635 (4th Cir. 1978) ("where [strong statistical] proof is coupled with evidence that the defendant based hiring and other employment decisions upon the subjective opinions of white supervisors, the trial court is entitled to infer . . . that the defendant illegally discriminated"), *cert. denied*, 440 U.S. 981 (1979).

128. *See, e.g.*, Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 453 n.2 (10th Cir. 1981) (portending the *Watson* result, the court noted that "the statistics used in cases not involving specific employment tests must be more closely scrutinized that the statistics used in cases where specific mechanisms are at issue"). *See also* Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981); Wright v. National Archives and Records Serv., 609 F.2d 702, 712-13 (4th Cir. 1979).

reliance is misplaced. This proposition is neither logically nor legally justified by the *Pouncy* decision.

Pouncy

The Court of Appeals for the Fifth Circuit in *Pouncy v. Prudential Insurance Co.*[129] provided the catalyst for a significant change in the way courts viewed challenges to subjective selection practices. In *Pouncy*, the plaintiff challenged the system utilized by the Prudential Insurance Company for promoting hourly employees to salaried positions. The system failed to notify employees of job opportunities, allowed movement only within an employee's job level and relied heavily on the subjective judgment of supervisory employees. The court of appeals affirmed the district court finding for the defendant. In so doing, the court made several general statements that have served as the basis for the conclusion that disparate impact theory is not applicable when subjective or multifaceted systems are challenged:

> The discriminatory impact model of proof . . . is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.
>
> Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously, [citation omitted], this is an incorrect use of the model. The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force.
>
> None of the three Prudential 'employment practices' singled out [the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria] are akin to the 'facially neutral employment practices' the disparate impact model was designed to test.
>
> Unlike educational requirements, aptitude tests, and the like, the practices identified by Pouncy are not selection procedures to which the disparate impact model traditionally has applied.[130]

The court was partially correct in its conclusion that the challenged selection devices were not procedures to which the disparate impact model had traditionally been applied.[131] The court was also justified in its observation that the plaintiff had not demonstrated a causal connection between a specific employment practice and a significant racial imbalance.[132] A number of courts,

129. 668 F.2d 795 (5th Cir. 1982).

130. *Id.* at 800-01.

131. This assertion, however, was irrelevant to the decision and more importantly, as to the practice of subjectively evaluating employees, inaccurate. See *supra* note 125 and accompanying text.

132. Plaintiff's work force/labor market analysis did not conclusively establish a causal connection between the challenged practices and the work force disparity shown. *Pouncy*, 668 F.2d at 801. See *supra* note 59.

however, have gone beyond the holding in *Pouncy* and relied on the above language as compelling the conclusion that the disparate impact model is only applicable in instances where isolated and objective selection devices, such as educational requirements, aptitude tests, and the like, are challenged.[133]

The following expresses the underlying rationale for the *Pouncy* court's affirmance of the district court's decision that unlawful discrimination had not been proven:

> The appellant cannot make a showing that the Prudential employment practices that he has identified have caused the racial imbalance in Prudential's work force. The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force. Aptitude tests . . . and similar selection criteria all may be shown to affect one class of employees more harshly than another by controlling for the impact of the employment practice on one class in the employers work force so that it can be measured . . . By contrast, Pouncy has not shown, nor can he show, that independent of other factors the employment practices he challenges have caused the racial imbalance in Prudential's work force. The statistics presented by the appellant do show that, on the whole, blacks are overrepresented in the lower levels of Prudential's work force. But this might result from any number of causes. Absent proof that the disparate impact is caused by one of the challenged employment practices, we do not require the employer to justify the legitimacy of any (or all) employment practices. In sum, the nature of the evidence presented by the appellant at trial could not establish a case of employment discrimination based on the disparate impact model.[134]

The "nature of the evidence presented"[135] was the basis for the decision, not the nature of the challenged practices. Plaintiff Pouncy did establish that a disparity existed in Prudential's work force and that certain practices were utilized in the selection process. The court found that Pouncy failed to establish any causal connection between the challenged practices and the disparity. As the court put it, "it is clear that Pouncy has not shown that a facially neutral employment practice used by Prudential falls more harshly on black employees."[136] The court went on to explain that aptitude tests, height and weight requirements and "similar selection criteria" all may be shown to affect one class of employees more harshly than another. In *Griggs*, for example,

133. *See, e.g.*, Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Carpenter v. Stephen F. Austin Univ., 706 F.2d 608 (5th Cir. 1983); Lewis v. NLRB, 750 F.2d 1266 (5th Cir. 1985); Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986); and cases cited *supra* at note 10.

134. 668 F.2d at 801-02.

135. *Id.* at 801.

136. *Id.*

the plaintiff showed not just a racial imbalance in the work force but also that the educational requirement disqualified a higher percentage of blacks than whites. In *Dothard v. Rawlinson*,[137] the height and weight requirement was shown to disqualify a disproportionate number of women. In *Pouncy*, the plaintiff failed to establish to the satisfaction of the court that the challenged selection practices disqualified a disproportionate number of blacks. The court did not hold that because the challenged selection practices were not identified, objective and facially neutral they *could not* be shown to have caused the adverse impact but rather in this case, they *had not* been shown to have such impact.

As discussed earlier, a number of alternative statistical analyses may be utilized by a plaintiff to establish the adverse impact of selection devices. Where applicant flow data are available, the "causation" problem which was critical in *Pouncy* is eliminated. Where applicant flow data are used, the nature of the impact evidence will be that individuals flowing through the challenged procedure are disqualified in racially disproportionate numbers. The statistical evidence presented in *Pouncy* was problematic only because the plaintiff, relying on a work force/labor market analysis,[138] failed to establish a causal connection between the challenged practices and the work force imbalances. The plaintiff's reliance on work force/labor market analysis rather than applicant flow analysis left the court unwilling to conclude that the work force disparities were caused by the challenged practices and not by any number of other factors.[139] Had the evidence presented shown more directly the connection between the challenged practices and the work force disparity, by demonstrating the system's exclusionary effect, or by eliminating the likelihood that the disparities were caused by factors other than those challenged, the court would have been better able to make a finding regarding the effect of the challenged practices.[140]

137. 433 U.S. 321 (1977).

138. See *supra* note 132.

139. The Court of Appeals for the First Circuit has addressed this problem in a similar manner, but without closing the door on the use of disparate impact theory. In Latinos Unidos De Chelsea En Accion v. Secretary of HUD, 799 F.2d 774 (1st Cir. 1986), the court noted that it was unnecessary to decide whether the disparate impact model may ever apply in cases involving subjective job criteria because plaintiffs had not identified any specific employment practice or policy (objective or subjective) that allegedly caused a discriminatory impact on minorities. Rather than ruling that subjective practices could not be challenged, the court appropriately found that plaintiffs had not done so effectively. Similarly, in Robinson v. Polaroid Corp., 732 F.2d 1010, 1015 (1st Cir. 1984), the court noted that the challenged layoff selection guidelines were characterized by "excessive subjectivity," but saw no need to decide whether such cases should be decided exclusively under a disparate treatment rather than a disparate impact theory because the plaintiffs had not established the discriminatory impact at issue. In Maddox v. Claytor, 764 F.2d 1539, 1549 (11th Cir. 1985), the court, applying disparate impact analysis in a challenge to subjective practices, found that impact had not been established because "a static, descriptive summary such as this reflects little more than the racial distribution of the work force . . . on conveniently chosen days."

140. Clearly, unless applicant flow data are unreliable or unavailable, the statistical showing required to establish the disparate impact of any decision-making process should focus on com-

As to the multifaceted nature of the system challenged, the court expressed a preference for application of disparate impact theory to cases where the challenge is to a specifically identified practice rather than a non-specific "multifaceted" system. That preference, however, should not be read as a bar to disparate impact challenges to multifaceted systems generally. The court's aversion to utilizing disparate impact analysis was clearly directed at the problems associated with establishing causation and not with the multifaceted nature of the process.[141] Where a multifaceted selection system can be shown to produce discriminatory results, identification by the plaintiff of a specific component of the system which causes the disparity becomes logically unnecessary.[142]

Logic notwithstanding, the *Pouncy* court asserted that identification of the specific component of the process allegedly producing a work force disparity was required to allocate fairly the parties' respective burdens of proof. The court stated "we do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices . . . ."[143] To do so, the court said, citing *Rivera v. City of Wichita Falls*,[144] would force the employer to validate components of its decisionmaking process having no adverse effects.[145]

The holding in *Rivera*, however, is not so broad. In *Rivera*, the plaintiffs had identified the specific components of the process being challenged, and the district court found the plaintiffs had failed to make out a prima facie case as to three of the four identified components.[146] The district court found

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parisons of the success rates of actual or potential candidates passing through the selection procedure rather than general population or labor market comparisons. Without such applicant flow data, the *Pouncy* Court was unwilling to assume that the selection devices challenged actually resulted in the general work force disparities shown. This observation however, is not meant to suggest that a plaintiff should always be precluded from relying on work force/labor market analysis to establish disparate impact. Indeed, there are situations in which applicant flow data are simply unavailable. *See* D. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1351 n.227 (2d ed. 1983). Where there are substantial disparities between the proportions of blacks in the work force and the relevant labor pool a court may logically conclude that the screening mechanism caused the observed imbalance, particularly where other likely causes of the imbalance have been discounted. See *supra* note 59. Multiple regression analysis, typically utilized by plaintiffs in class disparate treatment cases, may be helpful in discounting the effects of factors other than the practices challenged. *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 8.021 (1980).

141. The court stated that "[a]lthough some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously (citation omitted), this is an incorrect use of the model. The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, *that can be shown to have a causal connection* to a class based imbalance in the work force." *Pouncy*, 668 F.2d at 800. (emphasis added).

142. See *supra* note 54.

143. 668 F.2d at 801.

144. 665 F.2d at 531, 539 (5th Cir. 1982).

145. 668 F.2d at 801.

146. Challenged were a written test, a physical agility test, a background investigation and a job performance assessment.

that the only component shown to have had an adverse impact, the written examination, was valid. On appeal, plaintiffs argued that despite the finding that the other three components had no impact, the district court should have analyzed the selection process as a whole for adverse impact. The court of appeals stated that "such an approach might be appropriate if the effect of the individual elements in the selection process cannot be isolated, but a disparate impact can be shown to arise from the procedures' completion."[147] The court pointed out, however, that "[t]he burden of determining the validity of a screening procedure . . . will not be imposed where proof of an *absence* of discriminatory effect attributable to the procedure shows it to be unwarranted."[148]

Where there is proof of the discriminatory effect of the total selection process and no evidence of the absence of discriminatory effect attributable to individual components, a prima facie case of disparate impact is appropriately made on proof as to the effect of the total selection process.[149] Where an employer utilizes a decisionmaking system that is composed of numerous criteria, and data are available which would allow for isolation of the system's several components and their impact, it is appropriate to expect a plaintiff to identify the component, or combination of components, to be challenged. Such an identification of the challenged components would allow for an analysis of their actual effects, and render the analysis more probative in establishing the relationship between each isolated practice and the prohibited impact each is alleged to produce. Liberal use of discovery and complete record keeping by employers[150] may in some cases allow a plaintiff to develop the information necessary to identify each component causing or contributing to the impact. Where a plaintiff is unable to identify the offending component or where the adverse impact is produced by the combination of multiple components, isolation of a specific offending component should not be required. Well-settled evidentiary principles would dictate that in this situation, the burden must be placed on the only party to the litigation with ready access to knowledge of the facts in question—the employer.[151]

147. 665 F.2d at 539.

148. *Id.* (emphasis added).

149. See *supra* note 103 and accompanying text. See also *infra* note 240.

150. See UGESP, 29 C.F.R. §§ 1607.4(C), 1607.15(A)(2) (1988), for federal record keeping requirements. Because these provisions do not require employers to maintain information regarding the impact of the individual components of a selection process unless the total process produces a disparate impact (*see* 29 C.F.R. § 1607.15(A)(2) (1988)), it is likely that such information will not be available to a plaintiff in all cases.

151. *See* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 337 at 950 (3d ed. 1984) ("where the facts with regard to an issue are peculiarly in the knowledge of a party that party has the burden of proving the issue"); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.8 at 324 (3d ed. 1985) ("the burden of proof is frequently placed on the party with readier access to knowledge about the fact in question"); Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984) (one of the purposes of Title VII is to force employers to bring their employment processes into the open), *cert. denied*, 471 U.S. 1115 (1985). *See also* 9 J. WIGMORE ON EVIDENCE § 2486 at 290 (Chadbourn rev. ed. 1981); Teamsters v. United States, 431 U.S. 354, 359 n.45.

In short, where a plaintiff can establish the disparate impact of a multifaceted selection process, the employer (the party in possession of the data) has the opportunity in rebuttal to isolate the various components of its process and identify those not contributing to the prohibited impact.[152] This approach relieves the plaintiff of the heavy burden of isolating the effects of components of which he may not be aware, and allows the employer to limit its burden to establishing the business necessity of only those components resulting in a disparate impact.[153]

The *Pouncy* court, then, in reaching an appropriate result, utilized language that spawned a string of misguided progeny. To understand the misdirection of the courts that have "followed" *Pouncy*, it is helpful to understand the apparent source of the *Pouncy* court's misdirection.

Where the Pouncy Court Went Wrong

The *Pouncy* court could easily have limited its discussion to the failure of the plaintiff to establish a causal connection between the challenged practices and the work force disparity shown.[154] Instead, the court focused its discussion on the nature of the challenged practices rather than the plaintiff's failure to establish their effects. This approach was neither necessary to a determination of the issues raised in the case, nor the legal basis for the decision.[155] The court took the position that disparate impact analysis is only applicable in situations where specific facially neutral practices are challenged and, significantly, that the practices challenged there were not amenable to such analysis.[156] The court, in coming to that conclusion, relied on A. & L.

152. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) ("if the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own"); Segar v. Smith, 738 F.2d 1249, 1271-72 (D.C. Cir. 1984).

The Segar Court stated:

> The employer will possess knowledge far superior to that of the plaintiff as to precisely how its employment practices affect employees. This fact traditionally justifies placing on the defendant the burden of proving the business necessity of an employment practice. So too it justifies the lesser burden of requiring the employer to articulate which of its employment practices adversely affect minorities . . . . [A] requirement that the plaintiff in every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified . . . in effect permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII.

Id.

153. Segar v. Civiletti, 508 F. Supp. 690 (D. D.C. 1981); Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980); Rivera v. City of Wichita Falls, 665 F.2d 531, 539 (5th Cir. 1982).

154. See *supra* note 132.

155. *See* Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 882.

156. The *Pouncy* court in fact, did not state generally that subjective practices are not facially neutral. The court noted only that the practices challenged by plaintiff were not "akin to the 'facially neutral employment practices' the disparate impact model was designed to test." 668 F.2d at 801.

Larson,[157] who specifically and with no explanation asserted that subjective practices are inappropriate for disparate impact analysis because they are not "neutral."[158]

A logical reading of the term "facial neutrality" as first utilized in *Griggs* shows that it means nothing more than that the challenged device is, on its face, not race related. Where the employer uses a selection device that is on its face related to race, i.e., not facially neutral, then the employer is engaged in intentional discrimination and the practice is scrutinized under the disparate treatment theory. In such situations, there is no need to consider the effects of the device since individuals excluded because of its racial nature clearly have been treated differently based on racial considerations. Where the employer uses a device that is not on its face related to race, i.e., facially neutral, then the court looks to the effects of using that device unless there is evidence that the employer has applied its facially neutral device differently on the basis of race.[159] If the device is applied equally to all, but there is a racial effect, the use of the device must be justified by business necessity. The issue is that simple. The question is whether a decisionmaking process that depends upon the subjective judgment of those controlling the process can be facially neutral.

While it is true that courts which have found the use of subjectivity to violate Title VII have criticized such practices as "suspect" because they provide ready mechanisms for intentional discrimination,[160] that characterization does not render them non-neutral on their faces. The notion that a selection device cannot be "suspect" and "facially neutral" at the same time is flawed.[161] To suggest that the exercise of discretion is not facially neutral in a race discrimination context is to suggest that there exists an inference of intentional discrimination whenever discretionary judgments are made by whites regarding blacks. While there are many who would support such an observation as an accurate, contemporary social comment, it is obviously unacceptable as a rule of law. In all fairness to the employer, all employment practices must be presumed to be "facially neutral" unless there is evidence leading a reasonable observer to conclude they are related to race.[162] The subjective decisions of individual decisionmakers then, even though suspect, should be viewed on their faces as neutral and nondiscriminatory until some evidence is presented to the contrary. The evidence required at the prima facie stage in treatment cases would counter the presumption of neutrality and establish

157. 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 73.00 (1981 and Supp. 1988).

158. *Id.* at § 76.34 (1987).

159. See *supra* note 87 and accompanying text.

160. See, *e.g.*, cases cited *supra* at note 125.

161. *See, e.g.*, Page v. U.S. Indus., Inc., 726 F.2d 1038, 1045-46 (5th Cir. 1984). *Cf.* Rossini v. Ogilvy & Mather, 798 F.2d 590 (2d Cir. 1986) (court stating that it is logically impossible to have it both ways).

162. Such evidence could take the form of that required at the prima facie stage in individual disparate treatment cases (see *supra* text accompanying notes 20-33), or in class disparate treatment cases (see *supra* text accompanying notes 34-49).

a rebuttable presumption of intentional discrimination. Similarly, in impact cases, the practice of allowing the exercise of discretion must be presumed to be facially neutral. The fact that courts have viewed subjective decisionmaking practices as suspect should not strip such practices of their presumed neutrality.

The *Pouncy* court also noted that the kinds of selection devices challenged were not the kinds of devices to which the disparate impact model has traditionally been applied. While the court was partially correct in that observation,[163] it took liberties in suggesting that the devices were not akin to the devices the disparate impact model was designed to test. The types of devices the disparate impact model was designed to test, as set forth in *Griggs* and its progeny, are those devices that "produce a disparate impact on a protected group."[164] Subjective decisionmaking is not inherently unable to produce a disparate impact.[165] The practice clearly falls within the ambit of facially neutral devices which can produce adverse effects. Further, the *Griggs* decision does not suggest that the Court intended to limit the application of disparate impact theory to objective standards.[166] The mere fact that the selection practices challenged in *Griggs* were "overt, clearly identified, nondiscretionary [and] . . . applied at a single point in the selection process"[167] provides no justification for limiting the broad language used in *Griggs* to the narrow circumstances extant there.[168] This is particularly so in light of the broad legislative purposes of Title VII to "achieve equality of opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[169]

It has been suggested that footnote seven in *Furnco Construction Corp. v. Waters*[170] supports the notion that discretionary decisionmaking should be exempted from impact analysis.[171] In *Furnco*, the defendant construction com-

163. See *supra* note 131.

164. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (those that "operate as 'built-in headwinds' for minority groups"); New York Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) (those that have "the effect of denying members of one race equal access to employment opportunities").

165. *See* Carpenter v. Stephen F. Austin Univ., 706 F.2d 608 (5th Cir. 1983) (court criticizing the obviously discriminatory effects of the challenged subjective practices).

166. Griffin v. Carlin, 755 F.2d 1516, 1524 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).

167. *Pouncy*, 668 F.2d at 800.

168. The *Griggs* court, in describing the kinds of practices to which disparate impact theory applied, used such terms as "practices, procedures, or tests" (401 U.S. at 430), "practice" (401 U.S. at 431), "employment procedures or testing mechanisms" (401 U.S. at 343), and "any given requirement" (401 U.S. at 432).

169. *Griggs*, 401 U.S. at 429-31 ("removal of artificial, arbitrary and unnecessary barriers to employment"). *See also* Johnson v. Transp. Agency, Santa Clara County Calif., 480 U.S. 616 (1987) ("eliminat[e] the effects of discrimination in the work place").

170. 438 U.S. 567 (1978).

171. *See, e.g.*, A. LARSON & L. LARSON, *supra* note 157, at § 76.32; Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 795, 992 (1983); Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 348 n.167 (1987); Heward v. Western Elec. Co., 35 F.E.P. Cases 807 (10th Cir. 1984).

pany had a policy of only hiring bricklayers known by the job superintendent to be experienced and competent. No applications were accepted at the job site. Three black bricklayers who had attempted to secure employment at the job site challenged the practice as discriminatory. The district court found the plaintiffs had not proved a claim under impact theory because the policy did not result in a disparate impact. The plaintiffs failed under treatment theory because the policy constituted a legitimate nondiscriminatory reason for the failure to hire. The court of appeals reversed, holding that plaintiffs who were qualified, had applied and were rejected, had made out a prima facie case under treatment theory which had not been rebutted.[172] The appellate court then devised a new hiring process for the company which included taking applications at the job site and comparing those candidates against those known to the superintendent.[173] The Supreme Court granted certiorari "to consider whether the court of appeals had gone too far in substituting its own judgment as to proper hiring practices . . . ."[174]

At footnote seven, the Supreme Court noted its agreement with the court of appeals that disparate treatment theory was appropriately applied to the facts in that case.[175] The Supreme Court commented at footnote seven that "this case did not involve employment tests . . . nor particularized requirements such as height and weight specifications . . . nor was this a pattern and practice case . . . ."[176] The Larsons assert that the Court was suggesting by this footnote that disparate impact theory is only applicable to devices such as those described.[177] This conclusion, however, is not called for by the footnote read in context.

The court of appeals in *Waters v. Furnco Construction Corp.*[178] noted: This was not a case, like *Griggs*, of comparing white and black applicants by objective, but irrelevant standards, and rejecting more blacks, proportionally, than whites. The qualifications of [plaintiffs] were never compared with either the black bricklayers who filled the small proportion of jobs, nor the white bricklayers who filled the great majority of the jobs.[179] The facts revealed no adverse impact because blacks were selected in excess proportion to their availability in the relevant labor market.[180] The challenge in *Furnco* then was to a selection device that operated to exclude from consideration qualified applicants who were black and white and keep open the selection process

172. Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1088 (7th Cir. 1977).
173. *Id.*
174. *Furnco*, 438 U.S., at 574.
175. *Id.*
176. *Id.* at 575 n.7.
177. A. LARSON & L. LARSON, *supra* note 157, at § 76.32.
178. Waters v. Furnco Constr. Corp., 551 F.2d 1085 (7th Cir. 1977).
179. *Id.* at 1089-90.
180. While there was a factual dispute over the proportion of blacks in the relevant labor force, ranging from 5.7% to 13.7%, the district court found the figure to be 5.7%. Furnco's selection practice resulted in a bricklayer workforce which was 20% black, well above any labor force figure proposed.

for the consideration of black and white applicants who were no better qualified. The court of appeals reasoned that "vis-a-vis the white bricklayers employed . . . , racial discrimination is established under the principle of *McDonnell-Douglas*."[181] The court commented that the *Griggs* principle could not be turned around to establish the absence of discrimination where disparate treatment was at issue.[182] The plaintiffs were 1) of a racial minority, 2) qualified and applied, 3) rejected despite their qualification and 4) the position remained open and the employer continued to seek applicants of the plaintiffs qualifications. The claim of the individual plaintiffs was that, on the basis of race, they were treated differently than similarly situated whites. The court of appeals' reference to disparate impact theory was only to clarify that the plaintiffs' theory was one of treatment and that the defendant's defensive effort to utilize impact theory was inappropriate.

Commentators have suggested that the dissenting opinion of Justices Marshall and Brennan in *Furnco* recognizes and challenges a suggestion by the majority that the practices at issue were not facially neutral.[183] This conclusion misreads both the majority and the dissent. The majority did not hold that the practices challenged were not facially neutral. Rather, as the dissent points out, it assumed the court of appeals affirmed the district court's finding that there was no adverse impact and, consequently, the disparate impact theory did not apply.[184] According to the dissent, that assumption was unsupported because the court of appeals disposed of the case under a disparate treatment theory. What the dissent suggested is that the plaintiffs on remand should not be precluded from attempting to prove their case under disparate impact theory since the question of its applicability was not resolved by the court below. Neither the court of appeals, the majority, nor the dissent in *Furnco* focused on the facial neutrality of the challenged practice as a basis for determining which theory of discrimination to apply.

The real question posed by the *Pouncy* decision is not whether subjective selection devices are facially neutral, but whether they *can be shown* to have an adverse impact on a protected group. If so, disparate impact analysis is appropriate. The conclusion that subjective selection devices cannot be shown to have an adverse impact is not supportable. An employer who utilizes a system under which a particular employment decision is based on the subjective judgment of a supervisory employee is engaged in an employment practice—that of relying on the judgment of its supervisors. Assuming that 100 black and 100 white comparably qualified individuals are processed through such a system for placement in 100 vacant positions, the system clearly would have an adverse impact on blacks if, after the 200 went through the process, 95 whites and 5 blacks were selected. Any rule that would preclude a plaintiff from proceeding under traditional disparate impact theory and require proof

181. *Id.* at 1090.
182. *Id.* at 1089.
183. A. LARSON & L. LARSON, *supra* note 157, § 76.32.
184. *Furnco*, 438 U.S. at 584.

of intentional discrimination would frustrate the purposes of Title VII. The supervisor may be engaged in intentional discrimination, but proof of that intentional discrimination is logically unnecessary under Title VII where "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[185]

Pouncy and Its Misguided Progeny

A number of courts have relied on *Pouncy*'s observation that the disparate impact model traditionally had not been applied to the challenged selection devices as support for the proposition that disparate impact analysis is not available in instances where the plaintiff's challenge is to subjective criteria.[186] For example, in *Pegues v. Mississippi State Employment Serv.*,[187] the Court of Appeals for the Fifth Circuit, relying on *Pouncy*, stated flatly that "because the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied."[188] The court then applied the more rigid burden of proof imposed on plaintiffs under the disparate treatment model, finding a prima facie case had not been established.[189]

The challenged practices in *Pegues* were the classification and referral practices of the Mississippi State Employment Service (MSES). The MSES functioned as a labor exchange, matching qualified applicants with available jobs. On the initial visit, each applicant was referred to an interviewer who handled job codes which corresponded to the job preferences expressed by the applicant. Based on questioning about the applicant's education, training, experience, interests and skills, the interviewer assigned "the appropriate" code to the candidate's application.[190] Interviewers were also responsible for matching applicants with employer job orders. The plaintiffs claimed that these interviewers abused their discretion in coding and referring, and they presented evidence of the disproportionate classification of blacks and women in "stereotypic, less remunerative occupations . . . ."[191] The Fifth Circuit, however, in reviewing the evidence under the disparate treatment model, decided that the statistical showing was insufficient to establish the plaintiffs' prima facie case "where a strong inference of discrimination has [not] previously been raised."[192] Had the analysis proceeded under disparate impact theory, the challenge could have been viewed as against the process. Also,

185. *Griggs*, 401 U.S. at 432.
186. See *supra* note 10.
187. 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983).
188. *Id.* at 765.
189. *Id.* at 768.
190. *Id.* at 764.
191. *Id.* at 766-67. For example, ninety black women and one white woman with at least an eighth grade education were coded for domestic labor.
192. *Id.* at 768.

because of the substantial disparity in code assignments, the defendant would have been required to justify that process.

Similarly, in *Carpenter v. Stephen F. Austin University*,[193] the Court of Appeals for the Fifth Circuit stated:

> according to *Pouncy*, a subjective classification practice that depends on the employer's discretionary decisions is not included within the category of facially neutral procedures—such as the high school educational requirements in this case—whose discriminatory impact may be isolated and thus specifically shown to have a causal connection to a class based imbalance in the work force so as to require no further proof of discriminatory motivation or intent.[194]

Although the court seemed to notice the illogic of its reading of *Pouncy*, it viewed itself as bound by that reading, stating:

> Were this a case of first impression in this court, we would likewise have concluded that the other channeling practices likewise fell clearly under the disparate impact model, under the literal terms of section 703(a) of Title VII, 42 U.S.C. Sec. 2000e-2(a)(2), since they 'limit, segregate, or classify, employees in a manner that 'would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee' because of race or sex . . . Nevertheless, . . . a decision of this Court, *Pouncy* . . . now requires that the discriminatory treatment model, requiring proof of discriminatory intent, be applied in determining whether the obviously disparate effects of the other two channeling practices—systematic assignment of lower compensated employment to blacks and women . . . , and the use of subjectivity in implementation of job qualifications for initial job assignment and promotion and the placement of employees on the compensation scale—nevertheless reflected race and gender discrimination prohibited by Title VII.[195]

Similarly, in *Carroll v. Sears*,[196] the Fifth Circuit stated that "the use of subjective criteria to evaluate employees in hiring and job placement decisions is not within the category of facially neutral procedures to which the disparate impact model is applied."[197]

Many other circuits have relied on *Pouncy* to avoid application of disparate impact theory in challenges to subjective decisionmaking systems.[198] The Ninth

193. 706 F.2d 608 (5th Cir. 1983).
194. *Id.* at 620.
195. *Id.*
196. 708 F.2d 183 (5th Cir. 1983).
197. *Id.* at 188.
198. An example is the Fourth Circuit's holdings in EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983). *See also* Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982) and Stansky v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980).

Circuit's confusion during the early 1980's is particularly instructive. In *Heagney v. University of Washington*,[199] and *O'Brien v. Sky Chefs*,[200] the Ninth Circuit showed a predilection towards the misreading of *Pouncy*. Two later cases, however, indicated the court's disagreement with that approach. In *Wang v. Hoffman*,[201] and in *Peters v. Lieullen*[202] the court clearly suggested that disparate impact analysis was appropriately applied to subjective decisionmaking. In 1985, however, the Ninth Circuit rejected *Wang* and *Peters* in *Antonio v. Wards Cove Packing Co.*,[203] and held that the challenged practices—lack of well defined job criteria and subjective decisionmaking among others—were not specific facially neutral practices suitable for disparate impact analysis. Finally, in 1987, the court en banc in *Antonio*[204] resolved the conflict, holding that "disparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class . . . . We are persuaded that this holding comports with the express language of the statute, the intent of Congress . . . , the enforcement agencies' interpretation, and the broad prophylatic purposes of Title VII."[205]

Other courts of appeals have recognized the incompatibility with well-accepted Title VII principles that a rigid adherence to the widespread misreading of *Pouncy* entails.[206] Significantly, in *Page v. U.S. Industries, Inc.*,[207] even the Fifth Circuit, without reversing *Pouncy*, attempted to minimize the negative effects of its misapplication by reading it as *permitting* the application of disparate treatment analysis to subjective criteria, and not as precluding the application of disparate impact analysis. In *Page*, the court stated:

> In light of our recent decisions in *Pouncy* and *Pegues*, we conclude that this case *can* be analyzed under the disparate treatment theory. However, we note, as did the District Court, that either theory may be applied to the same set of facts . . . . It is clear that a promotional system which is based upon subjective selection criteria is not discriminatory per se. Consequently, such a system can be facially neutral but yet be discriminatorily applied so that it impacts adversely on one group.[208]

Citing the Fifth Circuit's cases applying impact analysis to subjective selec-

199. 642 F.2d 1157 (9th Cir. 1981).
200. 670 F.2d 864 (9th Cir. 1982).
201. 694 F.2d 1146 (9th Cir. 1982).
202. 746 F.2d 1390 (9th Cir. 1984).
203. 768 F.2d 1120 (9th Cir. 1985).
204. 810 F.2d 1477 (9th Cir. 1987).
205. *Id.* at 1482.
206. See, *e.g.*, cases cited *supra* at note 11.
207. 726 F.2d 1038 (5th Cir. 1984).
208. *Id.* at 1045-46.

tion devices, the court went on to "agree with the district court's assessment that [the] subjective promotional system in this case indeed may have had a class wide impact."[209] The defendant's subjective promotional system was then analyzed under the disparate impact model.

The *Page* panel's effort to minimize the negative effect of *Pouncy* was short lived. In *Bunch v. Bullard*,[210] and *Watson v. Fort Worth Bank & Trust Co.*,[211] the Fifth Circuit indicated a reluctance to deviate from the precedent set by *Pouncy*. In *Watson*, the court noted:

> As stated by this Court in *Carpenter*, 'were this a case of first impression in this court, we would likewise have concluded that the other [challenged practices] . . . fell clearly under the disparate impact model, . . . since they 'limit, segregate, or classify' employees in a manner that 'would deprive or tend to deprive any individual of employment opportunities . . .' because of race . . .' [citations omitted]. Nevertheless, this is not a case of first impression, and this court is constrained by *Pouncy* and its progeny to apply disparate treatment analysis to Watson's claims.[212]

In none of these cases has a court set forth a convincing analysis supporting the conclusion that impact analysis should be unavailable where a plaintiff challenges subjective selection practices. Courts have pointed to the problem of establishing causation where the challenge is to a multifaceted system, but, as noted earlier, this problem does not justify an absolute bar to such challenges, but rather suggests a need for a more refined statistical analysis.

The Supreme Court granted certiorari in *Watson* to resolve this obvious confusion. As is shown in the next section, the Court went far beyond resolution of the question whether challenges to subjective decisionmaking can be analyzed under disparate impact theory. The Court held that impact analysis was applicable in such situations, but went further to alter impact analysis in such a way as to render it practically indistinguishable in theory from disparate treatment analysis and, therefore, practically useless to plaintiffs.

Watson: a "Fresh and Somewhat Closer Examination"

The Supreme Court, in *Watson v. Fort Worth Bank & Trust Co.*[213] provides some guidance to the lower courts regarding what it views as the appropriate analysis to utilize in challenges to subjective employment practices. In *Watson*, the plaintiff, a black female, was hired by the defendant, Forth Worth Bank and Trust, as a proof operator. After approximately three years, she was promoted to a position as teller in the bank's drive-in facility. Ap-

209. *Id.* at 1046.
210. 795 F.2d 384 (5th Cir. 1986).
211. 798 F.2d 791 (5th Cir. 1986).
212. 798 F.2d 791, 797 n.12 (5th Cir. 1986).
213. 108 S. Ct. 2777 (1988).

proximately four years later, she sought a supervisory teller position. A white male was selected. The plaintiff then sought a position as supervisor of the drive-in bank. A white female was selected. After serving informally as assistant to the supervisor of tellers, the plaintiff again sought the supervisory teller position when the white male in the position was promoted. The white female who was then supervisor of the drive-in bank was selected for the position. The plaintiff then sought the vacated position as supervisor of the drive-in bank, but a white male was selected. The bank had no formal criteria for evaluating candidates for promotion. Instead, it relied on the subjective judgment of supervisors in determining a candidate's fitness for promotion.

Watson filed suit in the district court alleging the bank had unlawfully discriminated against blacks in a number of areas, including hiring and promotion. The district court held that Watson was not a proper representative of the class of black applicants, but it nonetheless addressed the merits of the case. The court found the plaintiff had not established a prima facie case of hiring discrimination because the percentage of blacks in the work force approximated the percentage of blacks in the metropolitan area in which the bank was located.[214] As to the plaintiff's promotion claim, the district court, applying individual disparate treatment analysis, found that a prima facie case had been made. However, the court held the bank had met its burden by presenting evidence of a legitimate nondiscriminatory reason for each challenged promotion decision, and the plaintiff had not demonstrated those reasons to be pretexts for racial discrimination.[215]

The plaintiff appealed claiming that the district court erred in failing to apply the disparate impact analysis to her promotion claims.[216] The Court of Appeals for the Fifth Circuit affirmed the district court's findings.[217] The United States Supreme Court granted certiorari to resolve the dispute whether disparate impact theory may be applied to subjective decisionmaking processes.

214. The court of appeals vacated this judgment and remanded the case to the district court to dismiss the applicant claims without prejudice. The court recognized the prejudice to the class that might result from deciding the class issue without a proper representative, and expressed reservations about the district court's use of population statistics rather than applicant flow data to determine the question whether the employer's hiring practices resulted in a disparate impact. See *supra* note 140.

215. 798 F.2d 791, 797 (5th Cir. 1986).

216. Interestingly, it is questionable whether a prima facie case could have been made on the evidence presented at trial, had the district court applied disparate impact analysis. The evidence indicated that during the relevant time period, only fifteen blacks had been employed by the bank and only one black other the plaintiff had ever applied for promotions that were given to whites. Memorandum Opinion of District Court at 13 (Nov. 21, 1984). It is questionable whether such data could establish a prima facie case of disparate impact since the sample size was so small as to render any conclusion suspect. See *supra* note 61. On this basis, amici suggested that the Supreme Court dismiss certiorari as improvidently granted. *See* Brief for the NAACP Legal Defense and Educational Fund, Inc., The Mexican American Legal Defense and Educational Fund, Inc., The Employment Law Center, and the Center for Law in the Public Interest as Amici Curiae at 3.

217. 798 F.2d 791 (5th Cir. 1986).

The Court began its analysis with a general description of disparate treatment and disparate impact theories. It is here the Court began to blur the critical distinction between the two theories, stating:

> The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used [citation omitted]. Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.[218]

In suggesting that the ultimate legal issue to be decided under the two theories is no different, the Court seriously understated the traditional significance of intent. Under disparate treatment theory, the employer is liable because her employment decision was intentionally discriminatory. Under disparate impact theory, the employer is liable because the practices unjustifiably produced a discriminatory result. While there may be some functional equivalence in that under both theories the end result of employer action must be discrimination, the factual issue of intent has traditionally been irrelevant in impact cases. This is because the courts have consistently found employer practices unlawfully discriminatory where they produce a discriminatory result without adequate justification. Under treatment analysis, the ultimate legal question of unlawful discrimination cannot be resolved against the employer without a factual finding as to intent. While the ultimate legal question may be the same under both theories, the factual basis for resolving that question has always been significantly different.

The Court's comparison of the quantum of evidence required under the two theories, then, is misleading. It is not a matter of holding a defendant liable on the basis of less evidence, but rather different evidence. There is a clear basis for holding a defendant liable for unintentional discrimination on the basis of this different evidence. That basis is the fundamental difference in the factual questions to be answered. The functional equivalence of employer practices as reflected in the end result does not eliminate the difference in the factual questions to be resolved under the two theories.

The Court used the functional equivalence of the two theories as reflected in the end result as the basis for finding impact theory applicable to subjective systems. Noting that an "undisciplined system of subjective decisionmaking" may have the "same effects as a system pervaded by impermissible intentional discrimination,"[219] the Court held that "subjective or discretionary

218. 108 S. Ct. at 2785.
219. *Id.* at 2786.

employment practices may be analyzed under the disparate impact approach in appropriate cases."[220] In support of this conclusion, the Court noted that limiting disparate impact theory to standardized selection practices would allow employers to "insulate themselves from liability" under impact theory by simply adding a subjective component to an otherwise objective system and rendering the system subjective.[221] The Court also noted: "[D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."[222] After deciding that disparate impact analysis may be applied to subjective practices, however, the plurality,[223] in dicta, turned to the evidentiary standards that should apply in such cases.[224]

The *Watson* plurality was persuaded by the defendant's argument[225] that applying traditional disparate impact theory as developed in *Griggs, Dothard* and *Albemarle*, would result in the employer's adoption of "surreptitious quota systems" to prevent plaintiffs from establishing a prima facie case.[226] This result, in the plurality's view, would run counter to congressional intent in enacting section 2000e-2(j) of the Act, and would perhaps violate the Constitution.[227]

Section 2000e-2(j) provides that

> nothing contained in [Title VII] shall be interpreted to *require* any employer . . . to grant preferential treatment . . . on account of an imbalance which may exist with respect to the total number of percentage of persons of any race . . . employed by any employer

220. *Id.* at 2787.

221. *Id.* at 2786.

222. *Id.* Here, the Court accepts the notion that use of subjective employment criteria is a facially neutral practice. Cf. *supra* note 157 and accompanying text.

223. Justices O'Connor, Rehnquist, White and Scalia.

224. As pointed out by Justice Stevens (108 S. Ct. at 2797) and Justices Blackmun, Brennan and Marshall (108 S. Ct. at 2792 n.1), there was no need to announce a new interpretation of disparate impact theory in order to resolve the narrow question on which certiorari was granted.

225. This argument was advanced also by the U.S. Department of Justice and other amici. *Id.* at 2786. *See also* Rose, *Subjective Employment Practices: Does Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 69-70 (1980).

226. 108 S. Ct. at 2787. Some consider the possibility that application of traditional impact theory to subjective systems will encourage meaningful affirmative action to be positive. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 1026-27 (1982); Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 28 (1987). Others question the legitimacy of such a result. *See* Maltz, *Title VII and Upper Level Employment—A Response to Prof. Bartholet*, 77 NW. U.L. REV. 776, 784-85 (1983). The plurality finds it unacceptable. In the author's view, speculation regarding a possible illegal response to a legal standard should not serve as the primary justification for a relaxation of that legal standard. The threat by employers that in order to avoid liability under disparate impact theory, they are likely to resort to the inappropriate use of quotas should, rather that prompt a change in the legal standard allegedly causing that response, prompt stronger enforcement of the prohibitions against the response.

227. *Watson*, 108 S. Ct. at 2788.

> . . . in comparison with the total number or percentage of persons of such race . . . in any community . . . or in the available work force in any community . . . .[228]

Clearly, the purpose of section 2000e-2(j) was to prevent courts from making findings of unlawful discrimination based *solely* on the fact that protected groups were underutilized in an employer's work force and then requiring preferential treatment as a remedy for such findings.[229] A finding of unlawful discrimination would be unsupported without some evidence that the underutilization shown was attributable to some employer action.[230]

Congress' prohibition against interpreting Title VII to require the use of preferential treatment is limited to situations in which the requirement is "on account of an imbalance" as evidenced through a work force/labor market comparison alone since a conclusion that such an imbalance resulted from employer practices is not inevitable. Where discriminatory impact is shown through one of the many other statistical techniques available, or where there is a finding that the imbalance was caused by employer practices,[231] section 2000e-2(j) is, by its language, inapplicable. Courts may require preferential treatment as a remedy for discriminatory conduct[232] and employers are permitted to engage in preferential treatment even without a finding of discrimination where evidence exists of a "conspicuous" or "manifest" racial imbalance.[233] Moreover, even if section 2000e-2(j) can be read so broadly as to prohibit preferential treatment based on evidence of prior discrimination, it does not prohibit utilization of a well-established theory of proof that could, in the words of the plurality, "put undue pressure on"[234] employers to engage in preferential treatment. Section 2000e-2(j) provides no justification for a redefinition of disparate impact theory.

Nevertheless, the plurality further explained how its "fresh and somewhat

228. 42 U.S.C. § 2000e-2(j). The plurality cites this section of Title VII as support for the proposition that Congress did not "require employers to avoid 'disparate impact' as such." The Court in its prior decisions however, has reached exactly the opposite conclusion. It is clear that the disparate impact theory was formulated for the purpose of eliminating unjustified practices that had a disparate impact on protected groups. It is accurate then to say that Congress did not require an employer's work force to mirror the general population. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). It is quite another thing to suggest that Congress did not intend that employers avoid utilizing selection devices that produced an adverse impact on protected groups.

229. In United Steelworkers of America v. Weber, 443 U.S. 193, 205 n.5 (1979), the Court described § 703(j) as "speak[ing] to substantive liability under Title VII." *See also* Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 464-65 n.37 (1986) ("legislative history convinces us that 703(j) was added to Title VII to make clear that an employer . . . does not engage in 'discrimination' simply because of a racial imbalance in its work force").

230. See *supra* note 140.

231. *Id.*

232. United States v. Paradise, 480 U.S. 149 (1987).

233. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616 (1987).

234. *Watson*, 108 S. Ct. at 2787.

closer examination of the constraints" of disparate impact theory "operates to keep that analysis within its proper bounds."[235] In defining the "evidentiary standards that apply in these cases,"[236] the plurality first noted:

> The plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. Cf. Connecticut v. Teal, 457 U.S. 440 (1982).[237]

This language, consistent with the view expressed in *Pouncy*, evidences a desire for a fine tuning of the plaintiff's evidence by requiring more than a generalized attack on a broad range of employment practices.[238] The language does not, however, preclude an attack on a specific employment practice that is composed of several component parts and is shown to have a disparate impact.[239] The plurality noted that where the employer combines subjective criteria with more rigid standardized rules and tests, the plaintiff is responsible for identifying the specific employment practices allegedly responsible for the observed disparities. To the extent that plaintiffs limit their showing of impact to identified practices, the likelihood that the employer will be required to justify components that do not contribute to the prohibited impact will be minimized. This is an appropriate goal. In situations where the components of the challenged procedure cannot so easily be isolated, however, or where adverse effects are produced by the interaction of several components, requiring plaintiffs to isolate individually the effects of specific components is

235. *Id.* at 2788.

236. *Id.* The plurality does not appear to intend that its new definition of impact theory apply generally in all disparate impact cases. If the plurality had intended that its redefinition was to apply more broadly than is indicated by the facts before it, surely it would have been more clear. The possibility for broader application however, is not foreclosed since the plurality indicates that it does "not believe that each verbal formulation used in our prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision." *Id.* at 2788 n.2.

237. *Id.* at 2788. If the reference to *Teal* stands for the proposition that a plaintiff must isolate and identify specific employment practices, it is inappropriate. *Teal* held that a plaintiff *may* challenge the effect of isolated components even though the total process did not result in a disparate impact. *Teal* did not hold that only isolated components may be challenged. See *infra* note 240.

238. See *supra* note 141 and accompanying text.

239. In the above quotation, the plurality refers both to plaintiff's responsibility for identifying the "specific employment practice challenged" and "specific employment practices . . . responsible for any observed disparities." Prior decisions leave little doubt, however, that a plaintiff may challenge a practice that is composed of several component parts.

not justified. Clearly the Court's "disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group."[240]

Where data are available that would allow a plaintiff to isolate specific components of a selection process and determine their impact, the plaintiff's statistical case will be more probative if the impact of specific components of the process are accounted for. Where such data are unavailable, however, requiring the plaintiff to identify the specific component of the process causing the adverse impact would seriously undermine the goal of Title VII to eliminate "artificial, arbitrary and unnecessary barriers to employment."[241] Such an approach would require courts to ignore obvious disparate effects until the plaintiff could identify one offensive component of the challenged process.[242] Similarly, where the plaintiff alleges that a combination of several devices instead of a single component causes the impact, isolation of a single component is inconsistent with the theory of plaintiff's case and should not be required.

Consequently, where the plaintiff is either unable to isolate the impact of individual components or is challenging their combined effects, as discussed earlier, equity would require that the burden of justifying the process be shifted to the employer.[243] The employer, with its superior knowledge of how its system works, is in a better position to isolate individual components of the system and to demonstrate their impact or lack thereof.[244]

The plurality further required that the plaintiff "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[245] The Court was unwilling to specify what kind of evidence could justify an "inference of causation," leaving that decision for a case-by-case analysis.[246] Clearly, something more than a simple utilization analysis should be required in most disparate impact cases.[247] In cases

240. Connecticut v. Teal, 457 U.S. 440, 458 (1981) (Powell, J., dissenting) (emphasis in original). The majority in *Teal* repeatedly emphasized that any "barrier to employment opportunities" could be challenged under disparate impact theory. 457 U.S. at 447-53. While disagreeing with the Court's conclusion that the bottom line could not serve as a defense to a disparate impact showing, Justice Powell, joined by Justices Burger, Rehnquist and O'Connor, clearly understood that an impact showing could be made as to the total selection process. Of course, the majority did not disagree on this point, but only held that the impact of the total selection process could not serve as a defense to the adverse impact of an individual component on the employment opportunities of individual members of the protected group.

241. *Griggs*, 401 U.S. at 431.

242. Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988). See also *supra* note 155 and accompanying text.

243. See *supra* note 151.

244. See *supra* note 152.

245. *Watson*, 108 S. Ct. at 2788-89. The Court noted that the disparity in such cases need not rise to the level of significance required in treatment cases. *Cf. supra* note 91.

246. *Id.* at 2789 n.3.

247. See *supra* note 140.

challenging selection devices that are not objective qualifying standards (such as the high school education requirement challenged in *Griggs*, or the height and weight requirements challenged in *Dothard*), applicant flow analysis will be more probative than a utilization analysis. In such cases, the causation difficulties encountered by the *Pouncy* plaintiffs and noted by the *Watson* plurality can be avoided.[248] Where applicant flow data are unavailable or unreliable,[249] a district court should retain the flexibility to find a causal connection between employer practices and a work force disparity. This is particularly so where other apparent causes of the disparity have been eliminated as probable causes.[250]

The *Watson* plurality then stated its case too broadly when it concluded that it was "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."[251] If limited to situations in which the plaintiff's proof consists of a general work force/labor market analysis, this conclusion might be appropriate. As was the problem in *Pouncy*, where a plaintiff shows a disproportion between the composition of an employer's work force and the composition of its labor pool without presenting evidence supporting an "inference of causation," a court may be justified in refusing to make any assumptions regarding the cause of the disparity. Where the plaintiffs' evidence of the impact of an employer's selection process is sufficient to support a finding that the process resulted in the observed disparity, the burden is appropriately shifted to the employer to offer a more probative analysis identifying and justifying the specific components that caused the result.[252] It is unrealistic to suppose that plaintiffs can discover and explain the myriad of employer practices that may lead to such imbalances. Once the impact of the total process is shown, equity would require that the employer shoulder the burden of explaining the role of its practices in causing that disparity.[253]

The plurality further confused disparate impact with disparate treatment theory when it concluded it would be "unrealistic to assume that unlawful discrimination is the sole cause" of work force disparities.[254] They suggest that a finding of discrimination under impact theory requires an assumption of unlawful discrimination, implying that employer intent is relevant. Under

248. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) (applicant flow data "very relevant" in determining whether a facially neutral device has a disparate impact).

249. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (applicant pool may fail to represent accurately the number of qualified minorities because of discriminatory recruitment practices). *See also* Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983); Wheeler v. City of Columbus, 686 F.2d 1144, 1152 (5th Cir. 1982); Castaneda v. Pickard, 648 F.2d 989, 1003 (5th Cir. 1981).

250. See *supra* note 140.

251. 108 S. Ct. at 2787.

252. See *supra* note 151.

253. See *supra* note 152.

254. 108 S. Ct. at 2787.

disparate treatment theory, an employer's act performed on the basis of race is "unlawful discrimination" without regard to its later consequences. Where there is no direct evidence of a discriminatory act, proof of impact permits the court to infer the existence of a preceding unlawfully discriminatory act. A subtle but critical distinction between impact and treatment theory is that under impact theory, the prohibited result renders the preceding act unlawfully discriminatory. Under traditional impact theory, then, the court is not asked to conclude that "unlawful discrimination" caused the disparity, only that practices of the employer which cannot be justified caused the disparity and, therefore, were unlawfully discriminatory.

The plurality's drift into disparate treatment theory is more clearly reflected in its treatment of the respective burdens of proof in cases challenging subjective decisionmaking under the disparate impact theory. Here, the plurality engaged in its most significant departure from traditional disparate impact analysis. Ordinarily, the defendant bears the burden of proof as to the business necessity of the challenged practice.[255] The Court, without distinguishing its prior holdings, stated that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times" and described the defendant's burden as "producing evidence that its employment practices are based on legitimate business reasons."[256] This alteration of traditional disparate impact analysis was roundly criticized by Justices Blackmun, Brennan and Marshall in their partial concurrence as "inconsistent with the proper evidentiary standards and with the central purpose of Title VII."[257] They claimed the plurality was "attempting to mimic the allocation of burdens the Court has established in the very different context of individual disparate-treatment claims" and turning "a blind eye to the crucial distinctions between the two forms of claims."[258]

The rebuttal burden placed on defendants by the plurality seems to fall somewhere between a showing of business necessity and the articulation of a legitimate nondiscriminatory reason. Under individual disparate treatment theory, the legitimate reason need not be related to business operations.[259] Under disparate impact theory, the use of the challenged practice must be manifestly related to the employment in question.[260] The plurality's new formulation does require that the employment practices challenged be based on legitimate business reasons. Accordingly, the Court has neither completely adopted the legitimate nondiscriminatory reason approach of traditional individual disparate treatment claims, nor completely abandoned the business necessity approach of traditional disparate impact claims.

255. See *supra* note 78.
256. 108 S. Ct. at 2790.
257. *Id.* at 2792.
258. *Id.* at 2792-93.
259. See *supra* note 25.
260. See *supra* note 74 and accompanying text.

The Court's reformulated language is consistent with the evolutionary development of the business necessity defense. It is similar to the approach taken by the Court in *Beazer* and *Davis* which recognized legitimate employer concerns unrelated to actual job performance. In both of these cases the Court accepted evidence that failed to establish clearly the manifest relationship between the challenged criteria and performance on the job in question, as meeting the business necessity defense. The Court did, however, establish the logical relationship between the criteria and legitimate business concerns of the employer. The plurality's recognition of this expansion is justifiable. Its effort to transform the defendant's rebuttal burden from what was a burden of proof to a burden of production is, however, not justifiable.

Stating that the *Griggs* formulation of the defendant's burden "should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant" and that "the ultimate burden of proving that discrimination against a protected group has been *caused by* a specific employment practice remains with the plaintiff at all times,"[261] the plurality correctly noted that the plaintiff in impact cases bears the ultimate burden of proof on the questions whether discrimination exists and whether employer actions caused that discrimination. Traditionally, once a plaintiff makes out a prima facie case of discrimination by demonstrating that employer practices resulted in a disparate impact, and the defendant meets its intermediate burden of proving business necessity, the plaintiff can meet its ultimate burden of proof only by showing pretext. According to the plurality, however, when a plaintiff has made out a prima facie case of disparate impact, and "when defendant has met its burden of *producing* evidence that its employment practices are based on legitimate business reasons,"[262] the plaintiff must show pretext.

This development ignores the "crucial difference between a treatment and an impact allegation . . . the intermediate burden on the employer" of *proving* that the challenged practices are required by business necessity.[263] As the partial concurrence pointed out, the purpose of the defendant's rebuttal in disparate treatment cases is to rebut a presumption of intentional discrimination. To rebut that presumption, the defendant should only put the factual question at issue.[264] The purpose of the defendant's rebuttal in disparate impact cases is to "legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate."[265] Once a prima facie case of disparate impact is made, "[t]he plaintiff already has proved that the employment practice has an improper effect [and] it is up to the employer to prove that the discriminatory effect is justified."[266]

261. 108 S. Ct. at 2790.

262. *Id.*

263. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1485 (9th Cir. 1988); *rev'd and remanded* 109 S. Ct. 2115 (1989). See also *supra* note 78.

264. 108 S. Ct. at 2793. See also *supra* note 25.

265. *Id.* at 2794. See also *supra* note 63.

266. *Id.*

The plurality's reformulation of the defendant's intermediate burden from what has traditionally been a burden of proof to a burden of production renders insignificant the fact that under traditional impact theory, evidence of a disparate impact alone without proof of business necessity compels a finding of unlawful discrimination.

The plurality's formulation has the practical effect of requiring plaintiffs to prove that the employer intentionally discriminated to succeed in the large proportion of disparate impact challenges to subjective decisionmaking.[267] Under the plurality's formulation, as in individual disparate treatment cases, once a plaintiff has made out a prima facie case, almost any business-related explanation for use of the challenged practices will suffice to meet the defendant's burden of production.[268] A trial court will have difficulty finding a justification for not accepting, for example, evidence of an employer's desire to select the best suited individual for the job based on the good faith exercise of professional judgment as "evidence that its employment practices are based on legitimate business reasons."[269]

While *Burdine* refined the defendant's burden in individual treatment cases by requiring that the articulated reason for the challenged action be stated clearly and with reasonable specificity,[270] such a requirement will not likely compel similar precision in a defendant's offer in cases challenging the discriminatory impact of the use of subjectivity. The defendant's burden in these cases is not focused on the reasons for taking a particular action, but on the general justification for utilizing the challenged practices. All that is required of a defendant by the plurality is evidence that the challenged practices are "based on legitimate business reasons."

Once the defendant's minimal burden is met, the plaintiff bears the burden of demonstrating pretext by showing that equally effective and less discriminatory alternatives exist, or that the use of the challenged practices is a cover-up for intentional discrimination.[271] As a practical matter, however, because the defendant is not required to demonstrate a positive relationship between its practices and legitimate business needs, the plaintiff will seldom

267. In Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419, 440 (1982), the author suggests that "the impetus toward merging disparate impact and disparate treatment defenses is inevitable." Professor Furnish however, grounded her conclusion, in part, on the notion that intent had already been made relevant in disparate impact cases. See *supra* note 99 and accompanying text.

268. See *supra* note 25.

269. 108 S. Ct. at 2790.

270. See *supra* note 26.

271. 108 S. Ct. at 2790. See also *supra* notes 79 & 80. The plurality here seems to recognize the optional functions of evidence of alternatives at the pretext stage since it addresses factors which are relevant in determining whether the alternatives identified are "equally as effective as the challenged practices" (undermining the necessity of the practices) and whether "the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment" (raising an inference of intent). See *supra* note 99.

be able to produce evidence of equally effective and less discriminatory alternative selection practices. Most jobs for which subjective selection devices serve as a screen require an evaluation of candidate traits and job performance standards that cannot be objectively measured.[272] As the plurality noted, "Some qualities—for example common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly."[273] With regard to such jobs there may be many alternative selection practices, but without evidence of the effectiveness of the challenged practices, it would be highly speculative to suggest that any alternative is equally effective in meeting the employer's legitimate goals. The plaintiff's practical burden at the pretext stage is to show that the process used is a cover-up for intentional discrimination. The plurality's formulation requires the plaintiff to adduce evidence of the discriminatory intent for which the use of subjectivity is a cover-up and, therefore, renders the question of the employer's intent critical in disparate impact cases.

Such a result is unnecessary in light of the evolution through which disparate impact theory has gone since its initial adoption by the Court in *Griggs*. Challenges to subjective selection devices under traditional disparate impact theory do present analytical difficulties not generally encountered in cases challenging clearly objective devices such as height and weight requirements or written tests. Plaintiffs may find it difficult to identify the specific employment practices which are challenged and then to establish that they caused the disparate impact observed.[274] Defendants may find it difficult to meet the burden of establishing a manifest relationship between the challenged practices and the employment in question.[275] The *Watson* Court also noted conflicting policy considerations that must be taken into account.[276] The existence

272. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 984-985; Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, U. ILL. L. REV. 869, 907 (1985); Rose, *Subjective Employment Practices: Does Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 69-70 (1980).

273. 108 S. Ct. at 2787.

274. 108 S. Ct. at 2788-89.

275. Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 117-18 (1979); Cooper, *Women in the Academy*, 16 U.C. DAVIS L. REV. 975, 992 (1983); Maltz, *Title VII and Upper Level Employment—A Response to Prof. Bartholet*, 77 NW. U.L. REV. 776, 789-92 (1983); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1289 (2d ed. 1983); Bartholet, *supra* note 275, at 984-98. The American Psychological Association, however, asserted as Amicus Curiae in Support of Petitioner in *Watson* that validation of subjective systems is indeed possible. *See* Brief for the American Psychological Association, at D-1, D-10 (Nov. 5, 1987).

276. 108 S. Ct. at 2786-87 (if disparate impact analysis is confined to objective tests, employers will be able to substitute subjective criteria having substantially similar effects and *Griggs* will become a dead letter); *id.* at 2787 (focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures).

of these complications however, does not justify the *Watson* plurality's abandonment of traditional disparate impact theory through redefinition.

An Appropriate Solution

While a number of commentators have proposed new solutions to the problems raised by challenges to subjective decisionmaking processes, this author suggests that a return to traditional disparate impact analysis provides a sufficient analytical framework for determining whether discrimination exists. Traditional impact theory can accommodate the difficulties associated with challenges to discretionary decisionmaking without unduly infringing upon management prerogatives or undermining plaintiffs' ability to prove a case.

It has been suggested that subjective decisionmaking should be totally exempted from disparate impact analysis. This suggestion is grounded in the belief that the economic costs of validation and the interest in protecting employer autonomy outweigh any benefit to be derived from applying impact analysis in such cases.[277] The suggestion is also grounded in the belief that because subjective judgments are nothing more than "hunches," courts will gain little insight on whether discrimination exists by second-guessing[278] those judgments.

Professor Maltz suggests that the economic cost imposed on employers by application of adverse impact theory in upper level jobs,[279] coupled with an interest in protecting employer autonomy, justify exempting all upper level employment decisions from adverse impact analysis.[280] He admits, however, that his calculation of cost "depends in large measure on the magnitude of the validation costs and on the precise definition of business necessity . . . respectively."[281] Because the approach proposed here recognizes that adverse impact theory does not require "validation" in all cases, but only a showing of a broadly defined business necessity, the costs of validation anticipated by Professor Maltz should not materialize. Maltz also factors into his cost

277. *See* Maltz, *supra* note 275, at 776.

278. *See* Lamber, *supra* note 272, at 873.

279. Professors Maltz, Bartholet, Lamber, Waintrob and Cooper all address the question of the applicability of disparate impact theory in terms of the level of the job for which the subjective standard serves as a screen. Professor Bartholet provides an excellent discussion of the fact that courts have shown a strong reluctance to find discrimination in upper level employment. Bartholet, *supra* note 272, at 959-98. Maltz is in agreement with Professor Bartholet's analysis. *See* Maltz, *supra* note 275, at 776. Unless one is willing to suggest that minorities and women are less entitled to be free from discriminatory practices at the upper level than the lower however, there is no basis for applying different modes of analysis depending on the level of the job in question. Practices that can be proven to be discriminatory are no less so because they operate at higher levels. The practical fact is that proof of discrimination may be difficult in many cases challenging upper level employment decisions because of a lack of compelling statistical evidence to establish impact, or a lack of direct evidence of discriminatory intent. The mere fact that the level of the job in question may be high, however, should be of no consequence in determining whether unlawful discrimination exists.

280. Maltz, *supra* note 275, at 786-90.

281. *Id.* at 787.

analysis the value of employer autonomy.[282] He recognizes, however, that "[s]ince both the desire to alleviate institutional racism and the desire to preserve employer autonomy originate in very basic concepts of justice, disagreement regarding their relative importance simply is not subject to resolution through reasoned argument."[283] Fair application of disparate impact analysis infringes on employer autonomy only where that autonomy results in the exclusion of protected groups. Employer autonomy is not eroded by a court that requires the employer to justify utilizing a practice that excludes protected groups from employment opportunities. Professor Maltz's proposed exemption from disparate impact theory for all upper level jobs is too broad and too drastic in light of the broad purposes of Title VII.

Professor Lamber has also suggested an exemption for discretionary decisionmaking. Her exemption is described as a "limited and principled" deference to such decisionmaking.[284] Her approach would have the courts "pierc[e] the discretionary veil" by distinguishing those employers who have a "legitimate claim to discretion" and those who do not.[285] She suggests several factors are relevant in determining which discretionary decisionmaking systems are legitimate and which are not. Those factors include whether the employer is public or private,[286] whether the decisions are made within a hierarchy of authority,[287] the degree of risk of bias in the measurement or definition of general standards,[288] and whether the job involves the exercise of considerable discretion.[289]

The apparent rationale for this limited exemption is that in situations where the employer takes serious business risks by playing hunches, such as where no one "knows what factors or characteristics predict success or how important a particular characteristic is," discretionary decisions should be immune from scrutiny because "courts will gain little from scrutinizing this employer's judgment."[290] Application of disparate impact theory, however, does not require a court to second guess an employer's discretionary judgment. Rather, it only requires that the court make a judgment regarding the business necessity of a process of "playing hunches" that consistently excludes members of protected groups. If the employer is unable to persuade the court that its discretionary process predicts success or is otherwise manifestly related to the employment in question, the force of its business necessity defense must be diminished. Other factors that may mitigate in favor of the use of subjective decisionmaking processes, of course, may be considered by the court in assessing a

282. *Id.* at 789.
283. *Id.* at 792.
284. Lamber, *supra* note 272, at 873.
285. *Id.* at 907.
286. *Id.* at 908.
287. *Id.* at 910.
288. *Id.* at 912.
289. *Id.* at 914.
290. *Id.* at 907.

defendants claim of business necessity; but none should preclude a court from making the inquiry.

Professor Blumrosen has offered yet another solution which includes an exemption for certain employers from disparate impact analysis. His proposed exemption relates neither to the level of the job nor to the nature of the system, but to the status of the employer in terms of its affirmative action record. Professor Blumrosen suggests that disparate impact theory be applied to subjective selection procedures only where the employer has "not participated meaningfully in affirmative action."[291] This approach is designed to reward employers who have hired minorities by forcing their employees to challenge their subjective judgments under the disparate treatment mode.[292] Blumrosen's approach is inconsistent with the *Teal* holding that the bottom line is irrelevant in determining whether a particular selection device has an illegal adverse impact on a protected individual. An employer's success in implementing affirmative action should not insulate those practices that have an adverse racial effect.[293]

Some proposals for revising the disparate treatment theory could, if adopted by the courts, render it a more useful mechanism for analyzing discretionary decisionmaking.[294] These approaches, however, like the *Watson* plurality's approach, constitute major changes in well-established substantive theories of liability, and should be approached with some degree of caution.

Professor Bartholet suggests that impact theory be applied in all cases challenging the use of subjective processes that cause a disparate impact. In her view, employers should be required to prove that their subjective evaluations were accurate or that the evaluation system was job related.[295] Bartholet's approach is more consistent with Title VII theory than the other approaches noted. The difficulty is that it places undue emphasis on the notion of technical validation. Bartholet requires that employers "validate" discretionary systems under traditional Title VII standards.[296] She urges that the defendant establish

291. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 32 (1987).

292. *Id.* at 33.

293. In light of the *Watson* plurality's fear that employers maybe pressured into adopting unlawful quotas by application of traditional disparate impact analysis, it is unlikely that the Court will ever adopt this approach. This carrot and stick approach may be useful as an administrative mechanism for guiding an enforcement agency in the exercise of its prosecutorial discretion, but not as a rule of law.

294. *See, e.g.*, Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Cooper, *Women in the Academy*, 19 U.C. DAVIS L. REV. at 1013 (1983).

295. Bartholet, *supra* note 272, at 1005.

296. *Id.* at 989. Bartholet argues for the imposition of a heavy burden of validation of subjective selection devices, although she recognizes that new undescribed validation techniques may be required. *Id.* Technical "validation" of selection devices however, is not the only way in which use of devices that produce a disparate impact may be justified. Validation is but one method of demonstrating job relatedness, and job relatedness one component of business necessity. See *supra* note 68 and accompanying text.

the "fundamental validity" of the discretionary process and not its "apparent rationality or good faith."[297] The difficulty with this approach is that "validation" under traditional Title VII standards may indeed be difficult,[298] and "validation" is normally associated with a demonstration of job relatedness. Validation is not required if the employer can convince the court that the use of the offending system is otherwise "manifestly related to the employment in question" as that concept was broadened by *Davis* and *Beazer*.

In *Davis* and *Beazer*, the Court began the expansion of the concept of business necessity beyond the bounds initially established by *Griggs* and *Dothard*. This broadening of the scope of the relationship established between the challenged selection device and legitimate business concerns to demonstrate business necessity recognizes not only that "validation" may not be required in all cases to establish business necessity, but also that job relatedness is not the only standard by which to measure a selection practice's manifest relationship to the employment in question. This expansion of the business necessity defense accommodates the difficulties associated with technical validation, and allows the courts to judge the business necessity defense through a searching evaluation of the employer's explanation for utilizing subjectivity. This analysis could take into account those factors which the court determines may mitigate in favor of the use of subjectivity.[299] It could take into account the "rationality" of the process without deferring unduly to the employer's "good faith."[300] By retaining an analytical model which places the burden of proving business necessity on the defendant, courts will encourage the presentation of all relevent evidence. By recognizing an expanded business necessity defense, courts will retain the flexibility to evaluate all such evidence, making an informed determination possible regarding the utility of the challenged practices. By reducing the defendant's burden of proof to one of production, however, the *Watson* plurality has transformed traditional disparate impact analysis into what is, for all practical purposes, a proxy for disparate treatment analysis. The plurality, rather than requiring the defendant to justify its use of practices causing an adverse impact, places the practical burden on the plaintiff to prove that the challenged practices are a pretext for intentional discrimination.

Professor Maltz's approach places the discriminatory effects of subjective decisionmaking beyond the reach of federal courts. Professor Lamber seeks to exempt some discretionary systems from disparate impact challenge, but those exempted are arguably most in need of scrutiny—those with no apparent

297. *Id.* at 967.

298. See *supra* note 275.

299. See *supra* text accompanying notes 289-92, for those factors viewed as important in the view of Professor Lamber. All of these factors and more could be considered by the trial judge, although the weight to be given each must be determined with care based on the relationship of the factor to business concerns. The absence of alternative devices for example, may be a significant factor while the extent to which the job requires the exercise of discretion may be of very little significance.

300. Bartholet, *supra* note 272, at 967.

justification. Professor Bartholet allows for challenges to the adverse effects of discretionary systems, but imposes upon employers stringent validation standards that limit an employer's ability to justify its practices. Professor Blumrosen also seeks to exempt certain systems from impact analysis, but does so by incorporating into the analysis policy considerations unrelated to the question of whether unlawful discrimination exists. The approach of the *Watson* plurality, apparently prompted by those same policy considerations, blurs the critical distinctions between the impact and treatment theories and seriously undermines the viability of disparate impact theory as an effective tool in such cases.

Traditional disparate impact theory, refined by defining with some precision the meaning of "business necessity" in this context, can be applied by courts to subjective decisionmaking systems in a manner that accommodates the unique nature of the jobs involved and systems challenged, without imposing undue burdens on employers. Employees can be spared the unnecessary and largely impossible surrebuttal burden of establishing that the employers use of subjectivity was a pretext for intentional discrimination. Employers can be spared the expense of formal validation through fair application of the already expanded concept of "business necessity."

Admittedly, this approach leaves much to the discretion of the courts, and may be criticized both for its laxity in eliminating discrimination in high level and academic positions, and for its arguably inappropriate insertion of federal judges into the affairs of business. This approach, however, maintains the balance already struck by Title VII between society's interests in nondiscrimination and employer autonomy without significantly and artifically altering the sound analytical models already in place.

On June 5, 1989, the Court decided *Wards Cove Packing Co. v. Atonio*.[301] In *Wards Cove*, the *Watson* plurality was joined by Justice Kennedy, and, in an opinion authored by Justice White, the Court confirmed the trend set in *Watson*. On the question of the appropriate statistical analysis for establishing plaintiff's prima facie case of disparate impact, the Court, not unexpectedly,[302] found that an analysis comparing the percentages of blacks and whites in different segments of the existing workforce was nonsensical where one segment did not reflect the pool of qualified applicants for the other.[303] Having found that the statistical analysis offered was insufficient to establish a prima facie case, the Court remanded for further proceedings to determine whether a prima facie case had otherwise been made.[304] The Court went on to address the other issues raised.

The Court expressly adopted the *Watson* requirement that plaintiff identify the specific employment practice being challenged and show that it is the

301. 109 S. Ct. 2115 (1989).
302. See *supra* notes 55-59 and accompanying text.
303. 109 S. Ct. at 2121, 2123.
304. *Id.* at 2123-24.

cause of the statistical disparity observed.[305] The Court shed little light, however, on the propriety of a plaintiff's challenge to the combined effects of a number of employment practices.[306] The Court noted "[a]s a general matter" that a plaintiff must demonstrate a nexus between a "specific or particular employment practice" and the disparate impact shown.[307] It also stated that plaintiffs must "demonstrate that the disparity they complain of is the result or one *or more* of the employment practices they are attacking."[308] This language might suggest that the Court is willing to consider the combined effects of a number of employment practices, but for the fact it is immediately followed by language seeming to require the plantiff show "that each challenged practice has a significantly disparate impact."[309] Although the dissenting Justices read the majority to the contrary,[310] the Court has yet to state clearly that the combined effects of multiple employment practices may not be challenged under disparate-impact theory.[311]

As to the defendant's burden after the prima facie case is made, the Court observed that while "some of our earlier decisions can be read as suggesting otherwise . . . to the extent that those cases speak of an employer's 'burden of proof' . . . they should have been understood to mean an employer's production — but not persuasion — burden."[312] Mirroring the test established in *Watson*,[313] the Court stated that "[i]n this phase the employer carries the burden of producing evidence of a business justification for his employment practice.[314] Indicative of the trend toward a merger of the two theories predicted by Profesor Furnish[315] is the Court's statement that "[t]his rule . . . conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."[316]

Finally, the Court addressed the pretext stage of disparate impact litigation. In this section of the opinion, the Court recognized a plaintiff's oppor-

305. *Id.* at 2124.

306. See *supra* notes 239-240.

307. 109 St. Ct. at 2124.

308. *Id.* at 2125 (emphasis added).

309. *Id.* Thus, this opinion may be read to suggest that: (1) plaintiff may only challenge individual employment practices; (2) plaintiff may challenge the combined effect of a number of practices; or (3) plaintiff may only challenge the combined effect of a number of practices where each of the practices challenged has a significantly disparate impact.

310. *Id.* at 2132 (Stevens, J., dissenting); *Id.* at 2136 (Blackmun, J., dissenting) ("it requires practice-by-practice statistical proof").

311. Clarification of this issue must await another day. On June 12, 1989 in USX Corp. v. Green, 109 S. Ct. 3151 (1989), the Court granted certiorari, reversed and remanded in light of its decision in *Atonio*. The Court of Appeals for the Third Circuit had held that the combined effects of a number of practices were subject to challenge under the disparate impact theory. See *supra* note 54.

312. 109 S. Ct. at 2126. See, however, *supra* note 78.

313. 108 S. Ct. at 2790.

314. 109 S. Ct. at 2126.

315. See *supra* note 267.

316. 109 S. Ct. at 2126.

tunity to prevail even if a defendant meets its burden of production, by demonstrating that other selection devices without a similarly disparate result would also serve the employer's legitimate interests.[317] The Court, however, seems to abandon the recognition in *Watson* of the two optional functions the evidence offered at this pretext stage,[318] and asserts that the employer's "refusa[l] to adopt these alternatives . . . would belie a claim by [the employer] that [its] incumbent practices are being employed for nondiscriminatory reasons."[319] This rationale further obscures the traditional distinction between disparate impact and treatment theories.

Justice Stevens joined the *Watson* dissenters,[320] and authored a dissenting opinion charging the majority, inter alia, with abandoning in a "casual — almost summary"[321] fashion the longstanding rule developed since *Griggs* that the employer in disparate impact cases has the burden of proving the "affirmative defense"[322] of business necessity.

Justice Blackmun, joined by Brennan and Marshall, wrote separately concurring in Justice Steven's dissent, accusing the majority of "upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases," and wondering "whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was."[323]

Conclusion

Disparate impact and disparate treatment are distinct theories, and each is equally a part of Title VII case law. Courts have used both theories effectively to combat employment discrimination. The abandonment of one should not be undertaken without sound reasons. No such reasons are provided by the plurality opinion in *Watson* or *Wards Cove*. *Griggs* established that Title VII's prohibition was intended to be broadly inclusive, proscribing both overt discrimination and practices that are fair in form but discriminatory in operation. Disparate impact theory, as formulated in *Griggs* and refined in *Beazer*, balances the disparate impact of employment practices against the interest in protecting business autonomy by allowing for a business necessity defense. The business necessity defense allows for business autonomy to the extent that such autonomy does not result in the "artificial, arbitrary, and unnecessary barriers"[306] to employment that Congress intended Title VII to remove.

317. *Id.*
318. See *supra* note 271.
319. 109 S. Ct. at 2126-27.
320. Justices Brennan, Marshall and Blackmun.
321. 109 S. Ct. at 2132.
322. *Id.* at 2131.
323. *Id.* at 2136.