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# The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task

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# THE REAGAN COURT AND TITLE VII: A COMMON-LAW OUTLOOK ON A STATUTORY TASK

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*Seldom has a group of Supreme Court decisions produced as much comment as the employment discrimination output of the 1989 Term. So substantially did the opinions curtail the reach of the modern comprehensive employment discrimination statute, Title VII of the 1964 Civil Rights Act, that they inspired passage of the recently vetoed Civil Rights Act of 1990. The Court grudgingly acquiesced in placing a persuasion burden on employers in cases of traditional intentional discrimination, but only when the plaintiff's prima facie evidence of a violation is "direct." In the more controversial case of challenges to facially neutral practices shown to have disproportionate adverse impact, the Court dramatically relaxed the employer defense. After analyzing the decisions, the authors conclude that the Court has been driven by a turn-of-the-century, common-law approach to the distribution of scarce employment resources. This impulse, they contend, has blinded the Court's new majority to alternative visions of Title VII that are more consonant with apparent legislative intent and the Court's own prior decisions.*

*The authors agree that the Court has good reason to demand greater refinement in the statistical evidence necessary to establish a prima facie adverse impact case, but find that the Court's new defensive standards doom neutral practice challenges to failure unless the plaintiff proves the functional equivalent of unlawful motive. Although their proposed alternative standards, designed to respond to the fortified prima facie case, are more stringent than the Court's, they are less exacting than those that had prevailed in several federal circuits. The authors also propose to reinvigorate the traditional intentional discrimination*

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*case by placing the risk of nonpersuasion on the employer when the plaintiff's prima facie proof of disparate treatment is "inferential" as well as when it is "direct."*

## I. INTRODUCTION

Speculating about the motivations of Supreme Court justices is often like reading tea leaves: one has to be slightly off center to try, although try we invariably do. But occasionally, a group of decisions arrives in which the Court seems to reveal its underlying theoretical premises rather clearly. As its 1989 term was ending, the Supreme Court handed down two important employment discrimination decisions under Title VII of the 1964 Civil Rights Act[1] that provided an occasion for examining its underlying premises. In *Wards Cove Packing Company, Inc. v. Atonio*[2] and *Price Waterhouse v. Hopkins*,[3] the Court dealt with the inseparable issues of causation and trial procedure: when was an employer's decision made "because of" an impermissible criterion;[4] who must prove what, when, and how? Among the enduring results are procedural modifications that affect substance in a type of litigation the Court's majority disfavors. Together the cases reveal many of the Reagan majority's assumptions about ordering the American workplace and portend a difficult future for discrimination's victims.[5]

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1. 42 U.S.C. §§ 2000e to 2000e-15 (1988).
2. 109 S. Ct. 2115 (1989).
3. 109 S. Ct. 1775 (1989).
4. 42 U.S.C. § 2000e-2(a) states the following:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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.

The "because of" language does not raise an issue of causation, at least as it is normally understood in traditional tort law; rather, the issue is one of motivation. The implications of that distinction are explored *infra* text accompanying notes 250-72.

5. For a powerful description of the societal impact of discrimination, see Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

Beyond its Title VII opinions and the roadblocks there erected, the Court's 1989 term will be remembered as one in which a much heralded new conservative majority created numerous substantive dead-ends for the victims of job-related (and other) discrimination.[6] In *Will v. Michigan Department of State Police*,[7] the Court declared that a state was not a statutory "person" for purposes of 42 U.S.C. section 1983 (1988), the major post-Civil War civil rights legislation. *Patterson v. McClean Credit Union*[8] upheld a 1976 interpretation of a second Reconstruction civil rights act, 42 U.S.C. section 1981 (1988). The *Patterson* decision granted litigants recourse against private racial discrimination in contracting, but did so in a way that suggested that the 1976 interpretation was erroneous. At the same time, the *Patterson* majority rendered a crabbed, even counterintuitive interpretation of the scope of that statute.[9] Finally the Court canonized a previous plurality's narrow construction of section 1983 for establishing municipal liability in *Jett v. Dallas Independent School District*.[10]

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6. Earlier in the 1989 term the Supreme Court handed down two important decisions involving the scope of the nation's civil rights legislation. First, it held that a municipality could not implement a voluntary affirmative action plan without showing a compelling governmental interest predicated on a detailed finding of past discrimination. City of Richmond v. Croson, 109 S. Ct. 706, 723-30 (1989). *Croson* prompted an incredulous response from former Atlanta Mayor Andrew Young. Young criticized the Supreme Court's requirement that cities document discrimination as a condition precedent to upholding minority preferences in hiring and contracts. He argued that maintaining the kind of records necessary to prove past discrimination, and confronting business and civic leaders with such proof as a condition for moving forward with new preference programs, was not only very "unsouthern," but was a surefire way to kill efforts to put the past behind us and move forward. Address by Mayor Andrew Young, Mercer University School of Law (March 9, 1989). For an excellent and less partisan, yet personal response to *Croson*, see Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

Somewhat later in the same term the Court decided a general procedural question that has profound implications for civil rights litigation—past, present, and future. See Martin v. Wilks, 109 S. Ct. 2180 (1989), which held that a group of white firefighters, who had not been parties to an earlier consent decree entered into between a city and minorities who had suffered discrimination in public employment, could collaterally attack that decree. *See also* Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2738 (1989) (refusing to award attorneys' fees against losing intervenors who sought to protect bargained-for seniority rights because such intervenors were "particularly welcome").

7. 109 S. Ct. 2304, 2312 (1989).

8. 109 S. Ct. 2363, 2371 (1989) ("Whether *Runyon*'s interpretation of § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country."). *See also* Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2710-22 (1989) (restricting § 1981 suits against public school systems).

The Court, on its own motion, asked the parties in *Patterson* a rather routine race discrimination case, to brief the question of whether it should overturn Runyon v. McCrary, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 prevents a private school from denying admission to a black child solely on the basis of race). *Patterson*, 109 S. Ct. at 2369.

9. The implications of *Patterson* are counterintuitive. The question, broadly stated, was whether the defendant's post-hiring, racially discriminatory conduct accorded plaintiff "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. The Court, eschewing the normal interpretive approach that emphasizes legislative history, held that the statute reaches issues related only to the formation of contracts, and not to their performance. *Patterson*, 109 S. Ct. at 2372-73. The implication of the Court's opinion is that the overt and honest bigot may be liable for discrimination under § 1981 because he betrays his true feelings at formation, but the closet bigot who withholds his true feelings until after formation may not. It is at best counterintuitive to suggest that the Reconstruction Congress had such a purpose in mind when it passed the statute.

10. 109 S. Ct. 2363 (1989). The prior decision was City of St. Louis v. Praprotnik, 485 U.S. 112, 124-31 (1988) (plurality opinion setting out guidelines for determining liability based on munici-

All three cases arose in the context of employment discrimination; their reach, however, easily extends beyond the workplace.

This Article focuses on *Price Waterhouse v. Hopkins*, *Wards Cove Packing Company, Inc. v. Atonio*, and a *Wards Cove* precursor from the previous term, *Watson v. Fort Worth Bank & Trust*.[11] These decisions, in the larger context of the 1989 term, suggest that the Reagan Court takes its cues from two policy axioms that flourished early this century and collectively preclude the attainment of standard labor market equality, equality of opportunity, and equality of result.[12] The first axiom is neutrality. The government should leave private contracting parties to their personal preferences. The second axiom is cut from the same cloth. The economy functions best with minimal government interference. These baselines dictate a limited judicial role; even in the face of contrary legislative mandates, federal courts ought to minimize government intrusion to the extent that statutory construction and objective rules permit. Thus, activist legislation like Title VII runs headlong into powerful contrary baselines.[13]

*Price Waterhouse* illustrates the problem in the context of "disparate treatment," the Title VII proof mode that implements the equal opportunity model which the Court professes to embrace unreservedly. Piecing together four separate opinions, one can conclude that the Court held that only "substantial" prima facie evidence of illicit intent underlying the challenged employment decision will shift to the defendant the ultimate burden[14] of showing that it would

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pal "policy" and "policy makers"). The *Praprotnik* guidelines were adopted in the majority opinion in *Jett*, 109 S. Ct. at 2723-24.

11. 487 U.S. 977 (1988).

12. The work of Professor Cass Sunstein has led us to these conclusions. *See* Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).

13. The term "baselines" is borrowed from Sunstein, *supra* note 12, at 876. By "baselines" Sunstein means that judicial interpretations of constitutional text invariably occur within the framework of individual justice's sense of controlling socio-legal values. In discussing the particular context of Lochner v. New York, 198 U.S. 45 (1905), Sunstein finds the common law as the controlling context. *See also* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (evaluating alternative rationale for government intervention in private markets and affairs). We return to this topic *infra* Part VI.

14. Because the courts have been so imprecise in their use of the terms "burdens of proof," "inference," and "presumption," it might be helpful to clarify the basic terminology. As used in this Article, the omnibus phrase "burden of proof" consists of the burden of producing evidence (the "initial" burden, the burden of production, or the burden of going forward) as well as the burden of persuasion (the "ultimate" burden or risk of nonpersuasion). *See, e.g.*, G. WEISSENBERGER, FEDERAL EVIDENCE § 301.2, at 47 (1987). The initial burden of producing evidence requires the party on whom it lies to convince the judge that she has offered sufficient evidence to submit the issue to a fact-finder "who could rationally conclude that the fact exists." E. IMWINKELRIED, COURTROOM CRIMINAL EVIDENCE § 2903, at 796 (1987). In contrast, the ultimate burden of persuasion requires the party who carries it to convince the fact-finder that her version of the fact is more likely true than her opponent's. *Id.* § 2914, at 805-06.

By "inference" we refer to a conclusion about the existence of a fact that the fact-finder is *permitted but not required* to make. Given the production of sufficient evidence of fact *O*, the trier of fact may infer fact *P*. In contrast, the term "presumption" *requires* the fact-finder to believe *P* in light of sufficient proof of *O*, unless the party against whom the presumption operates rebuts it. Thus, the creation of a presumption serves two purposes in Title VII litigation: it relieves the party in whose favor it operates of producing direct evidence of the presumed fact, and requires at a minimum that the party against whom it operates come forward with evidence to meet or rebut the presumed fact. Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1221-22 (1981); Méndez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1143-44 (1980). On the

have reached the same decision for independent, lawful reasons. Yet given the real-world prevalence of mixed motives and the limitations placed on this "same-decision" principle by three of the four opinions, the decision probably has the net effect of relieving most employers from making that showing in intentional discrimination situations. Plaintiffs will retain the ultimate burden of persuasion in most cases.

*Watson* and *Wards Cove* cast all the more doubt on the future of disparate impact analysis,[15] the far more controversial Title VII proof mode that seeks equality of result. By its very nature disparate impact analysis has been problematic. On the one hand, the legacy of discrimination, especially by race,[16] begets a desire to achieve outcome-oriented, redemptive justice, characterized by the reality and not just the opportunity for black representation. On the other hand, there is a perceived unfairness in targeting the employer, at worst only the last discriminator and at best not an intentional discriminator at all, as the locus of this drive. In a sense, achieving population-proportionate employment representation for all protected groups across all job echelons erodes the due process rights of the employer.[17] To counteract that possibility, the new majority rejects the normative theory that gives content to impact analysis. The Court apparently has concluded either that recovery without a showing of intentional discrimination serves no useful public value or that the detriment to the economy outweighs any incremental gain.

This Article explores the new majority's policy premises — its common-law baselines — and demonstrates how they are revealed in seemingly technical but practically dispositive questions of evidence. The Court's treatment of the causation conundrum, in particular its use of presumptions and its allocation of burdens of proof, reshapes Title VII in that common-law image. Part II outlines the primary strands of Title VII liability and the state of the law before *Watson*, *Wards Cove*, and *Price Waterhouse*. *Watson*, *Wards Cove*, and *Price Waterhouse* are then discussed in detail in Parts III, IV, and V, respectively.

Part VI identifies the new majority's baselines and premises, illustrating their crucial role in the Court's constrictive revamping of Title VII. In Part VII, we propose several measures in response to the changes wrought by the recent decisions. We conclude, in agreement with the Court in *Watson* and *Wards Cove*, that the plaintiff should be required to develop sound, statistically reliable prima facie evidence of disparate impact, traceable to a specific practice. We further conclude, however, that, given such powerful evidence of discriminatory effect, the Court has unduly diluted the employer defense and improperly placed the burden of persuasion on the plaintiff. In this connection we contend that the

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relationship between burdens and presumptions under the federal rules generally, see FED. R. EVID. 301.

15. Disparate impact analysis is discussed and outlined in general terms *infra* text accompanying notes 51-94.

16. Special problems associated with gender discrimination are taken up in some detail *infra* text accompanying notes 323-67.

17. To the extent possible, we intend to steer clear of the affirmative action issue and the perception that it violates the fourteenth amendment by victimizing individuals not responsible for discrimination. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

employer should be required to persuade that its chosen practice manifestly correlates with one or more important elements of the job in question. Further, and also contrary to the view of the Court, we suggest that the plaintiff should be able to rebut the employer's showing simply by offering evidence of an alternative practice that substantially accomplishes the employer's original business objectives with less discriminatory impact, even at somewhat greater cost. On this question, too, the employer should bear the burden of persuasion, as it possesses superior information about the relative inefficacy or expense of the plaintiff's proffered alternative.

We would also refortify the model of disparate treatment. At least four members of the *Price Waterhouse* Court would unjustifiably relieve employers from carrying the "same-decision" burden in the most common type of mixed motive case, where the evidence of unlawful motive is inferential. We argue that this employer persuasion burden should be triggered by evidence satisfying any of the accepted modes of proving disparate treatment, inferential or direct. Further, we suggest a reframing of the mixed motive question. Instead of asking hypothetically whether an employer already found to have acted on an unlawful motive would have reached the same decision absent that motive, a court should inquire whether the employer treated employees in the protected group like other employees under similar circumstances.

Finally, we consider to what degree the Civil Rights Act of 1990[18] would effectuate these proposals. We conclude that it does reinvigorate significantly the disparate treatment case by enlarging the circumstances of intentional discrimination under which employers must shoulder the "same-decision" burden announced by *Price Waterhouse*. We also conclude, however, that it falls well short of the more publicized aim of restoring the disparate impact case to its pre-*Watson* and *Wards Cove* state.

## II. THE TWO STRANDS OF TITLE VII

Title VII contains a general prohibition against discrimination that affects terms and conditions of employment "because of . . . race, color, religion, sex or national origin."[19] It also proscribes conduct that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect" an individual's job status.[20] It is not surprising, given the two categories of

18. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S9966 (daily ed. July 15, 1990) (President Bush vetoed the Act on Oct. 22, 1990; the Senate failed by one vote to override the veto on Oct. 24, 1990).

19. 42 U.S.C. § 2000e-2(a) (1988). The full text of the statute is set out *supra* note 4. For simplicity's sake, this Article will refer to all impermissible discrimination as if it were based on race or sex.

20. *Id.* For a discussion of whether Congress intended disparate impact recovery, compare Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 77-81 (1988) (arguing that § 703(a)(2) was designed to deal with unintentional, institutional discrimination) and Recent Developments, *Title VII's Application of Impact Analysis to Subjective Employment Criteria*, 24 HARV. C.R.-C.L. L. REV. 264, 269 (1989) (agreeing with Rose) with 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. L.J.

forbidden conduct, that the statute has generated two basic theories of recovery: disparate treatment and disparate impact.[21]

Disparate treatment prohibits employers from treating individuals differently because of race or sex.[22] Disparate impact refers to an adverse effect on members of a protected group resulting from an employer policy or practice. Prevailing orthodoxy holds that two different conceptions of equality animate the two theories of recovery. The treatment model is impelled by equal opportunity, the impact model by equal result or achievement.[23] In recent years the Court has sharply retreated from the equal achievement approach and only begrudgingly given effect to equal opportunity.

### *A. Disparate Treatment*

#### 1. Theoretical Basis

As the Court has noted, disparate treatment, discrimination rooted in animus, is " 'the most easily understood type of discrimination.' "[24] One must prove that the employer intended to treat the employee differently than other members of the work force and did so because of the employee's race or sex.[25] The employer's motive is key.

The treatment prohibition has both theoretical and practical consequences that warrant brief description. The concept of merit supports the mandate that businesses make employment decisions without reference to impermissible criteria.[26] As Professor Fiss explains, the treatment rationale rests on the unfairness of using a criterion such as race or gender that is neither predictive of productivity nor wholly within any individual's control.[27] Although market incentives

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429, 481 (1985) (concluding that there is no basis in the legislative history for disparate impact recovery).

21. We do not mean to say that the language of §§ 703(a)(1) and (a)(2) supports the two theories of recovery, despite the suggestion of Justice Rehnquist. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976). There are a host of reasons for rejecting his suggestion. *See* 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 4.2.1.2 (2d ed. 1988).

22. It is important to emphasize that to recover for disparate treatment the plaintiff need not show discrimination. Rather, the plaintiff must show that she was "treated" differently because of her sex. 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 248-49.

23. Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1757 (1989) (citing Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 10-26); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-40 (1971). Fiss notes that finding a basis for impact analysis in the statute's language is troublesome. *Id.* at 240.

24. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (O'Connor, J., plurality) (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

25. Two commentators describe the plaintiff's case in four parts: 1. *P* was treated differently, 2. than a person of another race or sex, 3. the employer intended the discrimination, and 4. the employer's intent caused *P*'s different treatment. Sullivan, Zimmer & Richards, *The Structure of Title VII Individual Disparate Treatment Litigation:* Anderson v. City of Bessemer City, *Inferences of Discrimination, and Burdens of Proof*, 9 HARV. WOMEN'S L.J. 25, 28 (1986).

26. 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21; *See generally* Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815 (1974) (analyzing particular systems of merit distribution and the implications of each); Fiss, *supra* note 23, at 240-44.

27. Fiss, *supra* note 23, at 240-44.

eliminate a large measure of nonproductive decisionmaking, our history, our commitment to equality, and our appreciation of human nature leave us without warrant to rely upon the marketplace entirely.[28] As long as an employer uses race or gender as an arbitrary basis for employment decisions and the court indulges an employer's "taste" [29] for discrimination, the court denies the individual's opportunity to succeed.[30] At the same time, the individual's autonomy is, at least at a formal level, denied; similarly, her individual responsibility is undermined.[31] Individual autonomy and responsibility course deeply through the veins of American culture.[32] When an employer intentionally refuses an individual that opportunity, he strikes a blow to our ethos and disregards a more objective, rational and moral way of ordering the workforce.[33]

### 2. Disparate Treatment Before *Price Waterhouse*

The individual plaintiff's[34] prima facie case of disparate treatment in hiring or promotion reflects the foregoing conception. At least before the 1989 term, few questioned the appropriate trial procedure in a treatment case. Plaintiff could prove up her initial burden in one of two ways. If she has "direct" evidence of intent to treat differently, she simply introduces it, and defendant responds accordingly.[35] Plaintiff must persuade the trial court that the employer intended the different treatment. More often than not, however, such evidence is unavailable. In that case plaintiff must prove the critical inquiry, defendant's intent, circumstantially and in stages. Plaintiff satisfies the less onerous prima facie burden in this variant by producing evidence that she (i) belonged to a protected group, (ii) applied and was qualified for a job or promotion, or contin-

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28. G. BECKER, THE ECONOMICS OF DISCRIMINATION 13-18 (2d ed. 1971); Fallon, *supra* note 26, at 844-45; Fiss, *supra* note 23, at 249-52.

29. This "taste" is one explanation for employment discrimination. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 27.1 (3d ed. 1986).

30. Fallon, *supra* note 26, at 835; Fiss, *supra* note 23, at 237.

31. Fallon, *supra* note 26, at 834; Fiss, *supra* note 23, at 241.

32. Fallon traces this to the Declaration of Independence. *See* Fallon, *supra* note 26, at 835-37. It is worth noting, as Sanford Levinson points out, that when Lincoln began the Gettysburg Address with reference to "[f]our score and seven years," he brought the Declaration's ascription of equality into the constitutional tradition. S. LEVINSON, CONSTITUTIONAL FAITH 139-40 (1988).

33. Here, of course, "objective" is measured in terms of the merit principle itself. If treating people equally in the workforce is the goal, discrimination on the basis of race or sex is, by definition, objectively irrational. Moreover, there is virtually no morally defensible reason for discrimination on the basis of sex or race. Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 13.

34. Unless otherwise stated in the text, when this Article refers to a disparate treatment case, we are referring to one brought by an individual. Later in this Article we discuss "systemic" disparate treatment cases, in which a class of plaintiffs alleges that differential treatment was the employer's routine operating procedure. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *See infra* notes 186-91 and accompanying text.

35. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). For example, if the employer were foolish enough to say that he was discharging an employee because of her gender, the trial court would find that statement to be direct evidence of discriminatory intent. The definition and importance of a direct evidence requirement in *Price Waterhouse* is taken up *infra* at texts accompanying notes 297-300, 309, 313-22.

ued to desire retention, and (iii) was nonetheless rejected.[36]

Establishing a prima facie circumstantial case achieves two interim litigation goals: surviving a motion to dismiss and placing the burden of production on defendant. Of immediate consequence to the plaintiff is the avoidance of involuntary dismissal under Federal Rule of Civil Procedure 41.[37] That fate is averted because meeting the prima facie case " 'raises an inference of discrimination' "; the trial court " 'presume[s] these [prima facie] acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors.' "[38] This inference is rather weak. The prima facie case, far from establishing with any conviction that intentional discrimination was likely, really only eliminates two or three common nondiscriminatory explanations for the plaintiff's rejection.[39] Nevertheless, this inference moves the initial burden of going forward from plaintiff to the employer, who must produce evidence of "a legitimate, nondiscriminatory reason" for the different treatment. The defendant's evidence must "raise[ ] a genuine issue of fact as to whether it discriminated against the plaintiff."[40] Should the defendant fail to rebut the presumption of discriminatory intent, the plaintiff will prevail.[41]

Title VII's very existence as a legislative statement of social policy demands this presumption. When observed fact O is proved, fact P is presumed, at least provisionally.[42] Often overlooked is that the act of choosing a presumption requires a statement of preference for "which of the two states of affairs one finds more desirable."[43] Particular presumptions "must be accepted or rejected because of the desirability or undesirability of the states of affairs they will produce, rather than on the basis of their own merits."[44] Presumptions, then, necessarily reflect normative decisions. In Title VII the prescription is to eliminate discrimination in the workplace, but that goal leaves open critical overrid-

36. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1003 n.4 (1988) (Blackmun, J., concurring); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court recently reaffirmed this inferential proof mode in Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2378 (1989). A fourth element mentioned in these decisions—that the position remained open and the employer sought other similarly qualified applicants after plaintiff's rejection—has been considered inessential when inapplicable to the plaintiff's circumstances. *See Patterson*, 109 S. Ct. at 2378 & n.7. The inferential proof mode assumes that plaintiff is unable to produce "direct" evidence of discriminatory intent. *Trans World Airlines*, 469 U.S. at 121. Until *Price Waterhouse*, it also assumed that the employer took the challenged decision with a single motive, prohibited or not.

37. *Burdine*, 450 U.S. at 253-56; *McDonnell Douglas*, 411 U.S. at 802. Employment discrimination cases are nonjury affairs; hence, the fate is involuntary dismissal. Under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988), which borrows Title VII analysis, jury trials are available. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1812 (1989) (Kennedy, J., dissenting).

38. *Watson*, 487 U.S. at 1003 (Blackmun, J., concurring) (quoting Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978)) (noting that the prima facie case eliminates the possibility that the applicant was rejected because she was unqualified or there was no available job).

39. *See Burdine*, 450 U.S. at 253-54.

40. *Id.* at 254-55.

41. *Id.* at 255.

42. *E.g.*, E. CLEARY, MCCORMICK ON EVIDENCE § 342 (3rd ed. 1984) [hereinafter MCCORMICK]; Morgan, *Presumptions*, 12 WASH. L. REV. 255, 255-56 (1937); Méndez, *supra* note 14, at 1142-43.

43. Katzner, *Presumptions of Reason and Presumptions of Justice*, 70 J. PHIL. 89, 91 (1973).

44. *Id.*

ing and interrelated issues. What kinds of discrimination should be eliminated, how, and at what cost? That presumptions mirror social values does not mean that only normative considerations apply to our decision to create presumptions. It does insist, however, that public values are a necessary component of that decision.[45]

If the employer comes forward with sufficient evidence to establish a believable, nondiscriminatory purpose for the different treatment, thereby rebutting the presumption of intent created by the prima facie case, then the plaintiff, who bears the ultimate risk of nonpersuasion throughout, still has the opportunity to prove that the defendant's proffered explanation is a pretext for invidious discrimination. As the Court has stated, once the employer provides evidence of nondiscrimination, the trial court no longer needs to presume discriminatory animus. At this point, plaintiff bears both the burden of coming forward with pretextual evidence and the ultimate risk of nonpersuasion should the fact-finder remain in equipoise.[46]

The Court's initial attempts to clarify the respective cases-in-chief in a disparate treatment challenge were unedifying. For example, in two leading cases, *McDonnell Douglas v. Green*[47] and *Texas Department of Community Affairs v. Burdine*,[48] the Court left open the issue of whether the defendant was required to rebut a prima facie case with evidence of its own, or whether the defendant could obtain a favorable judgment through effective cross-examination of plain-

45. In practice, when courts make prejudgmental determinations that they will presume fact *P* in light of *O*'s proof in order to advance the fact-finder's deliberations, they have undertaken a three-part analysis, which considers inductive-probabalistic and procedurally determinative factors along with value-related matters. *See* Ullman-Margalit, *On Presumption*, 80 J. PHIL. 143, 157-62 (1983), on which this analysis rests.

The probability consideration was adverted to specifically in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). By proving up a prima facie treatment case, plaintiff has demonstrated "at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Id.* at 358 n.44; *accord* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1003 (1988) (Blackmun, J., concurring); Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978).

The presumption also serves as a procedurally useful device in the trial court's deliberative process. The presumption of *P* is provisional, its command endures only in the absence of non-*P*'s proof by the party against whom the presumption operates. MCCORMICK, *supra* note 42, at 950-51; J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON SENSE 183 (1947); Méndez, *supra* note 14, at 1142-43; Ullman-Margalit, *supra*, at 162. The Court has made clear that if facts are admitted into evidence tending to prove the existence of non-*P*, the presumption is lost; the court is no longer mandated to presume *P*. However, the trier of fact is still permitted to infer *P*, depending upon the strength of all the evidence in the case. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). Thus the necessary effect is, at least, to require the party against whom the presumption operates to come forward with proof of non-*P*; at most, the party against whom it operates may bear the ultimate risk of nonpersuasion of *P*'s nonexistence. *See supra* note 14; *Teamsters*, 431 U.S. at 362; Franks v. Bowman Transp. Co., 424 U.S. 747, 773 n.32 (1976). McCormick notes that "[a] presumption shifts the burden of producing evidence, and may assign the burden of persuasion as well." MCCORMICK, *supra* note 42, at 968. The Court has often noted that the burden shift was intended " 'progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.' " *Watson*, 487 U.S. at 1003 (Blackmun, J., concurring) (quoting *Burdine*, 450 U.S. at 255 n.8).

46. *Watson*, 487 U.S. at 1003 (Blackmun, J., concurring).

47. 411 U.S. 792 (1973).

48. 450 U.S. 248 (1981).

tiff's witness.[49] Moreover, the Court bandied about the terms "burden of proof" and "burden of proving" as though they were unified concepts having only one shared meaning. In fact, the burdens differ, and the concepts those terms embrace are notoriously ambiguous.[50] Finally, all of the Court's disparate treatment efforts before *Price Waterhouse* were premised on a single decision-directing motive. Either the employer made the decision because of race, or he did not. In the real world, such decisions are rarely the product of a single criterion. They are generally mixed, based in part on an impermissible standard and in part on perceived business requirements.

### *B. Disparate Impact*

#### 1. Theoretical Basis

In the disparate treatment case, the conceptual analogy that controls is a footrace.[51] By making color-blind hiring decisions, employers assure members of the protected group an equal place in the race, an equal opportunity. Everyone starts at the same line. But the footrace analogy suffers a fate common to analogies: it neglects the question of whether all racers in fact start at the same line with the same chances of success. The problem for the protected racers is that the American race began centuries ago. The newly protected racers, therefore, begin with a disadvantage that survives to this day. Simply requiring an equal opportunity, the theory states, will not eliminate the headstart enjoyed by majority members. In other words, "[t]o shift from a system of group discrimination to a system of individual performance is to perpetuate the effects of past discrimination into the present and the future."[52] Protected racers, handicapped by centuries of ill treatment, may never catch up with the pack.

Consequently, for years many ardent supporters of our antidiscrimination laws both on and off the Court have argued for a recovery theory in addition to and broader than the equal opportunity model. They have championed some form of equal achievement or result with the goal of banning practices that would prevent protected group representation in the workforce from resembling

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49. Belton, *supra* note 14, at 1239-47; Méndez, *supra* note 14, at 1129-31. *Burdine* did, however, clarify the confusion over one issue. In *McDonnell Douglas*, the Court held that when plaintiff proves up the prima facie treatment case, the burden of going forward moves to the employer to "articulate" a nondiscriminatory reason for the treatment. 411 U.S. at 802. The Court tried unsuccessfully to define the "articulation" requirement in Board of Trustees of Keene State v. Sweeney, 439 U.S. 24, 28-29 (1978), and Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978). It succeeded, however, in *Burdine*, 450 U.S. at 255-56 (requiring the defendant to produce evidence of a non-discriminatory reason, rather than simply rely on its answer or argument of counsel).

50. Méndez, *supra* note 14, at 1129 n.2. See *supra* note 14 for a discussion of the respective definitions.

51. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 35; Fiss, *supra* note 23, at 237.

52. L. THUROW, THE ZERO SUM SOCIETY 188-89 (1980) (quoted in C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 36). Professor Horwitz writes in a similar fashion and notes that the "attempt to create a radical distinction between the supposedly legitimate goal of equality of opportunity and the supposedly illegitimate goal of equality of condition, confronts the obvious problem that in a substantially unequal society it is impossible to produce real equality of opportunity." Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 608 (1979).

its members' concentration in the relevant population within or outside the workforce. The resulting proof mode is styled "disproportionate adverse impact," or "disparate impact," or simply "impact."

If employer intent is the key to disparate treatment recovery, then motive, at least according to the pre-*Watson* conventional wisdom, is irrelevant in a case of disproportionate impact.[53] The concern in an impact case is with the result of an employer's selection device, not with differential or unlawfully motivated treatment. Accordingly, the typical impact plaintiff must make a different evidentiary showing. The prima facie impact case consists of a statistical demonstration that a facially neutral employment criterion—for example, a test, education requirement, interview technique, or reliance on nepotism—had a significantly disproportionate adverse impact or effect on those members of the plaintiff's protected group who encountered it.[54] It is critical that plaintiff attack a "practice," and show that it had an impact on her, independent of the "bottom line" or "overall" representation of her group in the "at issue" jobs for which the practice screens. Correlatively, relief from practices shown to have disproportionate adverse impact flows only to those members of the plaintiff's protected group who have shown that they were deprived of a term or condition of employment, or an employment opportunity, as a result of the practice. No assumption arises that all members of a protected group denied "at issue" jobs suffered unlawful discrimination merely because some of them were eliminated from the race by application of a practice that had disproportionate adverse impact on the group. By the same token, that the protected group fared well in its representation at the bottom line will not preclude recovery by individual members of the group who were screened out by a practice resulting in disparate impact.[55]

If the plaintiff demonstrates prima facie the significant disproportionate impact of a device or practice, the employer must produce evidence that the challenged practice satisfies some legitimate business need.[56] The underlying rationale of the employer defense to the prima facie case is simply that, notwithstanding its disproportionate adverse impact on the group to which plaintiff belongs, an employment practice that serves a legitimate business need does not constitute discrimination "because of" a protected characteristic.[57] Finally,

53. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

54. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (Title VII prohibits neutral practices that have a "significantly discriminatory pattern"); Equal Employment Opportunity Commission Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1989) [hereinafter Uniform Guidelines] (adverse impact inferred for enforcement purposes when an employer practice selects a group defined by race, sex, religion, or national origin at a rate less than 80% of the rate of another such group with the greatest success in surmounting that practice). *See* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof under Title VII*, 91 HARV. L. REV. 793 (1978).

55. *See* Connecticut v. Teal, 457 U.S. 440, 442 (1982).

56. See *infra* text accompanying notes 81-91 on the history of this issue before *Watson* and *Wards Cove*.

57. *See* L. MODJESKA, EMPLOYMENT DISCRIMINATION 49-53 (2d ed. 1988); Note, *Business Necessity: Judicial Dualism and the Search for Adequate Records*, 15 GA. L. REV. 376, 385 (1981).

even if the employer does proffer such evidence, the challenger may still prevail by persuading the court that the employer's business need could have been met with an alternative practice that would have had a less burdensome impact on the protected group.[58]

A fundamental paradox[59] underlies the disparate impact approach, which appears to equate the ordinarily discordant notions of neutrality and discrimination.[60] How can an employer, using facially neutral employment criteria, be deemed to discriminate on the basis of race or sex?[61] First, although inherent bias in testing is a demonstrable fact,[62] its non-neutrality in any given instance represents an empirical conclusion that demands verification.[63] Moreover, how society, not to mention the courts, ought to react when biased tests show a strong positive correlation coefficient with workplace traits the majoritarian culture values[64] is debatable.[65] The text of Title VII reflects this uncertainty. As

58. *Watson*, 487 U.S. at 998 (O'Connor, J., plurality); *id.* at 1005-06 (Blackmun, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 101-02 (1974).

59. Fiss, *supra* note 23, at 297; Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 804 (1985).

60. *See, e.g.*, Fiss, *supra* note 23, at 297; Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 556-57 (1977).

61. Griggs v. Duke Power Co., 401 U.S. 424 (1971), shed little light on this question. The Court wrote that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. Whether the Court was employer specific in its reference to "freeze" or not is unclear. Does the "status quo" refer specifically to the situation at this particular plant because of its history, or more generally to the inability of socially disadvantaged minorities to grasp initially or advance beyond the bottom rung? Moreover, if, as the Court held, this particular employer's intent was in fact neutral, arguing that the test is a surrogate for an adjudicated finding of intent is difficult.

62. The point is that some tests implicitly measure majoritarian cultural values in a way that, by definition, operate to the detriment of minorities. *See* Clark, *What is Your Tolerance of Ambiguity?*, 4 LEARNING & L. 12, 15 (1977); Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL ED. 293, 294 (1975); White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89, 108-14 (1979) (reviewing the social science research in the area). The squalid history of racial bias in psychological testing is richly documented in S.J. GOULD, THE MISMEASURE OF MAN (1981) [hereinafter MISMEASURE OF MAN], and S.J. GOULD, *Racist Arguments and IQ*, in EVER SINCE DARWIN 243 (1977). Similar "scientific" efforts at documenting the inferior intellectual capacity of women are discussed and explored in Gould, *Women's Brains*, in THE PANDA'S THUMB 152 (1980).

63. One of the few cases to recognize the problem of cultural bias in testing was *Regents of University of California v. Bakke*, in which Justice Powell speculated in a footnote that racial classifications in the medical school admissions process, a process largely motivated by quantitative measures, could serve the goal of "fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures." 438 U.S. 265, 306 n.43 (1978). The point was not raised, however, by the university. For a detailed discussion of the question, see White, *supra* note 62, at 108-14.

64. For example, a test of verbal skills, by hypothesis related to a job requirement, may well reflect white, middle-class values and language preferences. As a result, we can expect minorities to perform less well. Such a finding creates a problem for disproportionate impact theory. *Cf.* Washington v. Davis, 426 U.S. 229, 240-48 (1976) (noting the problem impact theory would create for legislative programs and avoiding it by holding that a denial of equal protection requires a finding of intent); Fiss, *supra* note 23, at 257 (noting that businesses may use race as a "symptom of merit").

65. We do not mean to underestimate the nature of the problem, or even to state without qualification that eliminating hierarchical preference is desirable. It may be that such preferences (biases) are necessary constitutive elements of every society. *See infra* text accompanying notes 386-87. But recognition of the phenomenon is a necessary precondition for dealing with those who fail to conform to the hierarchy's dominant values.

long as a "neutral," though inherently biased test is highly related to performance, it will not (absent a less discriminatory alternative) run afoul of the terms of section 703(h) of Title VII, which permits the use of tests that are not "designed, intended or used to discriminate."[66] But the word "used," as distinguished from "designed" or "intended," may connote liability predicated entirely on effects and thus appears to point to equal achievement as an ultimate Title VII objective. On this reading section 703(h) posits protected groups historically disadvantaged relative to "unprotected" groups[67] in their attempts to survive non-neutral practices. One could then conclude that a test or practice, although facially neutral, violates Title VII if, in operation, it is non-neutral, unless the employer offers a business justification.

Disparate impact analysis represents a compromise between economic equality in the abstract and some relatively benign strategy for achieving that aim.[68] For example, equal treatment may, with sufficient time, achieve equal result. That empirical relationship, however, is at best doubtful; too many resisting forces may already exist.[69] On the other hand, disparate impact analysis is partially incompatible with the principle of merit. The basic principle of color-blindness[70] may obstruct the goal of equal achievement. The incompatibility creates the persistent fear that equality of result may demand what many see as pernicious and even illegal activity. If workplace representation roughly approximating relevant demographics is the goal, some liberty with the color-blindness principle may be required.[71] That liberty is, of course, troublesome, because preferential treatment can be interpreted as the very conduct Title VII is designed to prevent: discrimination on account of race or gender.[72]

### 2. Disparate Impact From *Griggs* To *Watson*

Given this underlying theoretical tension, it is not surprising that impact analysis has proven resistant to coherent judicial elaboration. Indeed the confusion can be traced to the seminal decision that first articulated the impact case,

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66. 42 U.S.C. § 2000e-2(h) (1976). Judicial creation of a job-relatedness defense constitutes a recognition that inherent bias per se does *not* violate § 703(h), despite its pernicious effects.

67. In fact, an "individual" member of any race, religion, gender, or national origin has standing to assert a Title VII claim provided she contrasts her situation with that of members of a different group defined by the same characteristic. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (race).

68. Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1316 (1987).

69. Fiss, *supra* note 23, at 238.

70. As Fiss points out, the principle is traceable to Justice Harlan's famous dissent in *Plessy v. Ferguson*, in which Harlan stated: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896); *see* Fiss, *supra* note 23, at 235.

71. L. THUROW, *supra* note 52; Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 489-92 (1968); Fiss, *supra* note 23, at 240.

72. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 658 (1987) (Scalia, J., dissenting); United States v. Paradise, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting); A. BICKEL, *supra* note 17, at 132-33.

*Griggs v. Duke Power Co.*[73]

Duke Power had a history of racial discrimination. For years it openly and deliberately kept its black employees at the bottom of its labor pool. Before Title VII was effective, however, it had abandoned those practices.[74] Despite abating its intentionally discriminatory policies, the company still required a high school diploma or successful completion of two facially neutral and objective "intelligence" tests as a condition for most of its hiring and promotion decisions.[75] Those requirements tended to "freeze" into place intentionally discriminatory employment practices and patterns that had the effect of keeping minority laborers at the bottom of the employment ladder with little hope for advancement.[76] Although the practices were found not to have been adopted with invidious intent, they "operated to render ineligible a markedly disproportionate number of Negroes."[77]

Chief Justice Burger, writing for a unanimous Court, declined to condemn such practices out of hand. Instead, he wrote that "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[78] In its concluding paragraphs, however, the Court suggested a substantive defensive standard that is markedly more demanding than simple "job relatedness," but less demanding than "necessity": "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[79] In another phrasing of the business defense, the Court observed that Congress had forbidden the use of test procedures "unless they are demonstrably a reasonable measure of job performance."[80]

This variety of verbal formulations—in ascending stringency, "related to job performance," a "demonstrable" or "manifest" relationship, and strict "necessity" — announced in dictum[81] by the very opinion that declared the defense, spawned ongoing confusion that lasted until *Wards Cove.*[82] For example, in its

73. 401 U.S. 424 (1971).

74. *Id.* at 426-27, 428.

75. *Id.* at 427-28. For a highly critical view of the value of a single digit measure of "intelligence" as an accurate device for determining an individual's ability, see MISMEASURE OF MAN, *supra* note 62.

76. *Griggs*, 401 U.S. at 429-30.

77. *Id.* at 429.

78. *Id.* at 431.

79. *Id.* at 432.

80. *Id.* at 436. Under § 703(h) of the Civil Rights Act of 1964, employers are free to use professionally developed ability tests that are not "designed, intended or used to discriminate because of race." 42 U.S.C. § 2002e-2 (1988).

81. *Griggs*, 401 U.S. at 431-42. On reflection each of these versions of the defense should have been recognized as dictum. Duke Power, in response to the new, judge-made prima facie case, offered no evidence whatsoever that the requirements were related to successful job performance. *Id.* at 431-36. Accordingly, the Court could hold that the company had discriminated unlawfully "because of" race, notwithstanding its neutral or even benign intent, without ever having to decide what justification countervails the showing of adverse impact.

82. For a summary of the variety of tests used by the lower courts, see Note, *supra* note 57, at 387-89. *See also* L. MODJESKA, *supra* note 57, at 50-53 (providing overview of lower court's applications of seniority system tests).

first neutral practices case after *Griggs*, *Albemarle Paper Company v. Moody*,[83] the Court offered still another formulation: tests could be justified if "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job.' "[84]

In *Albemarle* the Court also devised the third potential stage of a disparate impact case, a plaintiff's rebuttal. Despite an employer's showing of business justification for its chosen practice, plaintiff could still prevail by establishing that some alternative practice would serve the employer's needs with lesser discriminatory impact.[85] But then, in *Dothard v. Rawlinson*,[86] a sex discrimination challenge to, among other things, Alabama's height and weight requirements for guards at an all-male maximum security prison, the Court, again in dictum, framed the inquiry as whether the practices were "necessary to safe and efficient job performance,"[87] or "essential to effective job performance."[88] Those formulations tilt heavily against the employer, since few if any practices will be "necessary" to both safety and efficiency.[89] Moreover, requiring any showing of genuine "necessity," however defined, is inconsistent with the *Albemarle* notion that it is the plaintiff's responsibility to identify a less discriminatory alternative. By definition a practice that is literally "necessary" admits of no alternative.[90] Perhaps recognizing these difficulties, the Court on still another occasion swayed in the opposite direction by permitting judicially noticed common experience or common sense to substitute for any employer evidence of a link between the challenged practice and a business need.[91]

Finally, in *Watson*, the plurality moved as far toward the employer as it could while retaining any job-relatedness requirement. It articulated a diluted defensive standard of simple job relatedness indistinguishable in substance from the easily established defense to a case of individual disparate treatment.[92] The employer need only offer evidence that its practice is "normal and legitimate" or "based on legitimate business reasons."[93] Further, the challenged practice need

83. 422 U.S. 405 (1975).

84. *Id.* at 431 (quoting Uniform Guidelines, *supra* note 54, at § 1607.4(c)).

85. *Id.* at 425.

86. 433 U.S. 321 (1977).

87. *Id.* at 332 n.14.

88. *Id.* at 331.

89. The same employment practice will rarely if ever be "necessary" to both "safety" and "efficiency," which are ordinarily conflicting rather than complementary qualities. Frequently, efficiency may be served by practices that exist at the very margin of safety.

90. Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

91. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (rejecting on intuitive grounds the trial court's finding that there was no correlation between the Authority's prohibition on hiring methadone treatment patients and job safety). *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (rejecting any requirement of business necessity or job relatedness for equal protection challenge to testing that had a disproportionate impact on minority applicants to District of Columbia police training course).

92. *Watson*, 487 U.S. at 986 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), an individual treatment case).

93. *Id.* at 999, 998 (plurality opinion).

only significantly serve those goals rather than be essential or even manifestly related to them.[94] Examination of the *Watson* facts and opinions underscores the significance of this new synthesis.

## III. *WATSON*: SUBJECTIVE PRACTICES, CONSTRAINTS, AND "FUNCTIONAL EQUIVALENCE"

Clara Watson was a black teller at Fort Worth Bank and Trust who had been passed over a number of times for promotion to supervisory positions. Each time a position became available, a white was hired or promoted to fill it. The bank had no formal evaluation standards for promotions; rather, it relied on "the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled."[95] On one occasion Watson was told, apparently unashamedly, that the position she sought was a "big responsibility with 'a lot of money . . . for blacks to have to count.' "[96] Watson filed a class action alleging racial discrimination in hiring, compensation, and promotions. Although the class was subsequently decertified, she proceeded on behalf of members of a former sub-class[97] and herself. Watson's individual claim, the subject of the Supreme Court's opinion, was tried as a treatment case. The trial court held that although Watson established a prima facie case, the employer rebutted the presumption of intent and presented a legitimate, nonpretextual, nondiscriminatory reason for its promotion decisions.[98] The Fifth Circuit affirmed this portion of the decision.[99]

Two general types of issues occupied the Supreme Court's attention, although only the first was certified. The certified question was whether challenges to the use of subjective employment criteria are triable as a treatment or impact case.[100] The Court unanimously agreed that plaintiffs could bring impact challenges to subjective practices. The Court's logic was compelling. If plaintiffs were not allowed to challenge subjective practices through *Griggs* analysis, employers could avoid *Griggs* simply by incorporating subjective techniques into their employment decisionmaking practices.[101] Moreover, the Court stated that unchecked subjective decisionmaking raises "the problem of subconscious

94. *Id.* at 998 (plurality opinion).

95. *Id.* at 982. On the nature of subjective standards and how they are used, see Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 17-24 (1987). The Bank employed criteria such as "personal appearance," "supervisor-co-worker relations," "quantity of work," and "accuracy of work." Although the last two categories appear amenable to quantification, they were apparently not quantified because the Bank provided no guidelines to its supervisors. Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 812 n.26 (5th Cir. 1986) (Goldberg J., dissenting), *vacated*, 487 U.S. 977 (1988). *See* Note, *Disparate Impact Challenges to Subjective Employment Decisions*, 102 HARV. L. REV. 308, 310 n.10 (1988).

96. *Watson*, 487 U.S. at 990 (quoting Appendix 7).

97. The trial court held that Watson failed to establish a prima facie case of discrimination in hiring and dismissed the group claim. The issue was not reviewed by the Supreme Court. The evidence presented on the class claim is summarized in Note, *supra* note 95, at 310.

98. *Watson*, 487 U.S. at 983-84.

99. *Id.* at 984 ("In order to avoid unfair prejudice to members of the class of black job applicants, however, the Court of Appeals vacated the portion of the judgment affecting them.").

100. *Id.* at 984-85 (summarizing the lower court conflicts).

101. *Id.* at 989-90, 1000.

stereotypes and prejudices . . . [that] suggest a lingering form of the problem Title VII was enacted to combat."[102]

But a plurality then argued that disparate impact analysis, at least as applied to subjective practices, must be reigned in by new "constraints" to "keep [it] within its proper bounds."[103] The plurality and the concurring justices split over three aspects of the impact case: (1) how specifically plaintiff must identify the challenged subjective practice, the plurality also stressing the desirability of more reliable and powerful statistical measures of adverse impact;[104] (2) the nature of the employer response to such a practice along the continuum of "job relatedness" to "business necessity"; and (3) whether the quantum of the employer's burden on this question is production only or also persuasion. In the end Justice O'Connor's plurality opinion (a) required the plaintiff to isolate a particular employer practice or device and demonstrate through refined and reliable statistical evidence that this practice was the cause of a substantial adverse impact on her group; (b) relaxed the defense, so that a practice is justifiable if it "significantly" (rather than essentially) serves "legitimate" (rather than compelling) business reasons; and (c) reallocated the risk of nonpersuasion on that defense to the plaintiff.[105]

These constraints were said to be necessary because the defendant feared, and the plurality agreed, that "employers will [otherwise] find it impossible to eliminate subjective criteria" and also find it "impossibly expensive to defend such practices in litigation."[106] As a result, the bank and the United States argued, employers will adopt quotas to avoid liability.[107] The plurality found support for the quota fear in Congress's mandate in section 703(j) that "[n]othing contained in [Title VII] shall be interpreted to require an employer . . . to grant preferential treatment to any individual or group because of . . . an imbalance which may exist" between that group's representation in the employer's workforce and the relevant comparative labor pool.[108] The plurality interpreted that section as a congressional mandate to employers "*not* . . . to avoid 'disparate impact' as such."[109] The new constraints are now discussed in turn.

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102. *Id.* at 990.
103. *Id.* at 994 (plurality opinion).
104. *Id.* at 995 n.3 (plurality opinion).
105. *Id.* at 994-97 (plurality opinion).
106. *Id.* at 992 (plurality opinion).
107. *Id.* (plurality opinion).
108. 42 U.S.C. § 2000e-2(j) (1988).
109. *Watson*, 487 U.S. at 992 (plurality opinion). The full scope of that mandate, and the change it wrought in the law, can be appreciated only by reference to United Steelworkers of Am. v. Weber, 443 U.S. 193, 205-06 (1979). There the Court, upholding a voluntary affirmative action plan, interpreted § 703(j) as a mandate directed solely at the judiciary, opening the door to "voluntary affirmative efforts to correct racial imbalances." *Id.*

### *A. The Prima Facie Constraints*

#### 1. Isolating A Specific Practice

One of the new constraints requires the challenger to locate and identify the particular subjective practice that caused a statistical disparity in the defendant's employment rolls and then prove a causal relationship between the practice and the disparity. To the extent that this burden increases the difficulty of establishing causation when the defendant uses a number of different practices, the requirement may present a serious problem for the impact plaintiff.

Recall that the typical impact case begins with plaintiff's statistical presentation showing that an employment practice has a disproportionate adverse effect on plaintiff's group, and that she was deprived of an employment opportunity because of that practice.[110] When the employer conditions hiring on a particular test score or other "objective" neutral practice, identifying and isolating the causal relationship between the test and the disproportionate effect is relatively easy, at least at a purely formal level.[111] By contrast, isolating the effect of a subjective practice from among a number of practices presents difficult and possibly insurmountable problems of proof. At the threshold, how does a prospective employee even identify the subjective technique the employer may have used? The prospective employee may know only that she was interviewed for a job. Although she may piggyback on the Equal Employment Opportunity Commission's (EEOC) files if the inquiry moves forward,[112] there is reason to suspect that the EEOC's investigation may not proceed to the point of discovery. Plaintiff may not know early enough (to make the EEOC's preliminary litigation process appear worth pursuing) that the employer hired by grapevine, practiced nepotism, held informal conferences among supervisors to assess various employees' personal appearance, perceived "quickness," ability to articulate, and so on.[113] Moreover, many subjective techniques may be ill defined. For instance,

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110. *See supra* text accompanying note 54.

111. The basic concept of validity asks whether an exam tests what it purports to test. Does it do the job we think it does? W. SCOTT & M. WERTHEIMER, INTRODUCTION TO PSYCHOLOGICAL RESEARCH 142-49 (1962).

That the relationship between the test and its effect is an easy one to determine at a formal level does not mean that the actual process of constructing a validation study is an easy one. In practice, it can be quite costly and require elaborate and sophisticated statistical techniques. *See* Uniform Guidelines, *supra* note 54, at §§ 1607.5 - .9, 1607.14. In fact, due to the fortuity that the Supreme Court deferred to these exacting and complex guidelines in an early Title VII case, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), validating tests has in practice proved more difficult than defending other "objective" practices, such as height or weight requirements and no-spouse rules, under the more general standards of business necessity or job relatedness. But even before *Wards Cove* lower courts began to dispense with literal compliance with the Guidelines. *See* Contreras v. City of Los Angeles, 656 F.2d 1267, 1283-84 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). After *Wards Cove*, defending a test, like any other "subjective" *or* "objective" practice, should be far simpler for most employers.

112. Equal Employment Opportunity Comm'n v. Associated Dry Goods Corp, 449 U.S. 590, 596-97 (1981).

113. Note the potential difficulty for the prospective employee, unaided by the EEOC, when it comes to complying with Rule 11 of the Federal Rules of Civil Procedure. Although the extent of required prefiling investigation varies with the circumstances (see Federal Rule of Civil Procedure 11 which requires a "reasonable inquiry"), in some cases no amount of investigation is possible without the help of the EEOC. Certainly the prospective employer has no prefiling obligations; in fact, one

one of the bank's employees in *Watson* testified that she was given no guidance at all for making hiring and promotion decisions.[114] These practical problems in isolating undefined criteria and demonstrating their significantly disproportionate impact did not concern the plurality.[115]

2. Reliably Demonstrating Statistical Adverse Impact

The *Watson* plurality also observed that the demonstration of disproportionate adverse impact must be made through "statistical evidence of a kind and degree sufficient" to tie the exclusion of protected group members to the practice in question.[116] The disparities must be "sufficiently substantial" to raise the inference of causation.[117] In the accompanying note the plurality implied that EEOC's own measure of disproportionate adverse impact for internal enforcement purposes — the success rate of plaintiff's protected group in passing the test or surmounting some other employment barrier must be less than eighty percent of the success rate of the group with the highest rate — is inadequate. While acknowledging the lack of consensus on "any alternative mathematical standard," the plurality referred approvingly to the far more rigorous "standard deviation" analysis used to signify gross, long-lasting underrepresentation of a protected class in cases alleging systemic disparate treatment.[118]

By suggesting that the standard deviation formula would be preferable to EEOC's eighty percent yardstick, the Court confuses, respectively, a measure of systemic intentional discrimination with a measure of the disproportionate adverse impact of a single employment practice. "Systemic disparate treatment," the residue of a number of individually discriminatory decisions, is evidenced by a gross underrepresentation of a protected group relative to the incidence one would expect based on its members' interest, availability, and qualifications. Unlike the impact case, it is predicated on a showing of intentional discrimination. In the systemic treatment case, all members of the protected group denied hire or promotion to the job level during the period when the protected group was found to be grossly underrepresented are presumptively entitled to remedies, regardless of which employer practice or conduct led to their exclusion.[119] By contrast, relief in the impact case is limited to those plaintiffs excluded by the particular practice shown to have had disproportionate adverse impact.

The Court may be right when it suggests that the EEOC's eighty percent

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can imagine without difficulty that an inquiry from an individual who has been refused employment sets off alarm bells and efforts to cover tracks. It comes as no surprise, then, that a large percentage of sanctions are falling on pro se civil rights litigants and that commentators have expressed fear that Rule 11 is "chilling" antidiscrimination litigation. *See* E. IMWINKELRIED & T. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY & TACTICS § 13:10, at 94-95 (Supp. 1989).

114. *Watson*, 487 U.S. at 977 (Blackmun, J., concurring).

115. *See* Comment, *supra* note 23, at 1782.

116. *Watson*, 487 U.S. at 994 (plurality opinion).

117. *Id.* at 995 (plurality opinion).

118. *Id.* at 995 n.3 (plurality opinion) (citing, *inter alia*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) and International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), both cases of alleged systemic disparate treatment).

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

rule is a poor measure of the impact of a particular practice. Because that test fails to reckon with the problem of sample size, it unreliably points to the discriminatory impact of some practices and overlooks the discriminatory impact of others.[120] At least, however, the stated test is a measure of the impact of a practice, and it should not be replaced by a formula designed to measure the entirely different phenomenon of widespread discriminatory treatment of an entire group.

This blurring in *Watson* of the type of statistics required in the systemic disparate treatment and neutral-practices/disproportionate-adverse-impact cases was paralleled by another confusion that the Court later would magnify in *Wards Cove*.[121] Prefacing her explanation of the specificity and causation requirements, Justice O'Connor wrote in *Watson* that plaintiff's burden in an impact case "goes *beyond* the need to show that there are statistical disparities in the employer's work force."[122] Later, citing to the prototypical systemic disparate treatment case, she writes that plaintiff's *impact* statistics may be flawed if "based on an applicant pool containing individuals lacking minimal qualifications for the job."[123] Does this mean that the plaintiff's statistics about the impact of a particular practice must also address the protected group's general representation at some level of the work force? If so, these passages imply, for the first time since *Griggs* created the neutral practice case, that the plaintiff must develop an overlay of systemic-treatment evidence in a case focused simply on the impact of one or more neutral practices.

The Court is certainly not alone in mistakenly equating the nature and magnitude of the two distinct modes of proof,[124] but the consequences of the Court's confusion are of course more significant than is confusion among commentators. One can readily acknowledge the general requirement that every plaintiff must prove causation and at the same time recognize that a requirement demanding systemic-treatment evidence in every case challenging only one or more particular neutral practices would virtually eliminate the utility of the neutral practices case as a distinct evidentiary alternative. Indeed, the only remaining reason plaintiffs would continue to offer neutral practice/impact evidence would be to bolster a case of systemic disparate treatment. Proof that the employer resorted to one or more practices with adverse impact on plaintiff's group would help explain, and thus make more plausible, that group's apparent gross

120. *See* Shoben, *supra* note 54, at 805-09.

121. *See infra* text accompanying notes 181-82.

122. *Watson*, 487 U.S. at 994 (plurality opinion) (emphasis added).

123. *Id.* at 997 (plurality opinion).

124. For examples of such confusion among commentators, see Blumrosen, *supra* note 95, at 30 (to prove disproportionate adverse impact, "plaintiffs claim a disparity between proportion of minorities in the pool of candidates and in the group selected"); Laycock, *Statistical Proof and Theories of Discrimination*, 49 L. & CONTEMP. PROBS. 97, 102 (1986) (suggesting that individual qualifications are "assumed away" in "the statistical cases," when in fact, under Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), they may be explicitly considered, albeit defensively, at the remedy stage of a systemic disparate treatment case); Note, *Availability of Disparate Impact Theory To Attack A Multicomponent Employment System*, 31 VILL. L. REV. 377, 384 n.29 (erroneously citing systemic disparate treatment authority for proposition that standard deviation analysis has been approved by the Supreme Court as a measure of disproportionate adverse impact).

underrepresentation at one or more levels of the work force. However, a plaintiff would no longer be able to attack a neutral practice alone, or use impact evidence to buttress the simple individual disparate treatment case of the *McDonnell-Douglas* type, without also proving that the employer routinely, systematically and intentionally discriminated against her entire group.

3. Justifying The New Prima Facie Constraints

Although the plurality's explanations for the new identification and enhanced statistical requirements are confused, good arguments can be made for both. The real problem in *Watson* and similar cases is not that the practice is subjective; rather, the challenge is to measure the effects of an identifiable practice, whatever its nature. The terminological confusion between subjectivity, on the one hand, and identifiability and measurability, on the other, no doubt arises from the happenstance that many subjective evaluative components of a larger process are not assigned arithmetic weight while others play no dispositive part in an employer decision. The results of most "objective" selection devices, by contrast, are either arithmetically or otherwise clearly recorded — does the applicant have an educational degree or not, did her score exceed the cut-off or not — and they typically serve an up-or-down screening function in a multistage selection process.[125]

The difference is crucial to appreciating the identification and causation requirements. Impact theory was originally devised, and, if we take the Court at its word, remains as an alternative to proof of disparate treatment or unlawful motive.[126] But the limited attack thereby made available is on a *practice* adopted by the employer that carries forward some socio-historical disadvantage afflicting plaintiff's group. It is not an attack on the residue of all the employer's formal and informal policies and practices concerning hiring or promotion. That residue, or "bottom line," if it grossly understates the expected representation of the protected group, may suggest classwide disparate *treatment*.

Suppose, for example, that a facially neutral practice is unquantifiable in terms of its effects on plaintiff's protected group — either because wrapped together with other practices or not assigned specific weight in the employer's decision. Then the principal fear is not with the practice itself; it is that over time multiple agents of the employer will *use* the device to treat people differently. Deference to discretionary decisions "involves an enormous risk because . . . employers tend to choose individuals most like themselves. In a world dominated by white males the risk is that employers will prefer white males over women and minority group members."[127]

If that is true, though, a statistically significant underrepresentation of qual-

125. Connecticut v. Teal, 457 U.S. 440 (1982).

126. Evidence of subjective intent to discriminate is necessary to support a claim of disparate treatment, but not of disparate impact. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2118-19 (1989). "Either theory may, of course, be applied to a particular set of facts." International Bhd. of Teamsters v. United States, 431 U.S. 324, 326 n.15 (1977).

127. Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 873.

ified protected group members should be revealed at the bottom line and challengeable as systemic-disparate treatment. Of course, because the requisite statistical showing of such treatment is rigorous, the effect of some immeasurable neutral practices may undoubtedly fail to show up at the bottom line with sufficient clarity or magnitude to sustain a disparate treatment attack. Such practices would then slip through the cracks, immune from both systemic-disparate treatment analysis and disproportionate adverse impact analysis. However, that seems to be the system's nod to, and its working accommodation of, some irreducible degree of employer discretion deemed essential to the viability of the merit principle in the real world.

In addition, there are potential inequities to both defendants and discrimination victims if these challenges may be predicated on the aggregate effect of a bundle of assorted practices. The practices' combined adverse impact on the protected group may mask the fact that one or more of the included practices actually results in disproportionately favorable minority selection.[128] Assume the existence of a victorious plaintiff group larger than the number of vacancies that the combined practices were designed to fill, and a district judge who decides to prioritize remedies among these discriminatees chronologically, by the date they encountered any practice. Those plaintiffs first exposed to a practice *favoring* minorities might then receive remedial preference over true discriminatees, since liability could be imposed without evidence of the effect of the separate practices.

Requiring reliable quantification of the effects of identifiable neutral practices works relatively little harm to the rationale underlying impact analysis. The bulk of those practices with measurable effects[129] produce their disproportionate effects precisely because members of different groups encounter those practices at different starting lines attributable to preexisting societal disadvantage. Impact evidence, designed specifically to attack the vestiges of such disadvantage at their latest waystation, the workplace, will continue to expose such practices effectively, notwithstanding the requirements of specific identification and causation. By the same token, the major legitimate Title VII objection to subjective discretionary evaluation, used most often for upper level positions,[130] is that it provides the mechanism for an evaluating group to indulge a preference of like for like, or a taste for discrimination against the unlike. Yet when this concern is sufficiently well founded to manifest itself in a statistically significant

128. A comparable phenomenon, stemming from the "aggregation fallacy," has been observed in the context of systemic treatment situations. It occurs, for example, where one of several occupational categories, usually low-skilled, has the lowest promotion rate to upper-level positions but also features the highest proportion of minorities. Where the minority-intensive category is numerous relative to the other low-level categories from which promotions are made, aggregating them by race may show that minority members are disproportionately underselected for the upper-level positions. But separate analysis of the categories may show that minority members are not disproportionately underselected, and may even be preferred. *See* Barrett, *Personnel Selection After* Watson, Hopkins, Atonio, *and* Martin *(WHAM)*, 3 FORENSIC RPTS. 179, 185 (1990).

129. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 998-99 (1982) ("objective" requirements used principally in lower level job systems).

130. *Id.* at 999.

fashion, such as gross underrepresentation of the evaluees, the problem may be addressed through the alternative proof mode of systemic disparate treatment.

There are, accordingly, justifiable reasons, despite the costs, for the Court to require a rejected hire or promotion applicant, as a part of her prima facie case, to isolate the particular practice that excluded her and to demonstrate that the practice had disproportionate adverse impact on her group. The *Watson* plurality also seems on solid ground in demanding a somewhat more powerful statistical showing of that impact — not the overwhelming evidence necessary to signify across-the-board disparate treatment, yet a measure that will account for the greater likelihood in small samples that chance, rather than the employer's practice, explains the adverse impact.

### *B. Constraints Affecting The Defense: Easing The Business Justification Showing*

By contrast, the *Watson* plurality's second set of constraints, which greatly relaxes the nature and quantum of the employer's defense to this fortified prima facie case,[131] is unjustified both in principle and in practice.

#### 1. Nature of The Defense

The appropriate linguistic formulation of the business justification defense is not a mere rhetorical dispute among scholars. It has the potential for genuine practical impact, and mirrors the justices' sympathy with or antipathy to the broader goals of Title VII. As one commentator has pointed out, the defense "defines the outer limits of the Act's potential effectiveness."[132] At a practical level, the scope of employee protection under Title VII is inversely proportional to the rigor with which the test is applied: the more rigorous the defense, the easier the recovery. In short, whether an employer's practice has caused redressable adverse consequences for a protected group is a function of the appropriate scope of the test.

While it would be unfair and inconsistent with the lesser discriminatory alternatives concept to require the employer to demonstrate the strict necessity of its practice, the *Watson* plurality opted for an equally unfair opposing extreme. Its pallid formulation of the defense allows an employer to overcome a statistically significant showing that a practice has disproportionate adverse impact simply by pointing to virtually *any* reason other than race, gender, religion, or national origin. That formula undervalues the plaintiff's prima facie case of adverse impact (especially as shored up by the opinion's other constraints) by equating it illogically with the weak, highly inferential case of individual disparate treatment.[133]

This conflation of disparate impact with intentional discrimination in the

131. *See supra* text accompanying notes 104-05.

132. Note, *supra* note 57, at 378.

133. *See supra* text accompanying notes 34-41 (describing inferential disparate treatment evidence).

standard for the defense may be a natural consequence of the different ways one can view the facially neutral selection practices of an erstwhile discriminating employer. A charitable portrait depicts the defendant's testing conditions as a former discriminator's effort to eliminate discrimination by removing subjectivity from the employment calculus.[134] In *Watson*, however, where a fractured Court upheld a disparate impact challenge to the use of subjective employment criteria in hiring and promotions decisions, the plurality opted for what appears to be a less forgiving explanation. Justice O'Connor identified *Griggs* as a case involving objective employment standards that "operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted."[135] In light of the company's history, perpetuated discriminatory effect could be equated with intentional, racial discrimination: "[T]he 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."[136]

The theory of functional equivalence originated in a seminal work by Owen Fiss. Fiss suggested that an employer's use of facially neutral ("innocent") employment criteria raises a number of concerns, including the concern that an employer may use a test because he knows blacks will perform more poorly than whites. At the same time, certain seemingly innocent practices, like nepotism or referral ("grapevine") hiring, may be unfair simply because they favor the relatives of incumbent whites, or because they frustrate the long-term goal of improving the relative economic fortunes of minorities.[137] In addition, if achievement or result is one of Congress's goals, the notion of intent seems incomplete as a measure for eliminating discrimination's legacy. A discriminatory effect exists whenever an employer uses an impermissible criterion in making an employment decision, regardless of his personal appetite for discrimination.[138] Thus, to avoid the potentially harmful effects associated with the use of practices that appear innocent, some theory of discrimination in addition to intent seemed necessary to explain a case like *Griggs v. Duke Power Company*.[139]

But even Fiss's sympathetic theory of disparate impact rests on an equivocal rationale. For example, the use of tests by an employer who knows that protected groups perform less well than white males is intent-based. The "neutral" test merely disguises a hostile motive. Nepotism or grapevine hiring, how-

134. Kandel, *Current Developments in Employment Litigation: Burden of Proof after* Watson: *A Major Shift in Disparate Impact Litigation?*, 14 EMPL. REL. L.J. 263, 271 (1988).

135. *Watson*, 487 U.S. 977, 987 (1988).

136. *Id.*

137. Fiss, *supra* note 23, at 296-97.

138. *Id.* at 298.

139. In a recent article, Professor Ortiz argues that the Court uses intent in two ways, depending in part on where the ultimate burden of proof lies. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1136 (1989). He suggests that in Title VII cases decided under the *Griggs* regime, when the burden shifted to the employer to prove business necessity, the statute was seen as concerned with "the substance of decisionmaking, not its motivation." *Id.* More generally, he argues that whether the doctrine of intent actually focuses on motivation or outcome is a function of the strength of the individual litigant's interest. If the general thesis holds sway, the shift of the ultimate burden to the individual reflects a diminution of her interest.

ever, may bear no relationship to an employer's personal passion for prejudice. The practices may reflect nothing more malignant than a cost-effective means of hiring. In the "knowing testing" context, functional equivalence appears to ease the task of proving intent. The rationale for discarding nepotism or grapevine hiring, by contrast, must be effect-oriented, namely, to improve the economic plight of a protected group collectively. Thus, at its inception the functional equivalence theory contains and fuels the same inherent ambiguity as do the two competing approaches to Title VII litigation.

The *Watson* plurality's "functional equivalence" language, if not its ethos, betrays the same ambivalence about the underlying theory of disparate impact litigation. Justice O'Connor indicated that "the ultimate legal issue" may be the same in both impact and treatment cases, unmistakably suggesting that impact is merely a surrogate for a finding of intent. Curiously, she did not identify that ultimate issue. Although the thrust of her opinion strongly indicates that functional equivalence and *Griggs* reflect incompatible understandings of Title VII, her language is inherently ambiguous: the ultimate issue could be either "intent" or, more generally, "discrimination."

To the extent that Justice O'Connor's language is susceptible to at least two readings, the functional equivalence theory, although indicating a new direction for impact analysis, ultimately begs the theoretical question of whether Title VII permits an achievement or result goal.[140] The *Watson* plurality appears to mean that in the case of *Griggs v. Duke Power Company*, given Duke Power's past history, it was in effect guilty of using objective measures to achieve the same end it had achieved in the past through intentionally prejudicial, subjective employment measures.[141] This interpretation reads as much into *Griggs* as its facts will bear.[142] It also reflects a rejection of the normative theory underlying at least one conception of disproportionate impact, namely, equality of result. Alternatively, functional equivalence may refer not to the practice, but to its effect. If an objective criterion has the same disfavoring effect as a subjective decision to discriminate, that criterion is "*in operation* . . . functionally equivalent to intentional discrimination."[143] At any rate, this view leads directly to diluting the

140. *Watson*, 487 U.S. at 987. Recall Justice O'Connor's statement: "[T]he 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." *Id.* The different readings depend upon whether one focuses on the "intentional discrimination" or "in operation" portions of the quote.

141. There is language in *Griggs* and *Watson* to support this interpretation. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."); Willborn, *supra* note 59, at 809.

142. While the *Griggs* opinion identifies Duke Power's past discrimination, it is at best ambiguous on the connection between that past history of discrimination and the adverse impact theory. In fact, the Court wrote that the source of impact theory was "plain from the language of the statute." 401 U.S. at 429. *But see* 42 U.S.C. § 2000e-5(g) (relief available only against respondents who "intentionally" engaged in unlawful employment practice); *id.* § 2000e-2(h) (authorizing employers to act on the results of "any professionally developed ability test . . . not designed, intended, or used to discriminate" on the prohibited grounds). If *Griggs* is correct, adverse impact does not depend upon a past history of discrimination; it stands as an independent, statutorily mandated theory of recovery. See *supra* note 61 for a discussion of the ambiguity.

143. *Watson*, 487 U.S. at 987; *see supra* note 140.

impact defense requirements to the low level of job relatedness associated with the defense to inferential disparate treatment.

The rejection by Justice Blackmun and the other concurring justices of the plurality's lax version of job-relatedness reflects their larger repudiation of an intent-based characterization of "functional equivalence." For them impact recovery was not a shorthand method of proving intent, as Justice O'Connor strongly implied.[144] Rather, an adverse impact, unjustified by business necessity, sufficed to establish liability without regard to motive. The concurring justices conceived of disparate impact theory as permitting recovery regardless of past or present motive, based solely upon the adverse effect of the employer's practice and the need to redress workplace imbalances that result from a legacy of the broader society.

Justice Blackmun feared that the plurality, by allowing an employer to defend simply by offering some evidence of "any" legitimate business requirement—the defendant's minimal rebuttal in an individual *treatment* case—would permit an impact defendant to escape liability without showing any real need for the practice. As Blackmun explained, a comparable minimal showing is sufficient to escape liability in the treatment context only because "any" nondiscriminatory reason negates the highly inferential prima facie case of unlawful motive. In the impact case, however, once the employee produces solid statistical evidence of a discriminatory employment effect flowing from an identified employer practice, only an explanation based on the legitimate needs of the business should suffice.

2. Quantum

The second new constraint on the defensive side of the impact equation concerns the quantum of justification evidence an employer is required to adduce. Would the defendant employer, as the Court's previous cases had generally assumed, bear the risk of nonpersuasion? In a startling turnabout,[145] Justice O'Connor placed the risk of nonpersuasion on the challenger: "[T]he 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."[146] She offered no supporting citation. Although this holding apparently

144. Justice Blackmun stated his position ten years earlier when he explained his allegiance to Justice Brennan's opinion in *Bakke*.

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that this hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

145. *See infra* note 147 and text accompanying note 420.

146. *Watson*, 487 U.S. at 997 (plurality opinion).

was new law, as the concurring justices elaborately documented,[147] the confusion and ambiguity of the Court's language in its earlier decisions arguably permitted the redefinition.

One difficulty with this allocation is that the challenger may possess little knowledge of the employer's business. Although the discovery process, her own on-the-job observations, or EEOC assistance might enable the plaintiff to identify shortcomings in the employer practice or to propose alternatives,[148] imposition of a persuasion burden requires the plaintiff either to disprove the needs of the employer or to prove that the employer's business needs would also be served by less discriminatory alternatives that plaintiff suggests. To recover, the challenger would have to know the defendant's business at least as well as the defendant.

Also arguing against the imposition of this burden on the plaintiff is "the hard cold reality" of plaintiff's prima facie case.[149] Reliable, relatively high order statistical evidence has shown already that the employer engaged in conduct with a significant discriminatory effect. The plurality, however, rejected such a characterization and in the process gave substance to the fears of those who concluded that *Watson* rang the death knell for an equal achievement goal.[150] Immediately before articulating her "functional equivalence" doctrine Justice

147. *Id.* at 10 7 (Blackmun, J concurring in part and concurring in judgment). The concurrence noted many of the cases in which the Court had apparently placed the respective burdens of proving job relatedness and business necessity on the defendant. *Id.* (Blackmun, J., concurring in part and concurring in judgment). In some of the cases, *e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329, 331-32 (1977) (various formulations), the language was clearly dictum; in others the language was simply imprecise because undefined. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 247 (1976) (Title VII litigation "involves a more probing judicial review, and less deference to the seemingly reasonable acts of [employers] than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed."). Nevertheless virtually everyone who commented on the Court's work prior to *Watson* assumed that the ultimate risk of nonpersuasion on business necessity rested with the employer. *See, e.g.*, C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 187-94; L. MODJESKA, *supra* note 57 at 30, 34, 49-53; Fallon, *supra* note 26, at 846-47; Rutherglen, *supra* note 68, at 1312; Note, *supra* note 57; Note, *supra* note 58. Other more restrictive formulations by individual members of the Court presaged the *Watson* plurality's decision to require plaintiff to bear the risk of nonpersuasion throughout. *See Dothard*, 433 U.S. at 337 (Rehnquist, J., concurring) (defendant need only offer evidence or make legal arguments to rebut the prima facie impact case).

148. *See supra* text accompanying notes 112-15.

149. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 591 (1985) (arguing that because of that "hard, cold reality" the initial burden of proof in impact cases ought to be accorded more weight than the prima facie case in treatment litigation).

150. *See* Kandel, *supra* note 134, at 271-72 (concluding that the new "high standards" of proof used to avoid quotas "may be daunting to plaintiffs"); Comment, *supra* note 23, at 1786 (concluding that *Watson* was a pyrrhic victory for plaintiffs); Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 923 (1989) (same): Note, *supra* note 95, at 316-17 (suggesting that the new standards may be applied to challenges to objective tests); Recent Developments, *supra* note 20, at 274-75 (stating that if carried to its extreme, *Watson* overrules *Griggs*).

The Court suggested that the constraints were required by the subjective nature of criteria under siege and the fear of quotas, i.e., that new procedures were peculiar to this form of impact challenge. *Watson*, 487 U.S. at 994 n.2 (plurality opinion). But if these new constraints have no basis in fact, that is, if they do not flow from any genuinely enhanced difficulty in validating subjective as opposed to objective practices, one has solid evidence that the court is collapsing objective and subjective disparate impact analysis into one theory that places significantly greater hurdles in the plaintiffs' paths.

O'Connor wrote, "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."[151] For the plurality, identifying and isolating the specific subjective technique, and demonstrating through exacting statistical proof its significant disproportionate impact, are simply not enough; such proof constitutes "less evidence" than proof of intent. Such a view reveals a notion of fairness that is inconsistent with the equal achievement goal expressed in *Griggs* and espoused by Congress when it amended Title VII in 1972.[152]

Justice O'Connor was prepared to go even further in *Watson* than the introduction of new constraints. As if such constraints were not sufficient to avoid the undocumented evil of quotas, the Court outlined the myriad ways in which an employer might challenge plaintiff's statistics[153] and asserted that employers are not required in any rigorous sense to "validate" their subjective practices.[154] In fact, the plurality concluded with language that can be taken only as an invitation to use more subjective hiring practices: "[T]he employer will often find it easier than in the case of standardized tests to produce evidence of a 'manifest relationship to the employment in question.' "[155] This relative ease of proof purportedly followed from both practical and theoretical considerations. Contrary to the position of the American Psychological Association,[156] it was "self-evident" that one could not validate certain discretionary hiring practices.[157] At a theoretical level, O'Connor opined that " '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.' "[158]

Under the plurality's revised formulation, the impact defendant satisfies the burden of going forward on the business necessity inquiry if it produces evidence of a "legitimate" or "normal and legitimate" business rationale for the challenged practice. Yet as one insightful student noted, "normal" employment practices are precisely those that *Griggs* cautioned the courts to be wary of, namely, ordinary business operations that perpetuate discrimination.[159] In this sense, *Watson* gave good cause for concern about the future of *Griggs* and the

151. *Watson*, 487 U.S. at 987 (emphasis added).

152. *Griggs*, 401 U.S. at 429-30; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amendments to 42 U.S.C. § 2000e to e-17 (1988) and 5 U.S.C. §§ 5108(c), 5314-16 (1988)); *see also infra* note 416 and accompanying text.

153. *Watson*, 487 U.S. 996-97 (plurality opinion).

154. *Id.* at 998-99 (plurality opinion).

155. *Id.* at 999 (plurality opinion). Using the "manifest relationship" language, Justice O'Connor potentially added further confusion to the appropriate business necessity inquiry. Given the attention she paid to the language issue when she considered it on its own terms, however, and the adoption of the weak version of the test in *Wards Cove*, one suspects that this was a case of loose language. On *Wards Cove* and business necessity, see *infra* text accompanying notes 206-09.

156. *See infra* text accompanying note 171.

157. *Watson*, 487 U.S. at 999 (plurality opinion) ("It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing.") On the Court's protection of upper-level employment positions in its Title VII jurisprudence, see Bartholet, *supra* note 129.

158. *Watson*, 487 U.S. at 999 (plurality opinion) (quoting Furnco Constr. Co. v. Waters, 438 U.S. 567, 578 (1981)). *See infra* note 163.

159. Recent Developments, *supra* note 20, at 267.

impact theory it spawned. *Griggs*'s central understanding—that "practices, procedures, or tests neutral on their face, *and even neutral in terms of intent*, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"[160]—was in jeopardy of being lost.

The Court's expression of its incompetence to restructure business practices, which it traced to *Furnco Construction Corporation v. Waters*,[161] resonates with our traditional expectations about the judicial role. But it also carries distinct normative implications. In *Furnco*, the court of appeals undertook precisely the kind of business restructuring against which the *Watson* plurality warned. It outlawed the employer's use of casual hiring procedures and devised its own substitute that effectively required the employer to maximize the number of minority applicants. The Supreme Court reversed, concluding that the employer's own recruiting and interviewing processes were supported by legitimate, nondiscriminatory reasons.[162] In contrast, the *Watson* Court was not faced with a situation in which the lower court had restructured an employer's practices. Rather, the issue was whether to enjoin an existing practice, the precise authority section 706(g) gives to the district court. In short, the *Watson* plurality's use of the *Furnco* quotation is not a response to overreaching by an appellate court but a generally applicable normative direction to lower courts: "Don't interfere with employers' subjective hiring schemes, especially for supervisory jobs."[163] The statutory text, of course, makes no distinction among job echelons.

### C. *The Quota Fear and Consequential Reasoning*

Apart from the plurality's call for more rigor in the prima facie showing of adverse impact, most of the new constraints rest largely on consequential reasoning. Conclusions based on the fear of detrimental consequences — here, quotas — ordinarily ought to dictate result only when the feared consequences are likely to occur, a matter for empirical inquiry. Certainly Congress, through sec-

160. *Griggs*, 401 U.S. at 430 (emphasis added).

161. 438 U.S. 567 (1981).

162. *Id.* at 576-78 (rejecting the lower court's order that the employer institute a hiring plan that required testing and formal screening in lieu of grapevine hiring).

163. *But see* Comment, *supra* note 23, at 1774 n.99, where the author wrote that "[t]aken in context, . . . the Court presumably meant only that it must refrain from dictating to employers how their decisionmaking systems should be structured. It should not affect [sic] a relinquishment of the court's ability to determine whether practices already in place violate the law." The problem with this conclusion *is* the context in which the quote was taken. There was no effort here, as in *Furnco*, to restructure an existing system. The context was precisely that which the commentator suggests will not be affected.

Language similar to that used by Justice O'Connor appears in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981), where the Court gave more flesh to the defendant's articulation burden in a *treatment* case. *See supra* text accompanying notes 39-40. The Court's use in *Burdine* of similar language grew out of a context analogous to that in *Furnco*, an appellate court's affirmative action requirement. The employer had been required to show that a rejected member of a protected group had qualifications that were inferior to the white who was hired. *Burdine*, 450 U.S. at 259. The Court noted that Title VII was "not intended to diminish traditional management prerogatives," *id.* (quoting United Steelworkers of Am. v. Weber, 443 U.S. 193, 207 (1979)), and that "[i]t does not require the employer to restructure his employment practices." *Id.* (citing *Furnco*, 438 U.S. at 577-78). Again, the difference in context suggests a difference in purpose.

tion 703(j) of Title VII,[164] sought to prohibit court-imposed quotas absent findings of egregious and persistent discrimination.[165] The Court itself seems loath to expand the use of preferential employment remedies.[166] But the Court's own professed concern that employers would voluntarily resort to quotas for fear of being unable to defend against a prima facie case of adverse impact is of a different kind.

By its terms section 703(j) does not speak to employers at all; it directs courts not to mandate affirmative action plans.[167] Moreover, even if section 703(j) were read as a mandate to employers, it does not prohibit all "voluntary" employment quotas.[168] Congressional policy does not plainly outlaw all quotas of other kinds[169] and it is doubtful whether, in the absence of restraints on impact theory, employers would indiscriminately implement them, or, if they did, that such quotas would be an unalloyed evil.[170]

But more than that, the fear the Court expressed, predicated on assumed employer inability to validate subjective practices, was without any empirical basis in the record. In fact, the only empirical evidence provided to the Court on the subject ran contra. The American Psychological Association, as amicus

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164. This section contains an interpretive warning to the courts against "grant[ing] preferential treatment to any individual . . . because of . . . race . . . [or] sex . . . on account of an imbalance" in the work force. 42 U.S.C. § 2000e-2(j) (1988).

165. Local 28, Sheetmetal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 475-76 (1986) ("In the majority of Title VII cases, the court will not have to impose affirmative action, . . . [but it] may have to . . . when confronted with . . . persistent or egregious discrimination.").

166. *Burdine*, 450 U.S. at 258-59 (rejecting the "better qualified" or "comparative" requirement as part of defendant's rebuttal of plaintiff's prima facie treatment case, as articulated in East v. Romine, Inc., 518 F.2d 332, 339-40 (5th Cir. 1975)).

Anyone with even passing familiarity with the subject of affirmative action realizes that the statement in the text is at best a prediction and at least requires qualification. It is quite true that the Court has permitted some affirmative action in the face of Title VII challenges. *See, e.g.*, California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 284-85 (1987) (holding that the Pregnancy Disability Act of 1978, 42 U.S.C. § 2000e(k) (1988), permits the states to give some preference to employees' "disabled" by pregnancy); Johnson v. Transportation Agency, 480 U.S. 616, 640-42 (1987) (holding that Title VII tolerates preferential promotions without proof of past discrimination). *But cf.* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (striking down on constitutional grounds a voluntary minority set-aside program adopted without a showing of compelling need based upon a documented history of discrimination).

There is a vast body of literature on the affirmative action question. Three useful recent articles are Daly, *Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark from* Weber *to* Johnson, 30 B.C.L. REV. 1 (1988); Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988); and Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987).

167. *See supra* note 164.

168. *E.g., Johnson*, 480 U.S. at 630; United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979).

169. *Cf.* Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a federal statutory set-aside program).

170. For example, even if an employer did resort to quota hiring to attain a "clean" bottom line, its individual practices would be subject to impact attack. Connecticut v. Teal, 457 U.S. 440 (1982). That there is a mythology about the likelihood of quotas as an employer's response to disparate impact is not doubted. *See, e.g.*, Fallon & Weiler, *supra* note 33, at 22 & n.92 (sources cited). Of course, to the considerable degree that the very term "quota" carries negative connotations, coupled with employers' natural desire to be let alone, they have every interest in encouraging the belief that quotas will occur.

curiae, argued that subjective employment criteria were amenable to the same validation procedures as objective ones.[171] The A.P.A. counselled that establishing the nexus between subjective criteria and job relatedness presented the same problems as did validating other objective practices. Thus the real burden on the employer in the subjective practices context may be no different from that which exists when a more "objective" neutral practice such as height or weight is challenged. The newly relaxed employer defense would then not rest on any premise peculiar to challenges to subjective practices. Indeed employers had lived with *Griggs* for seventeen years without any wholesale implementation of quotas.

In sum, the extension of impact analysis in *Watson* to practices deemed subjective was a pyrrhic victory for champions of the equal achievement principle. Justice O'Connor took the occasion to launch a fundamental revision of disparate impact theory and practice, ostensibly to avoid the perceived evil of quotas that would result from applying traditional evidentiary impact standards to subjective practices. With a new member, Justice Kennedy, joining the *Watson* plurality, the Court in *Wards Cove* would not only extend the *Watson* strictures to objective practices, but would also sharply limit the utility of the plaintiff's less discriminatory alternatives rebuttal.

## IV. *WARDS COVE*: THE IMPACT CASE DISMEMBERED

Two salmon canneries, including Wards Cove Packing Company, owned seasonal canning operations in the Alaskan hinterlands. Plaintiffs, a group of unskilled, predominantly native American, Samoan, Filipino, and other minority cannery employees, filed class action disparate impact and treatment claims alleging racial discrimination. The class claimed that the companies' use of subjective and objective hiring and promotion practices had created a stratified workforce, precluding class members from obtaining higher-paid, "noncannery" positions that were primarily skilled and predominantly filled by white workers.[172] Plaintiffs also complained of racial segregation in housing and dining.[173]

Plaintiffs alleged systemic disparate *treatment* based on the segregated facilities and also, apparently,[174] based on their asserted underrepresentation in both

171. *See* Brief for Amicus Curiae in Support of Petitioner by the American Psychological Association at 2, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (No. 86-6139), *quoted in* Comment, *supra* note 23, at 1771 n.84; Rose, *supra* note 20, at 69.

172. Among the allegedly discriminatory practices were "nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within" and others including word of mouth hiring, "an English language requirement . . . [and a] failure to post [skilled, predominantly white] noncannery openings." Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2120 (1989).

173. The majority did not dispute the existence of discriminatory conditions, but it did observe that all of the lower courts were in agreement that the plaintiffs had failed to prove that these conditions resulted from intentional discrimination. *Id.* at 2120 n.4; *see also id.* at 2136 (Blackmun, J., dissenting) (describing the salmon industry as "a total residential and work environment organized on principles of racial stratification and segregation"); *id.* at 2128 n.4. (Stevens, J., dissenting) (likening cannery life to a "plantation economy," and suggesting that the conditions do "not necessarily fit neatly into a disparate impact or disparate treatment mold").

174. The Supreme Court wrote that all of plaintiffs' claims, including "racial stratification,"

the skilled and unskilled noncannery jobs "at issue." They also mounted impact attacks on the several practices that allegedly affected them adversely. The trial court rejected all of these contentions. After the litigation had taken a number of tortuous turns,[175] the Ninth Circuit, sitting en banc and presaging *Watson*'s holding on the use of impact theory to attack subjective practices, reversed with respect to the subjective practices, holding that they could be scrutinized for adverse impact and that the employer bore the risk of nonpersuasion on a defense of "business necessity."[176] The appellate court affirmed the trial court's rejection of all claims of disparate treatment.[177]

The Supreme Court reviewed the court of appeals' rulings concerning the impact claims; plaintiffs did not seek review of the lower courts' rejection of their claims of systemic disparate treatment.[178] The issues before the Supreme Court were limited to those claims which both the plaintiffs and the Court characterized as disproportionate impact challenges to neutral practices.[179] Nevertheless, at the outset of the opinion, the Court discussed a supposed unitary "role" of statistics in undifferentiated "employment discrimination cases."[180] Replicating the precise confusion of the corresponding discussion in *Watson v. Fort Worth Bank and Trust Company*,[181] Justice White, for a five-member majority, condemned plaintiffs' statistical evidence of *impact* for failing to satisfy the standards of systemic *treatment*.[182]

### *A. A Systemic Treatment Overlay To Attacks On Neutral Practices?*

The majority properly condemned plaintiffs' statistics, but its reason for doing so is insupportable. Stated simply, plaintiffs had persuaded the Ninth Circuit that statistical evidence patently inadequate to demonstrate systemic disparate treatment could somehow do double duty as adequate evidence of disparate

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were "advanced under both the disparate-treatment and disparate-impact theories of Title VII liability." *Wards Cove*, 109 S. Ct. at 2120.

175. The procedural history of the case warrants brief attention. Initially, the trial court dismissed the case on jurisdictional grounds, a decision that was affirmed in part and reversed in part. Atonio v. Wards Cove Packing Co., 703 F.2d 329 (9th Cir. 1982), *cert. denied*, 485 U.S. 989 (1987), *cert. granted*, 487 U.S. 1232 (1988), *reh'g denied*, 487 U.S. 1264 (1988). On remand the trial court entered judgment for the employers on all theories, a judgment that initially was affirmed. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985), *cert. denied*, 485 U.S. 989 (1987), *cert. granted*, 487 U.S. 1232 (1988), *reh'g denied*, 487 U.S. 1264 (1988). Sitting en banc for the first time, the Ninth Circuit reversed in part, holding that subjective practices could be scrutinized on the adverse impact model, with the burden on the employer to rebut the prima facie case by proving "business necessity." Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482, 1485-86 (1987), *cert. denied*, 485 U.S. 989 (1987), *cert. granted*, 487 U.S. 1232 (1988), *reh'g denied*, 487 U.S. 1264 (1988). The en banc court therefore remanded to a panel, which held that plaintiffs had established a prima facie case of "disparate-impact in hiring for both skilled and unskilled noncannery positions." *Wards Cove*, 109 S. Ct. at 2120.

176. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482, 1485-86 (9th Cir. 1987).

177. *See supra* note 175.

178. *Wards Cove*, 109 S. Ct. at 2121 & n.4.

179. *Id.* at 2119-21.

180. *Id.* at 2121.

181. *See supra* text accompanying notes 121-23.

182. *Wards Cove*, 109 S. Ct. at 2121-24. Those standards are discussed in detail *infra* note 186.

impact.[183] Ironically, plaintiffs' evidence did not even purport to demonstrate statistically the adverse impact of any particular subjective *or* objective practice; the evidence was really "little more than a compilation of the results of the hiring process" as a whole.[184] As such, plaintiffs' evidence, if adequate, could only have established systemic, routine discriminatory treatment by comparing the "observed" representation of protected group members in the "at issue" noncannery jobs with an appropriate benchmark of "expected" protected group representation.[185]

But because systemic disparate treatment indicts the employer for intentional, persistent discrimination across the board, and gives rise to presumptive remedies for all members of the plaintiff class denied hire or promotion to the desired jobs during the period of proven gross under-representation, its prima facie requirements are exacting. Justice White duly rehearsed why the *Wards Cove* plaintiffs' statistical showings—which the plaintiffs, the court of appeals, and all justices of the Supreme Court erroneously styled as evidence of adverse "impact"—fell well short of established requirements for demonstrating sys-

183. The Ninth Circuit applied the faulty conception that evidence of protected group underrepresentation, standing alone and measured by internal workforce comparisons, demonstrated the disproportionate adverse impact of particular practices. In fact, the evidence in many other of the pre-*Watson* circuit court cases that held "subjective" practices unamenable to impact attack more closely resembled deficient prima facie cases of systemic treatment than attacks on the effects of specific practices.

Several cases illustrate this point. In *Pouncy v. Prudential Insurance Co.*, the plaintiffs, ostensibly under the umbrella of impact, in reality launched "a wide ranging attack on the cumulative effect" of the company's practices. 668 F.2d 795, 800 (5th Cir. 1982). There was simply no measurement of the effect of any particular practice, objective or otherwise. Their evidence of underrepresentation in the employer's workforce relative to their representation in the surrounding labor market amounted only to "indirect evidence" of the effects of the challenged rule. *See* Lamber, *supra* note 127, at 883.

Similarly, in Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984), the plaintiffs challenged the defendant's compensation practices by examining salary disparities between jobs dominated by men and others dominated by women. But salary is the classic example of a term and condition of employment that is the product of multiple factors of varying weight; and for this reason, salary disparities are customarily challenged in systemic treatment cases by "multiple regression" analysis, which attempts to account for the relative weights of the several nondiscriminatory factors that the employer relies on to explain them. *See* Bazemore v. Friday, 478 U.S. 385, 394 (1986). This is not to argue that a plaintiff might not attempt to demonstrate the disproportionate adverse impact on her group of a particular salary variable, only that plaintiffs made no such showing in *Spaulding*.

By contrast, in Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985), the appeals court upheld an impact attack on an ostensibly subjective practice when the employment term at issue was promotion. In addition to a systemic treatment attack on the underrepresentation of the protected group by comparison with their representation in a lower level of the workforce from which most promotions were made, plaintiffs identified at least one practice that led to this result and attempted to quantify its effects. Unlike *Pouncy* and *Spaulding*, which in retrospect are explicable by the plaintiffs' failure to produce statistical evidence of the impact of any particular practice, the *Griffin* court had little difficulty concluding that impact analysis was available, despite the "subjective" nature of that practice. *Id.* at 1522-25. *See also* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) (recognizing challenges not only to "bottom line" residue of practices but to many individual practices as such), *cert. denied*, 471 U.S. 1115 (1985).

184. *See, e.g.*, Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1370 (2d Cir. 1989) (citing *Wards Cove* and *Watson*), *cert. denied*, 110 S. Ct. 1470 (1990). *See also* Gilty v. Village of Oak Park, 50 Fair Empl. Prac. Cas. (BNA) 1388 (N.D. Ill. 1989) (complaint challenged "entire promotional process" rather than particular practices).

185. For example, the plaintiffs might have used an "internal" measure such as the cannery workforce, or some "external" measure in the general population or relevant geographical area.

temic disparate treatment.[186]

Thus, the Court is correct in observing that the relatively small percentage of minority workers in skilled positions is "not petitioners' fault."[187] Unfortunately, that conclusion is beside the point in an impact case: motive is irrelevant. Only treatment evidence, signifying underlying discrimination that is intentional, could have pointed to "fault"; and at the final stages of the litigation the plaintiffs themselves no longer purported to show disparate treatment. The Court was not content, however, to cite the obvious deficiencies in plaintiffs' evidence, viewed as a case of systemic treatment. Inspired by Justice O'Connor's practice in *Watson*, Justice White conjured the straw man of quotas. Imagine the difficulties employers would face, he wrote, if, *as had never been the case*, evidence of racial imbalance alone were sufficient to require them to defend all the component selection devices that in the aggregate produce the imbalance: "The only practicable option for many employers will be to adopt racial quotas

186. *Wards Cove*, 109 S. Ct. at 2121-24. Plaintiffs had shown that they were less represented in both skilled and unskilled noncannery positions as compared to their representation in the employers' cannery jobs. The Court rejected the comparison with skilled noncannery positions because the pool of protected group members among either applicants for those positions or any potentially relevant labor force was not shown to possess the qualifications for the jobs in question. *Id.* at 2122. This is a standard and essential prima facie requirement in cases of systemic disparate treatment. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).

The Court's reason for rejecting the evidence of a disparity between protected group representation in the cannery jobs and in the *unskilled* noncannery jobs is somewhat more suspect. The Court assumed that the employer's cannery workers possessed the skills necessary for the unskilled noncannery jobs. It nevertheless insisted—absent evidence that a particular practice deterred nonwhites from applying—on a threshold showing that the percentage of nonwhite qualified *applicants* was significantly less than the percentage of nonwhite applicants selected. The Court reasoned that the employer's particular "selection mechanism" had probably not had adverse "impact" if these applicant percentages were approximately the same. *Wards Cove*, 109 S. Ct. at 2123.

The Court accurately observed that the percentage of protected group members in the cannery jobs was a poor surrogate for the likely potential qualified applicant pool of protected group members, both because the full pool might encompass many persons not then employed by the defendants in any position and because many existing cannery workers qualified for the unskilled noncannery jobs might not have sought them. *Id.* But the Court's strong preference for such "applicant flow" statistics as the measure of systemic disparate treatment contradicts its earlier assertion, addressed to the evidence about the skilled noncannery positions, that applicant flow data is merely "equally probative" as a labor market comparison. *See id.* at 2121. Further, an insistence on applicant flow data to establish the prima facie case of systemic treatment is inconsistent with prior opinions of the Court—opinions with which Justice White, however, had disagreed. *See Hazelwood*, 433 U.S. 299, 307 (employer may use applicant flow data to rebut prima facie case, but the prima facie case itself may rest on an underrepresentation of protected group members relative to their qualified, available numbers in the surrounding labor market); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (evidence of the impact of a practice need not be geared to the rate of exclusion of protected group members who actually applied, only to those in the general population).

Despite the conceptual deficiency, the Court was again justified in rejecting the evidence concerning the unskilled noncannery jobs as a sufficient showing that any particular *practice* for selecting employees to fill those jobs had disproportionate adverse *impact* on members of plaintiffs' group. At least on appeal, neutral practice discrimination was the model plaintiffs pressed. The Court was not discarding the impact case; it was merely deciding that impact's basic requirements had not been met. Indeed, reaffirming its holding in Connecticut v. Teal, 457 U.S. 440 (1982), the Court noted that even if there were no bottom-line racial imbalance of the sort that would suggest systemic disparate treatment, individual applicants for noncannery jobs who had been subjected to (and failed) a particular selection practice could prevail by proving that the practice has disproportionate adverse impact on their group. *Wards Cove*, 109 S. Ct. at 2123 n.8.

187. *Wards Cove*, 109 S. Ct. at 2122.

. . . a result that Congress expressly rejected."[188]

After properly rejecting plaintiffs' putative "impact" evidence as nothing more than insufficient evidence of systemic treatment, the Court unaccountably appeared to require future impact plaintiffs to present systemic treatment evidence as part of an impact case. One hesitates to reach such a bizarre conclusion casually, but the suggestion first appeared in *Watson*,[189] and in *Wards Cove* the Court referred to it four times in only two pages of text.[190] The requirement of a systemic treatment overlay as an essential part of plaintiff's proof that a particular practice had a disparate impact on her group would all but eviscerate the utility of the neutral practices case as a freestanding alternative to the individual and systemic treatment modes of proof.[191]

Fortunately, despite the four repeated references to the contrary, it is unlikely that the Court intended this requirement. Instead, the Court's repetition in this instance may reflect its own profound misunderstanding rather than new law. Two reasons compel this conclusion. First, elsewhere in the *Wards Cove* opinion[192] the Court specifically reaffirmed the availability of the attack permitted by *Connecticut v. Teal*[193] on a particular employer practice even in the face of bottom-line racial balance of the employer's workforce. That an employer has not routinely, intentionally, and systematically discriminated does not preclude the possibility that some of its practices perpetuate pre-existing societal disadvantage by falling more heavily on a protected group.[194] Second, it strains credulity to suppose that the Court would so casually eliminate these more limited challenges to employer practices in *Wards Cove* when, only one year earlier in *Watson*, all justices except Justice Kennedy, who did not participate, actually

188. *Id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993, 994 n.2 (1988) (plurality opinion)).

189. *Watson*, 487 U.S. 977, 994 (1988) (plurality opinion) ("Plaintiff's burden in establishing a prima facie case [of adverse impact] *goes beyond* the need to show that there are statistical disparities in the employer's work force." (emphasis added)); *see also id.* at 997 (plurality opinon) (discussing the need for comparative statistical evidence refined for qualifications, with a citation to *Hazelwood*).

190. Justice White began Part III of the opinion by suggesting that it is unnecessary for the Court to analyze whether the employer could justify the adverse impact of any specific practices because the "statistical disparity" relied on by the court of appeals — comparative evidence of the disparate treatment variety — "did not suffice to make out a prima facie case" of disproportionate adverse impact. *Wards Cove*, 109 S. Ct. at 2124. Shortly thereafter, he repeated the *Watson* plurality's observation, *see supra* note 189, that the prima facie burden in an impact case "goes beyond," and therefore includes, general comparative statistical disparities in the defendant's work force—that is to say, the type of evidence used to show systemic disparate treatment. *Wards Cove*, 109 S. Ct. at 2124.

Justice White then added that "even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth in Part II . . . this alone will *not* suffice to make out a prima facie case of disparate impact." *Id.* at 2125. But in Part II the Court, as discussed in text above, simply restated the customary refinements requisite to a case of systemic disparate treatment. *See supra* note 186 and accompanying text. Justice White concluded this section of the opinion by reiterating that evidence showing the significant disparate impact on nonwhites of a specific practice is only "part of respondents' prima facie case." *Wards Cove*, 109 S. Ct. at 2125. The other part, apparently, is threshold evidence of systemic treatment.

191. *See supra* text following note 124.

192. *Wards Cove*, 109 S. Ct. at 2122, 2123 n.8.

193. 457 U.S. 440, 448-56 (1982).

194. *See supra* note 186.

extended the formal reach of impact analysis, albeit in diluted form, to "subjective" practices.[195] Indeed, Justice White wrote at the very outset of the opinion that impact proof is an alternative to evidence of intent.[196] Preliminary indications from the lower courts also suggest that disparate impact analysis will survive the more rigorous *Wards Cove* approach to statistical evidence once its requirements are properly understood.[197]

### *B. Revising The Impact Case*

Wholly apart from the potentially fatal, highly problematic, but also unlikely new systemic treatment statistical wrinkle, the Court, building on the foundation Justice O'Connor laid in *Watson*, undertook a wholesale revision of the commonly conceived impact case. *Wards Cove* departed from the pre-*Watson* understandings in six respects.[198] Three changes relate to the prima facie case. A majority now embraces the identification and causation requirements of *Watson*. The *Wards Cove* majority also apparently subscribes to the higher magnitude statistical demonstration of causation that Justice O'Connor outlined in *Watson*.[199]

The other three changes relate generally to the issue of employer justification for a practice shown prima facie to have caused a significantly disproportionate adverse impact. The nature of the employer justification is substantially relaxed and the burden is explicitly declared to be one of production only — developments both previewed in *Watson*. The third, and new, alteration in the evidence relating to defense is a considerable limitation on the substance of the "lesser discriminatory alternative" which the plaintiff may propose in an effort to overcome the employer's stated justification. Each of these changes is addressed in turn.

#### 1. Identification and Causation

The *Wards Cove* majority wholeheartedly embraced the *Watson* requirements of identification and causation. Plaintiffs had difficulty demonstrating "that . . . the application of a specific or particular employment practice . . . created the disparate impact under attack."[200] Once again the problem for the Court lay in the relationship between the impact and some notion of defendants'

195. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989-91, 999-1000 (1988); *id.* at 1000, 1006-11 (Blackmun, J., concurring); *id.* at 1011 (Stevens, J., concurring).

196. *Wards Cove*, 109 S. Ct. at 2119.

197. Nash v. City of Jacksonville, 905 F.2d 355 (11th Cir. 1990) (holding evidence of adverse impact of firefighters test sufficient even under *Wards Cove* standards); Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1369-70 (2d Cir. 1989) (noting *Wards Cove*'s language on comparative systemic statistics but not requiring such proof in impact case).

198. *See generally infra* text accompanying notes 200-33.

199. *See supra* text accompanying notes 116-18. The Court's statement in *Wards Cove* that plaintiff must show the challenged practice to have a "significantly disparate impact" on the protected group, 109 S. Ct. at 2125, parrots the "significantly discriminatory impact" phrase found at the exact place in the *Watson* opinion that Justice O'Connor suggests the need for a technical measure of disparity more rigorous than EEOC's 80% rule. *Watson*, 487 U.S. at 995 & n.3 (plurality opinion).

200. *Wards Cove*, 109 S. Ct. at 2124.

fault. Unless the plaintiff shows that each challenged practice has a significantly disproportionate adverse impact, businesses could be "potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.' "[201] Following *Watson*'s logic if not its facts, *Wards Cove* made no distinction between objective and subjective practices in terms of causation; it simply extended *Watson*'s holding to objective practices. A rigorous causal showing is required in all impact cases.[202]

Requiring the plaintiff to isolate and identify the particular employment practices that caused the disproportionate impact brought a cry of protest from the dissent. Justice Stevens acknowledged that plaintiff must tender proof of a causal nexus between defendant's conduct and the discrimination alleged,[203] but found the majority's language overly burdensome and unfair to the extent that it called for isolating *the* practice among several that caused an adverse impact.[204] The dissent's disagreement on this issue, as on the question of appropriate guidelines for the essentially irrelevant evidence of overall workforce underrepresentation, drew more strength from the inhospitable spirit of the majority's opinion than from an articulated disagreement with its substance. In fact, insistence on reliable evidence that an identified practice caused an adverse impact is reasonable, particularly since most intentionally discriminatory uses of unidentifiable or immeasurable discretionary practices will be redressable through individual or systemic evidence of disparate treatment.[205]

2. Reformulating the Business Defense

A more doubtful decision that carried over from *Watson* to *Wards Cove* is the reformulation of the employer's defense to a prima facie case of adverse impact. Rejecting the earlier formulations that ran the gamut from simple job relatedness to strict business necessity,[206] the new *Wards Cove* majority, again taking its cues from *Watson*, framed the nature of defendant's burden in terms far less demanding: "The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice."[207]

The Court pointedly observed that the challenged practice need not be "es-

201. *Id.* at 2125 (quoting *Watson*, 487 U.S. at 992 (plurality opinion)).

202. The Court anticipated critics who would argue that the causal requirement was unduly burdensome. Justice White sought to allay such comments by noting that liberal discovery rules and EEOC record keeping requirements would ease the burden. *Wards Cove*, at 2125 (quoting Uniform Guidelines, *supra* note 54, at § 1607.4(A)). The Court went on to note, however, that many record-keeping requirements did not apply to seasonal employers, *Id.*, at 2125 n.10, thereby confirming the dissent's point that the majority "requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible." *Id.* (Blackmun, J., dissenting); *see also id.* at 2133 n.20 (Stevens, J., dissenting) ("[I]t is undisputed that petitioners did not preserve such [necessary] records.").

203. *Id.* at 2130 & n.12, 2132 (Stevens, J., dissenting).

204. *Id.* at 2132-33 (Stevens, J., dissenting) (charging the majority with betraying basic principles of fairness and the requirement that Title VII litigation be treated like any other lawsuit).

205. *See supra* text accompanying notes 122-30.

206. The range of previous statements of the test are discussed *supra* at text accompanying notes 77-90. *See also* L. MODJESKA, *supra* note 57, at 50-53 (surveying lower court renditions).

207. *Wards Cove*, 109 S. Ct. at 2126.

sential" or "indispensable" to pass muster.[208] The "reasoned" review seeks only to ensure that the challenged practice "serve[ ], in a significant way, the legitimate goals of the employer."[209] The Court gave no guidance as to the content of a "legitimate" goal. Legitimacy apparently has the same pallid meaning — any reason other than discrimination — as in the setting of the "legitimate nondiscriminatory reason" defense to a case of individual disparate treatment. Moreover, if the practice need only serve this undefined goal in a "significant" way, the employer presumably need not show that a demonstrable or manifest need for the practice exists, let alone that the questionable practice is a matter of strict necessity.

Thus what began in *Watson* as an essential mechanism to control the expansion of impact analysis into the realm of disputes about subjective employment criteria ended in *Wards Cove* with a new and substantially diluted formula applicable to all disparate impact cases.

3. Reallocating the Burden of Persuasion

The *Wards Cove* majority also confirmed the *Watson* decision to assign the employer only a burden of production on this defense. *Griggs v. Duke Power Company*[210] placed on the employer a burden of "showing" the justification,[211] a requirement that most courts and commentators interpreted as placing not only the initial burden of going forward but also the ultimate risk of nonpersuasion on the employer.[212] By contrast, the *Wards Cove* Court squarely approved the unsupported assertion in *Watson* that the ultimate risk of nonpersuasion is on the challengers.[213] The Court offered two justifications for this allocation, notwithstanding "earlier decisions [that] can be read as suggesting otherwise."[214] First, it adverted to Federal Rule of Evidence 301 which states that, absent an act of Congress, a "presumption" shifts only the burden of production.[215] Second, it adopted a theory of conceptual symmetry: Requiring the challenger to retain the burden of persuasion conforms to disparate treatment practice.[216] In both Title VII configurations, Justice White argued, the statutory language required plaintiffs to show that the discrimination was " 'because of . . . race.' "[217]

Neither justification withstands close scrutiny. The need for symmetry is

208. *Id.*

209. *Id.* at 2125-26.

210. 401 U.S. 424 (1971).

211. *See id.* at 432.

212. *See Wards Cove*, 109 S. Ct. at 2130-31 & n.14 (Stevens, J., dissenting) (citing and quoting from more than a dozen Supreme Court and lower court formulations of the defendant's burden); *see supra* note 145.

213. " 'The ultimate burden of proving that discrimination . . . has been caused by a specific employment practice remains with the plaintiff *at all times*.' " *Wards Cove*, 109 S. Ct. at 2126 (quoting *Watson*, 487 U.S. at 997) (emphasis added in *Wards Cove*).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* (quoting 42 U.S.C. § 2000e-2(a) (1988)).

not readily apparent, unless there is no longer any distinction between impact and treatment analysis, which seems doubtful.[218] One is tempted to suggest that the reference to rule 301 is either a makeweight or a reflection of the search for a convenient hiding place. Rule 301 addresses the effect given to presumptions unless "otherwise provided for by Act of Congress."[219] The Court omitted entirely any discussion of Title VII's allocation of burdens or its previous interpretations of legislative intent. It thus begged the question of whether rule 301 applies.

In fact, Title VII embraces a number of contexts in which the employer is encumbered with true affirmative defenses, complete with a burden of persuasion. One example is the defense of bona fide occupational qualification by which the employer avoids liability for policies or decisions that facially discriminate.[220] The *systemic* treatment case also shifts the burden of persuasion to the defendant if plaintiffs present statistics illustrating gross underrepresentation of a protected group. The prima facie disproportionate adverse impact case, at least as *Watson* and *Wards Cove* shore it up, points to the adverse impact of a single practice roughly as reliably as systemic treatment evidence points to gross, across-the-board underrepresentation. Given the comparable statistical showings, why should the Court fail to require the defendant to bear the risk of nonpersuasion in defending either type of prima facie showing?

4. Limiting The Utility of "Less Discriminatory Alternatives"

The Court's work did not end with reframing the business defense test or reallocating the respective trial burdens. The issue of less discriminatory alternatives still remained. Realigning the analysis in highly restrictive terms, the Court wrote: "[I]f on remand the case reaches this point, and . . . [the employee] cannot persuade the trier of fact on the question of [the employer's] business necessity, [the employee] may still be able to prevail."[221] To do so the employee must persuade the trial court that there is an alternative that is "equally as effective" as the employer's original practice which would meet the employer's needs with less discriminatory impact on plaintiff's group. Borrowing from Justice O'Connor's observation in *Watson*, the Court added that the " 'cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective.' "[222]

This approach to alternatives is perhaps the single feature of *Wards Cove* that most trivializes the impact mode of proof. That stage of the case is vitally important under the *Wards Cove* refashioning of the employer defense, because

218. *See supra* text accompanying notes 192-97.

219. FED. R. EVID. 301.

220. *See* § 703(e), 42 U.S.C.§ 2000e-2(e) (1988); Dothard v. Rawlinson, 433 U.S. 321, 333 (1982). In *Dothard*, where neutral height/weight requirements were found unlawful on an impact theory, Alabama successfully defended a distinct practice that expressly excluded women from holding contact positions in maximum security prisons as a bona fide occupational qualification. *Id.* at 332-37.

221. *Wards Cove*, 109 S. Ct. at 2126.

222. *Id.* at 2127 (quoting *Watson*, 487 U.S. at 998 (plurality opinion)).

any employer who has continued to litigate past the plaintiff's prima facie showing at trial will be able to produce some evidence that its practice serves to some uncertain degree any "legitimate" business goal.[223] Thus, as with individual disparate treatment, where most cases after *Texas Department of Community Affairs v. Burdine*[224] were won or lost on the battleground of "pretext," most impact cases under a *Wards Cove* regime will turn on the issue of less discriminatory alternatives.

The Court's handling of the less discriminatory alternatives option drains it of practical vitality. The suggestion that increased financial or other costs associated with the proposed alternative preclude it from being considered "equally as effective as the challenged practice"[225] usually should render the option unavailing to the plaintiff. After all, if the employer, with its greater knowledge of the demands and possibilities of the business, could implement an alternative practice that serves its needs as well and cheaply as the original practice but with less discriminatory impact, would it not have done so initially, to avoid the expense of litigation? The only precedent for the position that minimal incremental cost to the employer will defeat a showing of employment discrimination is in the area of religious discrimination;[226] but in that setting there is a genuine concern that stringent interpretation of the Title VII employer duty to "reasonably accommodate" an employee's religious practices[227] could result in an unconstitutional establishment of religion.[228] In other contexts the Court has consistently rejected a general cost defense to discrimination in employment.[229]

The *Wards Cove* Court conceptualized the plaintiff's showing of alternatives in the impact case as akin to the rebuttal phase of the inferential form of treatment discrimination. The required proof of a less discriminatory alternative "would prove that . . . [employers] were using their tests merely as a 'pretext' for discrimination."[230] Taken literally, the Court is saying that the plaintiff's demonstration of a less discriminatory alternative must be so powerful as to yield the conclusion that the employer's earlier adoption of a different practice to accomplish the same goal was motivated by a desire to discriminate. If so, whether the

223. Less discriminatory alternatives would probably have remained a key battleground even under the vetoed Civil Rights Act of 1990. *See* S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S9966 (daily ed. July 15, 1990) (President Bush vetoed the Act on Oct. 22, 1990; the Senate failed by one vote to override the veto on Oct. 24, 1990); *see infra* text accompanying notes 481-82.

224. 450 U.S. 248 (1981).

225. *Wards Cove*, 109 S. Ct. at 2127.

226. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); *infra* text accompanying note 406.

227. § 701(j), 42 U.S.C. § 2000e(j) (1988).

228. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (Connecticut statute providing employees with an absolute and unqualified right not to work on their chosen sabbath held to violate the Establishment Clause); *cf.* Protos v. Volkswagen of Am., Inc., 797 F.2d 129 (3d Cir. 1986) (distinguishing Title VII from the statute in *Thornton* in that the former calls for reasonable accommodation of an employee's religious beliefs and practices rather than absolute accommodation).

229. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (requiring gender-neutral pension contributions despite the greater cost of providing those benefits to women); Arizona Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris, 463 U.S. 1073 (1983) (mandating that similar retirement benefits be paid to male and female employees).

230. *Wards Cove*, 109 S. Ct. at 2126 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

majority wishes to retain an impact case at all is in doubt, especially given the diluted nature of the employer defense and the placement of the persuasion burden on the plaintiff.

But if "pretext" is accorded the meanings it receives in the context of individual disparate treatment, an impact plaintiff could persuade the fact-finder that a less discriminatory alternative exists without necessarily establishing an unlawful motive. In those cases, the plaintiff may show pretext in one of two generic ways. She may demonstrate either that the employer took her race or gender into account explicitly or, more obliquely, that the employer's proffered legitimate nondiscriminatory reason is simply implausible.[231] The fact that the Court seems intent on preserving the impact case[232] suggests that its notion of "pretext" in the context of lesser discriminatory alternatives may be little more than a rhetorical nod in the direction of a misplaced sense of symmetry.

The Court's discussion of the less discriminatory alternative issue also generated complications for trial procedure. It ends with this curious passage:

> If . . . [the employees], having established a prima facie case, come forward with alternatives to . . . [the employers'] hiring practices that reduce the racially-disparate impact of practices currently being used, and . . . [the employers] refuse to adopt these alternatives, such a refusal would belie a claim by [the employers] . . . that their incumbent practices are being employed for nondiscriminatory reasons.[233]

The refusal would confirm, in short, that the existing practices are a "pretext" for covert discrimination.

Implicit in the Court's new approach to the proof of alternative practices is a timing aspect that accounts for the strangeness of the passage. When does the Court suppose the employer will reject the proposed alternative — during discovery, during settlement negotiations, at trial? According to the Court's own account, the plaintiffs' evidence of alternatives becomes relevant (1) *after* they establish a prima facie case, including evidence of less discriminatory alternatives, and (2) *after* the employer comes forward with a credible and legitimate justification for the practice. If the employer refuses to adopt the effective, less detrimental option, a pretext conclusion arises.[234] The most logical reading of the quote permits the employer to admit, during trial if necessary, that plaintiffs suggested a better, less discriminatory practice.[235] As a grammatical matter, this interpretation is supported by the use of the present tense: the pretext conclusion arises if the employer "refuse[s] to adopt" the proposed measures.[236]

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231. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); *see* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2378-79 (1989).

232. *See supra* text accompanying notes 192-97.

233. *Wards Cove*, 109 S. Ct. at 2126-27.

234. *Id.* at 2125-26.

235. Presumably, this necessity would arise if the defendant and counsel predict an unfavorable verdict during trial. One has cause to wonder how often this will happen, given the hurdles placed in the paths of disparate impact plaintiffs.

236. *Wards Cove*, 109 S. Ct. at 2126-27.

Most importantly, if the analysis offered here is correct, the employer's refusal is a condition precedent to recovery.

One possible effect of the employer's admission that it rejected plaintiff's suggested alternative would be a limitation on or avoidance of liability for backpay.[237] Even more clearly, an employer's mid-litigation adoption of the proposed less discriminatory alternative would undermine plaintiff's need for an injunction. In addition, the Court apparently gave no thought to the interface between defendant's rejection of a proposed alternative and Federal Rule of Evidence 408, which makes offers of compromise inadmissible.[238]

How this new condition will operate outside *Wards Cove*'s particular procedural context is unclear. Presumably, sometime during discovery the plaintiff and defendant will discuss settlement and during a conference the employer will either accede to or reject the proposed alternative. If the employer rejects the alternative, the condition precedent is satisfied. During her case in chief the plaintiff will proffer evidence of the alternative and the defendant's disapproval. If the employer agrees to the new, less burdensome condition, the matter ends. One might then conclude that *Wards Cove* has created an incentive to use the litigation process to produce less discrimination by encouraging employers to restructure their employment practices without proof of intentional discrimination. Once the enlightened employer is confronted with equivalent practices that yield more socially desirable consequences, he will embrace them. At the same time, however, the Court offers no explanation why plaintiff's success should hinge on the employer's decision to accept or reject an alternative.

Another scenario runs along these lines. Suppose the employer is accused of using a discriminatory practice, and that during discovery plaintiff proposes a less discriminatory alternative. The employer rejects the alternative and the case goes to trial. If that alternative was not reasonably available as an optional industry practice before the settlement conference, the employer will argue that although it might be liable for backpay from the time it became aware of the alternative, it is inequitable to hold it liable for backpay that accrued before the alternative was drawn to its attention. After all, according to this argument, the employer has offered evidence at trial that the incumbent practice is legitimate. The practice becomes pretextual only when the new alternative is proposed. In this sense, pretext depends upon timing and the state of industry practice.[239]

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237. *Cf.* Ford Motor Co. v. EEOC, 458 U.S. 219, 241 (1982) (defendant's unconditional tender of reinstatement avoids its liability for backpay accruing thereafter).

238. One can foresee a problem arising in age discrimination litigation under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988), where jury trials are routine and liability principles are largely interchangeable with those developed under Title VII. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985). Federal Rule of Evidence 408 makes inadmissible "[e]vidence of (1) furnishing or offering . . . to furnish, or (2) accepting or offering . . . to accept, a valuable consideration in compromising . . . a claim which was disputed." FED. RULE EVID. 408. In age litigation, the defendant's refusal to accept a reasonable less discriminatory alternative, even one that is more expensive than the incumbent practice, could impermissibly operate to its detriment, since the jury might view the refusal itself as evidence of discrimination.

239. As others have pointed out, it is not clear what "pretext" means in this context. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 194-95. Ordinarily, one associates the term with a state of mind, and that is clearly its connotation in treatment cases. Here, however, defendant

The likelihood that employers will prevail with such an argument is small. The Court generally has not absolved employers from Title VII liability for violations occurring after the statute's effective date merely because, by the time of trial or decision, the acts of discrimination have ceased.[240] Of course this begs the question of whether the employer has committed any violation before the plaintiff presents it with an alternative practice. If it has, and the only available remedy is an injunction, the impact mode becomes purely prophylactic, something suggested neither by statutory text nor by the Court.[241]

The *Wards Cove* dissent vented most of its frustration on the Court's willingness to place the ultimate risk of nonpersuasion on the challengers, a willingness that betrayed a "profound[ ] misapprehen[sion]" of the distinction between treatment and impact cases.[242] Justice Stevens labelled the business necessity inquiry a "classic example of an affirmative defense," and found the Court's "casual — almost summary — rejection" of precedent tantamount to a renunciation of a legislatively approved interpretation of the statute.[243] On his reading, only Congress has the power to restore what *Wards Cove* took away: disparate impact analysis faithful to its progenitor, *Griggs*.

*Wards Cove* exacted a heavy toll for the *Watson* plaintiffs' success in expanding the reach of disparate impact. The theoretical cost was the unraveling of the fundamental assumptions of the impact mode. Under a regime of functional equivalence, a finding of impact looks very much like a proxy for intent. The revised theory also had several concrete trial practice consequences. To justify a significant disproportionate adverse impact the employer would henceforth only have to offer some evidence that its practice served, to an uncertain degree, any legitimate business purpose. Plaintiffs would then bear the ultimate burden of proving the contrary, and in doing so they would be limited to evidence of less discriminatory alternatives as cheap and effective as the employer's own chosen practice.

## V. *PRICE WATERHOUSE* AND THE FUTURE OF DISPARATE TREATMENT

Ann Hopkins, a senior manager, was on the partnership track at Price Waterhouse, a "Big Eight" accounting firm which in 1982 had 662 partners,

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has demonstrated a legitimate business reason for the practice. Thus, the "pretext" showing is at best relative, that is, it is only a pretext for discrimination because the employer has been shown the error of its ways and still refuses to change. Alternatively, pretext may have nothing to do with intent. If the employer, having justified its practice in nondiscriminatory terms, nevertheless honestly believes that its incumbent practices are superior to those proposed (an easy situation to hypothesize in light of ordinary inertial forces), *but the trial court disagrees*, the court could impose liability without necessarily impugning the employer's motives. *See supra* text accompanying note 231.

240. *See* Bazemore v. Friday, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part).

241. Indeed, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), where the Court first explained that compensation is a crucial remedial goal of Title VII, was itself a case where only unintentionally discriminatory neutral practices were at issue.

242. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2132 n.18 (1989) (Stevens, J., dissenting) (noting that this allocation had a very recent pedigree and was put forward in *Watson* without citation).

243. *Id.* at 2131-32 (Stevens, J., dissenting).

only seven of whom were women. The partnership process began with a proposal for candidacy after a requisite term of employment, followed by solicitations for comments from the existing partners. Thereafter, the nominations went through committees before a vote of the full partnership. In general, those partners who knew something about the candidates responded to the initial solicitation. In 1982 eighty-eight candidates were proposed; plaintiff was the only woman among them. Of the eighty-eight, the partners elevated forty-seven to partnership, rejected twenty-one, and put twenty, including plaintiff, on "hold." The "hold" category meant that the partnership candidate could be reconsidered the following year. Plaintiff was not reconsidered.

The partners' comments about plaintiff were mixed.[244] Everyone considered her intelligent, productive, competent, and aggressive. She billed more hours than any other partnership candidate.[245] She played a key role in bringing into the firm a twenty-five million dollar government contract, a feat that put her above all other candidates in terms of soliciting new accounts.[246] She had, however, a history of strained relations with the staff; in fact, even her supporters were critical of her interpersonal skills.[247] With unanimity that betrays a numbed vision of America's potential, every judge and Justice who reviewed the facts of the case agreed that her difficulties in dealing with staff formed a legitimate basis for partnership rejection, despite the fact that she brought into the firm contracts worth between $34 and $44 million.[248]

Hopkins's lack of interpersonal skills tells only half the story. Even as that charge was leveled against her, a number of partners criticized Hopkins for being unwomanly. They apparently insisted that her behavior conform to their stereotypical view of women. One of her supporters, in a comment that revealed more about the insidious nature of stereotypes than it did about his motives, suggested that her chances for promotion would improve if she learned to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[249] Because the partners would not have

244. Thirty-two partners responded to the solicitation, thirteen positively, eight negatively, three recommended hold, and eight had no informed opinion. *Id.*

245. Hopkins v. Price Waterhouse, 825 F.2d 458, 462 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

246. According to the court of appeals, "[t]he firm's Senior Partner . . . characterized one of . . . [the] contracts [she helped win] . . . as a 'leading credential' that enabled the firm to win similar business from other federal agencies." *Id.* She was credited with bringing in between $34 and $44 million during her tenure. *Id*; *see also* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985) (finding that "[n]one of the other partnership candidates . . . had a comparable record in terms of successfully securing major contracts for the partnership"), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

247. *Price Waterhouse*, 109 S. Ct. at 1782 (plurality opinion).

248. *See supra* note 246. Having practiced in large law firms, we cannot resist the urge to suggest that had Ms. Hopkins been a man, her "interpersonal skills" problem would not have existed, notwithstanding the unanimity among all judges and justices who reviewed the case. Our experiences tell us that interpersonal difficulties with subordinates, as opposed to clients, law firm peers, or superiors, would likely not weigh in at all as against such demonstrated capacity as a "rainmaker."

249. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). The evidence of stereotypes in this case and their insidious nature is discussed in more detail later. *See infra* text accompanying notes 323-67.

demanded such traits from a man, they treated her differently, at least in part, because of her gender.

### A. *Causation and Mixed Motives*

One cannot recover under Title VII unless the employer's discriminatory treatment occurred "because of . . . sex." Sometimes that showing is uncomplicated;[250] more often establishing intent is subtle. Evidence scholars have long recognized that one can never prove state of mind directly; one can only glimpse its presence circumstantially.[251] In any event, the Court assumed in its pre-*Price Waterhouse* jurisprudence that a single impulse moves the employer who discriminates. Seldom is reality as simple as the Court's assumption. Torts scholars have grappled with problems involved in multiple causation for decades. The next two subsections address first, the problem in theory, and second, the Court's resolutions of the issue.

#### 1. The Theory of Multiple Causation

Distinctions in kind between tort problems of cause in fact and Title VII mixed motive issues suggest that the former is an inappropriate model for the latter. Nevertheless, courts confronting the issue in Title VII have borrowed almost uniformly from torts to analyze the mixed motive issue.[252] Accordingly, we begin with a brief general discussion of causation in tort law.

The basic concept of cause in fact, or "but-for" causation, is deceptive. The premise of the "but-for" requirement is familiar: if plaintiff would have suffered an injury despite the defendant's substandard conduct, the plaintiff is not entitled to recover; the defendant has not *in fact* caused the injury.[253] The pluperfect "would have" is necessarily conjectural. Professors Hart and Honore stated the issue succinctly some thirty years ago: When events are causally related, they occupy a "place . . . in a set of . . . general propositions . . . [distinguished] by the fact that the [causal relations] are used . . . to justify inferences, not merely as to what has or will happen, but 'counterfactual' inferences as to what *would* have been the case, if some actual event which in fact happened, had not happened."[254] The cause-in-fact inquiry demands the creation of a hypothetical world.[255]

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250. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976) (discharging white, but not black, employees for identical misconduct constitutes discrimination because of race).

251. See *infra* notes 316-18 and accompanying text for discussion of this issue in the *Price Waterhouse* context.

252. *Price Waterhouse*, 109 S. Ct. at 1784 n.2 (plurality opinion).

253. W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON TORTS § 41, at 264-65 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

254. H. HART & A. HONORE, CAUSATION AND THE LAW 14 (1959).

255. In the typical tort case our hypothesis is assumed. For instance, picture plaintiff, *P*, kneeling behind a car parked in a driveway when he is hit by the driver, *D*, who backs the car up without using the rearview mirror. Although *D*'s conduct is clearly substandard, the court will conclude that D is not liable. Even if *D* had looked behind her, she would not have seen *P*; "the defendant's failure to look in the rearview mirror did not cause the plaintiff's injuries." Jordan v. Jordan, 220 Va. 160, 163, 257 S.E.2d 761, 763 (1979). The court reaches this conclusion not because the judges

Both the need for and the validity of the hypothesis are more attenuated when multiple events cause one injury. In tort law this can occur in at least three ways, only one of which is central to understanding the mixed motive case.[256] Imagine two sources of harm combining to produce one indivisible injury, but only one of the two sources originating in substandard conduct.[257] Under these facts, potential liability is and should be imposed on the negligent defendant, even though it cannot be said that the defendant "in fact caused" plaintiff's injury, which, by hypothesis, may have resulted from the nonnegligent source.[258] Liability is imposed because the court seems to ask: Are we a better society if we impose liability, given defendant's substandard conduct and the ultimate unknowability of what might have happened based on the counterfactual hypothesis? The answer is yes; the court allocates the risk of nonpersuasion to the defendant to absolve itself of liability, after plaintiff's prima facie showing of substandard conduct.

### 2. The Special Problem of "Mixed Motives"

Mixed motive cases bear remarkable resemblance to the tort problem of multiple causation, but the resemblance is misleading. Mixed motive cases are not about two or more causes; motives are not causes. In mixed motive litigation, the court is asked to decide what to do when two or more motives produce one result, such as loss of job or failure to get promoted or transferred. Lower courts struggled for years with the proper "because of" formula to resolve these mixed motive cases.[259] *Price Waterhouse* presented a fairly typical case and posed a deceptively simple problem: Was Ms. Hopkins denied promotion "because of" her gender? Text, however, does not tell us how much of a factor

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know that *D* would not have seen *P* had she used her mirror, or because logic dictates that conclusion. Rather, the court's holding rests on unarticulated generalizations that reflect the judges' collective experience with relations between events. H. HART & A. HONORE, *supra* note 254, at 9-14. Although no one seriously disputes the court's conclusion, bear in mind that the conclusion is neither dictated by logic nor necessarily correct. It represents nothing more (or less) than an experiential judgment, rooted in statistical probability, about the connections among events.

256. In one scenario, two instances of substandard conduct may conjoin to create a single injury, and the timing of the two events may prevent proof as to which event first occurred. *See, e.g.*, Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W. 2d 731 (1952); Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902). In a second scenario, there are also separate instances of negligent conduct, but the evidence shows that (a) only one actor could have caused the injury, and (b) *P* cannot discern which of the two actors caused the harm. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). In both configurations defendants were required to bear the burden of persuasion.

257. *See, e.g.*, Kingston v. Chicago & N.W. R.R. Co., 191 Wis. 610, 211 N.W. 913 (1927); Anderson v. Minneapolis, St. P. & S. Ste. M. R.R., 146 Minn. 430, 179 N.W. 45 (1920) (holding a railway company liable when a fire it caused joined with another of unknown origin to destroy plaintiff's property), *overruled on other grounds sub nom.* Borsheim v. Great N.R.R., 149 Minn. 210, 216, 183 N.W. 519, 521 (1921).

258. In *Anderson* judgment was against the defendant, *even though the nonnegligent source of harm was sufficient alone to cause the entire harm*, so long as the negligent source of harm was a "substantial factor" in bringing about the injury. *Anderson*, 146 Minn. at 434, 179 N.W. at 46 (jury trial instructions upheld). *See* PROSSER AND KEETON ON TORTS, *supra* note 253, § 41, at 267-68; RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

259. The split of authority is noted in *Price Waterhouse*, 109 S. Ct. at 1784 n.2 (plurality opinion).

gender must be, relative to a permissible factor, before the court should impose liability.

The typical mixed motive case resembles the multiple causation tort scenario because an impermissible "cause" combines with an apparently innocent "cause" to produce a harm. That resemblance, though, is largely superficial, owing more to shared language than shared etiology. At the theoretical level, tort investigations are distinct from Title VII actions in at least two ways. First, the but-for cause element of a tort is by definition wholly divorced from questions of motive; the lawfulness *vel non* of defendant's conduct is irrelevant. As Professor Green notes, "[t]he moment some moral consideration is introduced into the inquiry the issue is no longer one of causal relation, . . . [which] is a neutral issue, blind to right and wrong."[260] This is so because motivation need not recur; and it is the routine spatial and temporal recurrence among events that permits the fact-finder in tort to generalize about the relation among the particular events *sub judice*.[261] Second, in multiple-cause tort cases the court assumes independence among events; it assumes that two independent acts join to produce one harm. If racial and gender stereotyping are pervasive, it is not at all clear that one should assume sufficient independent "legitimate" employer motivation. In fact, precisely because racist and sexist thoughts are so deeply imbedded in our "cultural belief system,"[262] the idea that one can distinguish among such motives, especially where one of them is subscribed to unconsciously, reflects a "false dichotomy."[263] It may be impossible to ferret out lawful and unlawful motives by asking what decision would have been reached on the basis of the lawful motive alone.

In the tort context, plaintiff bears the ultimate burden of proving cause in fact. Plaintiff, to establish causation, must demonstrate, and persuade the jury that his hypothesis is valid. The two distinguishing features described above combine with at least two additional distinctions in the mixed motive, disparate treatment action: the existence of the statutory prohibition itself, and, following from the statute, the finding that illicit motives tainted the decision. If we carry the tort analogy one step further, the existence of the statutory prohibition is akin to the traditional negligence per se doctrine.[264] In the Title VII context the

260. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 549 (1962). *See* H. HART & A. HONORE, *supra* note 254, at 21 (in "interpersonal" transactions the inquiry is into reasons for harm, not relations between physical events).

261. H. HART & A. HONORE, *supra* note 254, at 21, write the following:

> [T]he statement that a person acted for a given reason does not require for its defence generalizations asserting connexions between types of events. When we assert that one person acted as he did because of another's threats our point is that this was his conscious reason, and an honest account from him of his deliberations would settle the question of its truth or falsity. It is no part of the meaning of such a statement that if the same circumstances recurred he would do the same again. The point is that some model other than one which is based on the experience of recurring physical events is necessary to explain a mixed motive case.

262. Lawrence, *supra* note 5, at 322 (specifically addressing the cognitive and psychological foundations and dimensions of racial motives).

263. *Id.*

264. The unexcused violation of the statute, as Justice Cardozo pointed out, "*is* negligence." Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 614, 814-15 (1920). The issue is admittedly more

argument for liability is even stronger than in the traditional negligence per se context. Whereas the typical negligence per se case pretermits the question of causation, in mixed motive cases the court begins the burden of proof analysis with an adjudicated finding that an impermissible motive played a part in producing the injury.[265] In light of that litigated conclusion, there are no clear cut policy reasons to offer the defendant a second bite of an exonerating apple, especially given the difficulty of separating lawful from unlawful motives.

In theory, at least three possible solutions derived from the tort analogy existed before *Price Waterhouse.*

Solution #1: Following something like a pure "substantial factor" test, a court could simply find that the employer made his decision because of race. This solution is consistent with section 703(a)(1)[266] and with tort law. In light of the employer's conduct respecting a protected group and the inference of intent drawn therefrom, it is a "discharge . . . because of such individual's race."[267] Moreover, in a case like Hopkins's, solution #1 is the optimal resolution if, using a comparative approach, the court determines that a man presenting her mix of credentials would have been promoted.

Solution #2: One potential problem with Solution #1 is that it appears to collide with section 706(g)'s mandate that an employer may fire an employee for any reason other than discrimination based on race.[268] Thus, if the employer could have denied partnership to Ms. Hopkins for lack of "interpersonal skills,"[269] the argument holds, the decision is not "on account of" gender. Solution #2 permits the defendant to demonstrate that he would not have promoted Ms. Hopkins anyway, that is, he would have made the "same decision" even if he had not adverted to an improper criterion.

Solution #3: A third possibility opts for liability under section 703(a)(1) without a remedy under section 706(g).[270] The idea builds on the fact that Congress separated the liability and remedial provisions of the statute; only in the remedial section does Congress state that the employer is free to make decisions on any ground other than those proscribed.[271] The theory assumes that a finding of liability

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complex than our analogy suggests. We use it only to suggest that the general tort analogy is itself more complex than the courts allow.

265. *See infra* text accompanying notes 276-79.

266. 42 U.S.C. § 2000e-2(a) (1988), quoted at *supra* note 4.

267. *Id.*

268. *Id.* § 2000e-5(g).

269. This is itself a question of proof. The employer could not discharge a woman for insubordination, for example, if he would not discharge a man under the same circumstances. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

270. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 44-51 (building on Brodin's ideas).

271. 42 U.S.C. § 2000e-5(g); Brodin, *supra* note 270, at 298-99. Brodin recognizes that the location of § 706(g)'s mandate may simply reflect a limitation on the court's ability to find liability under § 703(a). *Id.* at 298-99. The *Price Waterhouse* Court rejected Solution #3. That recommended approach, however, may have been even stronger than Brodin realized. The limitation he describes as an alternative understanding of § 706(g) is fairly implied in the language of § 703(a) without the additional language in the remedial provision.

under section 703(a) has social value apart from any remedy. Even accepting that assumption, however, this approach is at best theoretical. In the real world, prospective Title VII plaintiffs could not obtain legal counsel for such cases, because attorneys' fees for prevailing parties are dependent on achieving more than de minimis relief.[272]

In *Price Waterhouse*, the Court chose Solution #2, but it did so without considering the significant distinctions between multiple causation in Title VII mixed motive suits and in garden variety tort cases, and without resolving fully the question concerning the type of evidence that will effect a shift in the risk of nonpersuasion.

### *B. The* Price Waterhouse *Approach*

#### 1. Causation

*Price Waterhouse* generated a plurality opinion by the *Wards Cove* dissenters,[273] separate concurring opinions by Justices O'Connor and White, and a dissent written by Justice Kennedy, joined by Justices Rehnquist and Scalia. We take Justice O'Connor's opinion as most representative of the Court's opinion.[274]

The Justices took three separate tacks on causation. Justice O'Connor, following basic tort law, wasted little energy in adopting the notion of but-for causation, and wasted still less time in subscribing to the "substantial factor" variation that applies to problems of multiple causation.[275] She stressed that it is only when the plaintiff makes a strong preliminary showing of illicit intent that the employer must bear the burden of proving that it would have made the same decision had it considered permissible criteria alone.[276] The critical issue for Justice O'Connor was the nature of the evidence sufficient to "shift"[277] the risk of nonpersuasion. For her, only "direct evidence" that a discriminatory motive played a substantial role in the employment decision would justify the shift.[278] Justice White agreed that plaintiffs' prima facie evidence of discriminatory intent must be "substantial," but he was silent as to whether it must also be

272. Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486 (1989).

273. Justices Brennan, Blackmun, Marshall, and Stevens.

274. Prediction is unusually slippery without a majority opinion. The decisions of the recent past, however, are so firmly committed to erecting barriers to recovery that Justice O'Connor's opinion seems destined to become the opinion of the Court, just as a majority in *Wards Cove* ultimately subscribed to the views she expressed in *Watson*. *See also* Lowe v. Commack Union Free School Dist., 866 F.2d 1364 (2d Cir. 1989) (applying the *Watson* plurality's demand for more reliable statistical evidence of adverse impact).

275. *Price Waterhouse*, 109 S. Ct. at 1797-98 (O'Connor, J., concurring).

276. *Id.* at 1798-99, 1801 (O'Connor, J., concurring).

277. We adopt common, if somewhat misleading terminology in referring here to a "shift." Of course there is no true shift of burden on a single issue. Plaintiff's persuasion burden throughout the unadorned, "single motive" *McDonnell Douglas* individual treatment case is on the issue of the employer's intentional discrimination. The persuasion burden imposed on the employer in those cases in which plaintiff carries her burden, yet the evidence reveals that the employer decision may also have been based in part on a benign consideration, is on a different issue: whether the employer would have reached the same decision without relying on the motive Title VII condemns.

278. *Price Waterhouse*, 109 S. Ct. at 1801-05 (O'Connor, J., concurring).

"direct."[279]

In contrast, Justices Brennan and Kennedy engaged in what at times bore the scars of a scholastic debate over the proper definition of "because of." Justice Brennan rejected "but for" as a synonym for "because of." He interpreted Title VII's prohibition as meaning that "gender must be irrelevant to employment decisions."[280] That being the case, requiring the plaintiff to show that a forbidden motive played a "substantial" role in the decision went too far; rather, "[t]he critical inquiry . . . is whether gender was *a factor* in the employment decision *at the time it was made.*"[281] If so, he would place the persuasion burden on the employer as to the "same decision" issue.[282]

Justice Kennedy, by comparison, accused Brennan of writing an opinion that lacked internal consistency. The language of the statute, in his view, makes it impossible to find that gender played a causal role in the decision, yet permits the employer to prove that he would have made the same decision anyway. In his opinion, if the employer would have made the same decision without considering gender, the decision was not made "because of" gender; "[i]n other words, there is no violation of the statute absent 'but-for' causation."[283] The problem, according to the dissent, was that after the burden-shift the wrong party — the employer — ultimately had to prove the absence of "but-for" causation.[284]

Justice Kennedy's reasoning is flawed. He accuses the plurality of conflating "the question whether causation must be shown with the question how it is to be shown."[285] Yet Justice Brennan's formulation of plaintiff's prima facie mixed treatment case recognizes that plaintiff must establish improper motivation. Justice Kennedy did not address motivation. Instead, he reasoned in terms of causation and fell prey to the inherent limitations of the tort analogy: he confused causation with motivation. To suggest that an employer's decision was not based on gender because the defendant subsequently establishes that he would have made the same decision without recourse to an impermissible motive simply ignores an adjudicated finding of unlawful intent.

More importantly, when Title VII employs the phrase "because of" in the treatment case, it is not speaking to the temporal and spatial relationship between physical events, which Justice Kennedy implicitly explains cannot both exist and not exist in recurring relationships. Justice Kennedy's explanation is accurate but irrelevant. *McDonnell Douglas* and *Burdine*[286] tell us that Title VII's language, as applied to disparate treatment analysis, refers not to causal

279. *Id.* at 1795 (White, J., concurring) (relying on Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

280. *Id.* at 1785 (plurality opinion).

281. *Id.* (plurality opinion) (emphasis added).

282. *Id.* at 1790 (Brennan, J., plurality). Brennan also suggested at this point that there was no meaningful distinction between his formulation and O'Connor's. *Id.* at 1790 n.13 (Brennan, J., plurality).

283. *Id.* at 1809 (Kennedy, J., dissenting).

284. *Id.* (Kennedy, J., dissenting).

285. *Id.* at 1807 (Kennedy, J., dissenting).

286. *See supra* text accompanying notes 47-48.

relations but to motivation,[287] and motives need not recur if the actor is given a second chance. Thus, an actor could admit that an impermissible motive tainted the decisionmaking process, but — because specific motives need not recur or even predominate — he can still opine that he would have made the same decision.

Justice Kennedy equated the traditional tort question of causation with the distinct Title VII question of motivation and disregarded essential issues relating to the separate question of trial procedure — who, for instance, must show motivation, when and why. Moreover, he failed to discuss the very policies and value judgments underlying Title VII that traditionally have influenced the allocation of burdens on the issue of causation.

2. The "Same Decision" Fiction

Finally, in creating the "same decision" test, each of the Justices undertook the creation of a counterfactual, hypothetical reality that fails to meet the "but-for" test to which they purported to subscribe. Each Justice imagined that we can separate permissible motives from a sexist mindset historically indulged. If we cannot expunge unlawful motives, we deceive ourselves if we find as fact that a decision was more likely than not based on a legitimate business reason. Under this view, the same decision test is a fiction the Court should not condone for at least two reasons beyond self-deception. First, it encourages employers to create personnel files simply to mask previous decisions made on impermissible bases. Perhaps more importantly, in the absence of an objective evidence requirement of the sort Justice Brennan proposed,[288] the test will conduce inevitably a kind of petty perjury. What employer will fail to take the stand and swear that he would have made the same decision absent the impermissible motive? Moreover, the test is not necessary to achieve the result the Court seeks. We can permit an employer to avoid liability in mixed motive cases without creating an unnecessary fiction and without these other undesirable consequences if we simply require the employer to prove that he would have made the same decision if the candidate had been a member of the group most heavily represented in the workforce, usually a white male.

3. Burdens of Proof and "Direct" Evidence

The dissenters found the plurality's approach to causation misleading, for even the plurality appeared to admit that the plaintiff must "effectively" show "but-for" causation to place the same decision burden on the employer.[289] Although Justice Kennedy twice adverted to the "thoughtful" quality of Justice O'Connor's arguments, he nevertheless opined that the benefits of a burden shift were outweighed by the potential for confusion that such a shift would entail.[290] He predicted a new generation of jurisprudence over the meaning of "substantial

287. *See supra* text accompanying notes 35-36.
288. *See infra* text accompanying notes 301-02.
289. *Price Waterhouse*, 109 S. Ct. at 1809 (Kennedy, J., dissenting).
290. *Id.* at 1806, 1811 (Kennedy, J., dissenting).

factor" and the distinction between "direct" and "indirect" evidence.[291]

This latter distinction was born of Justice O'Connor's concern for employers. In general, she subscribed to the *McDonnell Douglas/Burdine* proof scheme: the plaintiff bears the ultimate risk of nonpersuasion throughout the trial.[292] In light of the challenger's "not onerous"[293] prima facie showing, the employer "facing only circumstantial evidence of discrimination" after the prima facie showing, is entitled to a "presumption of good faith" in his decisionmaking.[294] Any departure from that scheme required significant justification and "outlines . . . [that were] carefully drawn."[295] For Justice O'Connor, the employer's "presumption of good faith" could never be overcome in a circumstantial case like *McDonnell Douglas*. Rather, only when the plaintiff has "direct" evidence of "substantial reliance" upon an impermissible criterion does this "presumption" dissipate. Only in such unusual cases, then, would Justice O'Connor consider it warranted to strap the employer with a risk of nonpersuasion.[296]

The relatively simple circumstantial showing that attends the shift in burdens of production in the more common individual treatment case of the *McDonnell Douglas/Burdine* variety explains Justice O'Connor's insistence on "direct" evidence before she would reallocate the ultimate risk of nonpersuasion. The very premise of that scheme, she wrote, is the plaintiff's difficulty in unearthing "direct evidence" of discriminatory motives. The substitute, stripped down *McDonnell Douglas* prima facie case, should place on the employer only the burden of going forward with evidence of justification.[297]

Alternatively, if plaintiff can produce "direct" evidence — testimony about a slur, or about a policy explicitly geared to gender, or, more doubtfully, reliance on a stereotype — she has gone as far as she can go; to require plaintiff to continue to carry the ultimate burden of nonpersuasion is simply unfair.[298] Given such strong plaintiff's evidence, the failure to allocate the risk of nonpersuasion to the employer in the multifactor, subjective decisionmaking context might be "tantamount to declaring Title VII inapplicable to such decisions."[299] As Justice O'Connor chided the dissent, if presumptions and burden shifts reflect " 'judicial evaluations of probabilities and [ought] to conform with a party's superior access to the proof,' one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision

291. *Id.* at 1812 (Kennedy, J., dissenting) (also predicting confusion in jury instructions in litigation under 42 U.S.C. § 1981 and Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 634, both of which recognize counterparts to Title VII's treatment mode).

292. *See supra* text accompanying notes 45-46.

293. *Price Waterhouse*, 109 S. Ct. at 1801 (O'Connor, J., concurring) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981)).

294. *Id.* at 1798-99 (O'Connor, J., concurring). The inconsistency between this "presumption" and its progenitor, *Burdine*, is discussed *infra* at text accompanying notes 313-15.

295. *Id.* at 1801 (O'Connor, J., concurring).

296. *Id.* at 1800-01 (O'Connor, J., concurring).

297. *Id.* at 1801-02 (O'Connor, J., concurring).

298. *Id.* at 1802 (O'Connor, J., concurring).

299. *Id.* at 1803 (O'Connor, J., concurring) (citing Fields v. Clark Univ., 817 F.2d 931, 935-37 (1st Cir. 1987); Thompkins v. Morris Brown College, 752 F.2d 558, 563 (11th Cir. 1985)).

would have been justified by wholly legitimate concerns."[300]

Justice Brennan placed that burden on the defendant by denominating the "same decision" issue an affirmative defense.[301] After the plaintiff shows that a forbidden criterion was a factor in the adverse employment decision, the employer bears the burden of proving by a preponderance of "objective" evidence that it would have made the same decision had it not relied on impermissible factors.[302] Speaking for the entire Court, he found no persuasive reason to depart from normal standards of proof in civil litigation; the employer need not show that it would have made the same decision by proof of "clear and convincing evidence."[303] Then, speaking for only four members of the Court, he wrote that the employer must present "some *objective* evidence as to its probable [i.e., same] decision in the absence of an impermissible motive."[304] On this issue, Justice Brennan responded specifically to Justice White's concurrence.[305] Justice White found "no special requirement that the employer [produce] . . . objective evidence" to support the "same decision" inquiry.[306] He concluded that any credible testimony that "the action would have been taken for the legitimate reasons alone . . . [would constitute] ample proof."[307] In light of a trial court finding that the employer had, in fact, relied upon impermissible factors, Justice Brennan found Justice White's position "baffling."[308]

The dissenters made the doubtful[309] assertion that the "Court" would impose the "same decision" burden on the employer only when plaintiff's prima facie evidence is "direct" as well as substantial.[310] More convincingly, they ob-

300. *Id.* at 1802 (O'Connor, J., concurring) (quoting Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977)).

301. *Id.* at 1788 (plurality opinion).

302. *Id.* at 1790-91 (plurality opinion).

303. *Id.* at 1792-93 (plurality opinion).

304. *Id.* at 1791 (plurality opinion) (emphasis added).

305. Justice Brennan also made a comment apparently addressed to Justice Kennedy, who began his opinion by counting votes and characterizing the various opinions. Justice Kennedy wrote that the employer needed to show only that its employment decision "would have [been] justified . . . without reference to any impermissible motive." *Id.* at 1806 (Kennedy, J., dissenting). Although Justice Kennedy referenced that statement to the White and O'Connor opinions, neither opinion will sustain that reading. Justice Brennan seemed to be speaking for six members of the Court when he said that "justification" is not the standard; the employer must prove that it would have made the same decision without reference to the forbidden criterion. *Id.* at 1791-92 (Brennan, J., plurality).

Justice Kennedy seemed to be saying that if the employer "could" have made the same decision, it will be exonerated. There is, of course, at least potentially a significant difference between "would" and "could." Professor Ortiz surveys this issue in the equal protection context and concludes that moving from "would" have made the same decision to "could" have made the same decision undermines the court's need to analyze the "actual policy's worthiness." Ortiz, *supra* note 139, at 1113-15. If the Court ultimately subscribes to such a test, it would give teeth to Justice O'Connor's normative statement in *Watson* that the courts are not competent to reorder employers' hiring decisions. *See supra* texts accompanying notes 158, 162-63. Moreover, the substitution of "could" for "would" also totally undermines "but-for" causation.

306. *Price Waterhouse*, 109 S. Ct. at 1796 (White, J., concurring).

307. *Id.* (White, J., concurring).

308. *Id.* at 1791 n.14 (plurality opinion).

309. *See supra* text accompanying note 279. If, as the cited text suggests, Justice White took no position on the "direct" evidence prerequisite, then only four members of the Court, the dissenters and Justice O'Connor, subscribe to it.

310. *Price Waterhouse*, 109 S. Ct. at 1812 (Kennedy, J., dissenting).

served that the plurality's insistence on "objective" evidence to discharge that burden had failed to carry the day.[311] In any event all the justices agreed that the quantum of the employer's burden on that issue is the ordinary civil standard, a preponderance of the evidence.[312]

The "direct-indirect" evidence requirement is hard to assess. It may either reflect a relatively pedestrian concern about fair trial procedure or, alternatively, mask a judicially erected, artificial barrier to recovery. If Justice O'Connor means only that something more than the standard *McDonnell Douglas/Burdine* prima facie showing is required to reallocate the risk of nonpersuasion in the average disparate treatment case, her formulation is unexceptionable.[313] The prima facie individual treatment case is not onerous; to some extent it is merely a procedural device for moving the inquiry forward. It only begins to assay the employer's intent and therefore provides marginal justification for reversing the ordinary burdens of persuasion. At the same time, however, Justice O'Connor's conclusion that the employer is entitled to a presumption of good faith after the plaintiff's initial *McDonnell Douglas* showing seems inconsistent with current law, which permits the imposition of liability immediately after plaintiff's prima facie case.[314] This would happen, for example, if, after the prima facie showing, the employer fails to offer evidence of a legitimate business reason.[315]

Justice O'Connor's distinction between types of evidence may betray hostility towards Title VII. If she is suggesting that circumstantial evidence of illicit intent will not effect the shift at *any* stage of an inferential treatment case, she has sorely confused probative value with the nature of the evidence.[316] It presses hard on intellectual vapidness to suggest that only statements which more or less "directly" reveal an employer's unlawful motives justify a finding that the employer relied upon an impermissible criterion and in turn warrant a persuasion burden shift. First, even when such statements of intent are found,

311. The three dissenters joined Justice White in explicitly rejecting the objective evidence requirement. *Id.* at 1806 (Kennedy, J., dissenting). Justice O'Connor did not squarely address the point, writing simply that the employer must "demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action." *Id.* at 1804 (O'Connor, J., concurring).

312. The trial court had required the employer to meet that burden by clear and convincing proof. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1120 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). The appellate court affirmed without discussion. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 472 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). Without dissent as to this portion of the opinion, the Supreme Court reversed, holding that the ordinary preponderance of the evidence standard would adequately serve the public policies underlying Title VII. *Price Waterhouse*, 109 S. Ct. at 1792-93 (plurality opinion).

313. In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the Court held that if the plaintiff has access to direct evidence of discrimination, it could not rely on the *McDonnell-Douglas* inferential scheme. *Id.* at 121. Although *Thurston* is not mentioned in the *Price Waterhouse* opinion, the Court seems to be limiting the burden shift in a mixed motive case in a similar fashion.

314. *See Price Waterhouse*, 109 S. Ct. at 1798-99 (O'Connor, J., concurring).

315. *See supra* text accompanying notes 40-41.

316. A common articulation of the distinction between direct and circumstantial evidence focuses on whether the fact-finder must make an inference to determine materiality. If the immediate inference from the evidence is the existence or nonexistence of a material fact, the proof is direct; if an intermediate inference is required, it is circumstantial. R. CARLSON, E. IMWINKELRIED & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 139 (1983); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 43 (1987).

they frequently are not "direct," but only circumstantial evidence of the proscribed conduct, namely, discrimination because of sex. In that sense Justice O'Connor's test fails in its very first application.[317] Second, drawing any conclusion about the probative value of the evidence from the mere fact that it is circumstantial is impossible; only the particulars of each incident reflect on the weight of the evidence.[318]

A third, related problem is the distinction's clear overbreadth. Most employers are circumspect—or will be now that corporate counsel have brought word of *Price Waterhouse* home.[319] Business managers, like lawyers, often cover their tracks. Accordingly, it will be difficult for many plaintiffs to point to such direct evidence. In addition, it is simply too easy to imagine believable scenarios where probative circumstantial evidence beyond the simple prima facie showing would clearly reflect improper motives. For example, assume a systemic disparate treatment claim by twenty-five fully qualified minority employees of a company. They prove that on one hundred occasions, they sought but were denied promotion to management positions and that on each occasion, the job was held open until filled by a white male. It ignores reality to suppose that the employer was not engaging in proscribed conduct.

Moreover, read literally, the distinction renders evidence of stereotyping irrelevant to the burden inquiry, regardless of how rampant its use may be within a particular plant or company. Evidence of the existence of stereotyping behavior is not "direct" evidence of motive, but omitting such evidence from the allocation determination is, at best, shortsighted. As law evolves it soaks up and digests information provided by other disciplines.[320] No one advocates arbitrarily isolating evolving legal doctrine from sources of information in the behavioral sciences that may provide penetrating insights into the operations of

317. Consider, for example, the statements "I hate women and I'm going to fire her," or "Blacks just can't work worth a damn and I'm going to lay him off." Both reveal the state of mind of the speaker; both, however, are only circumstantial evidence of discrimination because of an impermissible motive. All we can ever produce is circumstantial evidence of the thoughts of an individual, even if a letter says "I fired her because she's a woman." Those thoughts are forever immune to direct examination. There is no direct evidence of intent *in this case*. *See* G. LILLY, *supra* note 316, at 248 & n.3; MCCORMICK, *supra* note 42, § 295; C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 34.

318. *See, e.g.*, Holland v. United States, 348 U.S. 121, 140 (1954) ("[c]ircumstantial evidence . . . is intrinsically no different from testimonial [direct] evidence"); G. LILLY, *supra* note 316, at 43-44 (no conclusion can be drawn about probative value from the distinction between direct and circumstantial evidence). Professor Prosser asks rhetorically: "There are footprints in the mud, and a hundred eyewitnesses testify on oath that they sat there the whole time and no one passed by. Can a jury find that someone did?" W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 238 (8th ed. 1988). And, of course, some "direct" evidence is notoriously unreliable. *See* Levine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079 (1973).

319. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 21, at 34; Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 806-14 (1989) (discussing the current debate within feminist circles on the merits of "sameness" or "difference" as a way of achieving equality for women).

320. *See generally* Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 (discussing a theory of precedential authority based on the assumptions of the natural and social sciences); Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985) (discussing the evolutionary tradition in Anglo-American jurisprudence).

discrimination. Regrettably, Justice O'Connor's direct evidence requirement does just that.

Finally, Justice O'Connor herself supports the imposition of a persuasion burden on the employer in a different kind of treatment case: the classwide, "pattern and practice" case grounded in evidence of *systemic* disparate treatment.[321] Yet there, as in the individual treatment case, the ultimate conclusion about intentional discrimination rests only on statistical inference. Granted the inference is both stronger and broader than in the individual case, but the fact remains that plaintiff's evidence is credited as demonstrating unlawful discrimination despite its lack of resemblance to any other type of evidence Justice O'Connor considers "direct."

Given the number of times she reiterated the need for direct evidence, and her generally insensitive view of evidence of stereotyping, Justice O'Connor's "direct evidence" requirement may represent more than a simple reaction to the relatively easily met prima facie burden in a treatment case. If so, and if the "direct-indirect" distinction is interpreted to preclude a burden shift in the absence of written statements or oral testimony that bear immediately on the employer's motives under this scenario, one can conclude that the direct evidence mandate reflects one of at least two positions. It may reflect an artificially imposed barrier to recovery that simply mirrors arbitrary judicial disfavor for the cause of action.[322] Alternatively, the requirement may represent an attachment to individual autonomy that refuses to find blame in the absence of substantial, direct evidence of subjective bad faith.

4. Expert Testimony of Gender Stereotyping

A large part of plaintiff's case in *Price Waterhouse* was built on the existence of gender sensitive stereotypes that permeated the thinking of some number of the firm's male-dominated partnership hierarchy. The problem of linking those illicit, largely unconscious motives to the liability-dependent finding that an adverse employment decision was made "because of . . . sex" occupied much of the lower courts' opinions and informed the Court's resolution of the issues discussed above.

One unambiguous aim of Title VII is the equal treatment of women and men in the labor pool.[323] As one commentator writes: "[S]exual equality . . .

321. *Price Waterhouse*, 109 S. Ct. at 1799 (1989) (O'Connor, J., concurring) (citing Teamsters v. United States, 431 U.S. 324 (1977) and Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)).

322. For a contrary conclusion, see Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment under Title VII*, 87 MICH. L. REV. 863, 877-82 (1989). The writer's empirical assumption is that most employers in fact have more than one motive. *Id.* at 877-82. Yet the argument is made that the Court should adopt a direct evidence test in part because in mixed motive cases, the Court is not convinced by either side's evidence. But if the assumption about multiple motives is correct, then the court should be impressed when there *is* an adjudicated finding of an impermissible motive regardless of the type of evidence that yields the findings. It is unreasonable to suppose that the discovery of an unlawful motive is dependent upon direct evidence.

323. Title VII's application to gender based discrimination raises unresolved tensions about its goals similar to the tension underlying its application to race discrimination. *See supra* texts accompanying notes 19-33, 51-53 & 59-72. The statute's scope and remedial power will depend upon which of two views of the problem the Court or Congress adopts. In one modest, if yet unrealized

means . . . that those of one sex, in virtue of their sex, should not be in a socially advantageous position vis-à-vis those of the other sex."[324] In its *Guidelines on Discrimination Because of Sex*, the EEOC states succinctly that "[t]he refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general" is not permissible.[325] The *Guidelines* also forbid job denial "based on stereotyped characterizations of the sexes."[326] The Commission gives as one example the notion that "women are less capable of aggressive salesmanship," noting that "[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[327] Still, federal courts have been somewhat less consistent either in recognizing employer stereotyping as per se gender discrimination under Title VII,[328] or in condemning legislative stereotyping as unconstitutional.[329]

Stereotyping takes root in a deeply embedded, richly reinforced cultural ideology that has elevated males over females.[330] So strong is the ideology's

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view of the problem, Title VII exists simply as a legislative requirement that differentiations made on the basis of gender be justified by some rational difference between the sexes. Differentiation is legal if it is not arbitrary. Another vision sees Title VII as a vehicle for ending male dominance as a defining value of our culture. Thus, discrimination exists if laws that treat men and women differently maintain male domination. C. MACKINNON, SEXUAL HARASSMENT OF THE WORKING WOMEN: A CASE OF SEX DISCRIMINATION 101-06 (1979).

324. Jaggar, *On Sexual Equality*, 84 ETHICS 275, 275 (1974) (envisioning a radically desexualized society and arguing that sexual inequality is almost entirely an institutional phenomenon having no basis in physiological differences). For a different view that emphasizes a biological basis for differences in temperament that the author believes to have implications for societal ordering, see Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617 (1984). The current stage of the debate within feminist literature is described in Williams, *supra* note 319.

325. Uniform Guidelines, *supra* note 54, at § 1604.2(a)(1)(i) (1988). The prohibition arises in the context of what constitutes a bona fide occupational qualification.

326. *Id.* at § 1604.2(a)(1)(ii).

327. *Id.*

328. *Compare* Dothard v. Rawlinson, 433 U.S. 321, 334-37 (1977) (paying lip service to the evils of gender stereotyping but upholding a sex-based classification resting largely on a stereotype of women as relatively powerless sex objects) *and* Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985) (condemning only those gender stereotypes that presented "distinct employment disadvantages" and thus upholding gender-based differences in employer's rules about dress and grooming), *cert. denied*, 475 U.S. 1058 (1986) *with* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987) (upholding state protective legislation because it "does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers").

329. *Compare* Califano v. Webster, 430 U.S. 313 (1977) (upholding compensatory legislation that favors women where the benefits were calculated to redress a specific well-articulated problem) *with* Califano v. Goldfarb, 430 U.S. 199 (1977) (criticizing legislative stereotyping and striking down a paternalistic plan that made it more difficult for widowers to collect benefits where the plan took no account of the relative financial status of individual men and women). *See* Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 145 (1978) (describing the benefits plan in *Goldfarb* as a "knee jerk reflex, a certain way of looking at [women]").

330. *See* B. HARRIS, BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY 3-22 (1978). Professor Harris traces the intellectual origins of what she labels "An Ideology of Inferiority" from biblical times through colonial America. *Id.* She finds that during the Victorian period ideology had superimposed upon society "a rigid conceptual distinction between the home and the economy and a determination to preserve that separation as desirable," *id.* at 33, which was ultimately—and arbitrarily—tied to anatomy, physiology and reproduction. *Id.* at 40-41. *See, e.g.*, C. MACKINNON, *supra* note 323, at 101. Rosemary Tong relates:

> At every turn, nature appears hand in glove with culture, so that the special definition of woman's place within man's world appears to conform exactly to her differences from him.

grasp that even social scientists researching gender-based differences in work socialization are frequently impervious to it.[331] The problem has, until recently, escaped unbiased study and measurement.[332] If social scientists studying the phenomenon—those who ought to be sensitive to stereotyping behavior—fail to recognize it in themselves, one has little cause to wonder why the work-a-day person has little awareness of the problem.[333]

The problem manifests and reinforces itself in a variety of ways;[334] but most important, at least in the present context, is the incompatible dominant cultural virtues that seem to be demanded of the woman and the worker.

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> But the same reality can be seen as the fist of social dominance hidden in the soft glove of reasonableness—the ideology of biological fiat.

R. TONG, WOMEN, SEX, AND THE LAW 198-99 (1984) (connecting the problem to the traditional Freudian notion of the Oedipal crisis, and concluding that stereotypical notions about sexual identity have been reinforced profoundly by erroneous perceptions about the relative value of female and male genitalia).

331. *See* S. DEX, THE SEXUAL DIVISION OF WORK: CONCEPTUAL REVOLUTIONS IN THE SOCIAL SCIENCES (1985). Professor Dex summarizes a study of attitudes toward work in which the researchers, following the conventional wisdom in industrial sociology, used entirely different models to discuss the attitudes. *Id.* For males, researchers used a "job model," which viewed attitudes through the work they did; for females, the researchers employed a "gender model," which viewed attitudes towards work in relation to women's personal traits or family life. *Id.* at 36. As Dex concludes, the "use of sex-segregated models coincides with the view of men as primarily bread winners . . . and women primarily as wives." *Id.* The study surveyed was Feldberg & Glenn, *Male and Female: Job versus Gender Models in the Sociology of Work*, 26 SOC. PROBS. 524 (1979). The older studies that contained the conventional wisdom were H. BEYNON & R. BLACKBURN, PERCEPTIONS OF WORK: VARIATIONS WITHIN A FACTORY (1972), and R. BLAUNER, ALIENATION AND FREEDOM: THE FACTORY WORKER AND HIS INDUSTRY (1964).

332. S. DEX, *supra* note 331, at 36-37; Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M.L. REV. 91, 91 (1987); Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 354-55 (1980).

333. A number of writers have surveyed and summarized the social science research on both the pervasiveness of the stereotyping problem and the difficulty men have even seeing that it exists. *See* Bratton, *supra* note 332, at 98-104; Taub, *supra* note 332, at 355-56; Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 590 (1977).

Even when men acknowledge the existence of stereotypes and the harassment that may follow from them, some managers are incapable of seeing it in themselves. Meyer *et al.* relate an interview with a senior manager at a St.Paul-Minneapolis broadcasting organization. Asked how he would respond to an incident of sexual harassment in his organization, he opined that he would "fire his butt" because he demanded that his personnel "treat people fairly and not abuse [their] power." Later, without a hint of recognition for the incompatibility of his position, he remarked, " 'You know, some women dress so that people will look at their breasts.' " And later still: " 'A man has to earn a living, you know. Most women don't—they can get married and be taken care of.' " M. MEYER, I. BERCHTOLD, J. OESTREICH, & F. COLLINS, SEXUAL HARASSMENT 39 (1981) (quoting L. FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 151-52 (1978)).

334. Dex lists a number of common stereotypes that operate in the workplace, including the following:

—Women find it hard to reject the notion that their prime role is in the home 'servicing' male breadwinners.

—Women work only for pin money.

—Women have an instrumental orientation to work: young women are only interested in work as a means to find a husband; older women to finance home improvement.

—Women only work for money and are not involved in work personally.

—Women do not like to show initiative in their work and they are less interested in challenging jobs or promotion than men.

S. DEX, *supra* note 331, at 37 (citations omitted); *See* Taub, *supra* note 332, at 352-53 (women's participation in the market is secondary to men's).

> The model of the successful manager in our culture is a masculine one. The good manager is aggressive, competitive, firm, just. He is not feminine, he is not soft or yielding or dependent or intuitive in the womanly sense. The very expression of emotion is widely viewed as a feminine weakness that would interfere with effective business processes.[335]

Given the prevailing perception of the value of the woman's virtues, the stereotypical expectation for the woman as manager presents the classic "Catch-22": if she is competent and aggressive, she's deficient as a woman; if she retains her femininity, she is not doing her job. Thus, any conduct that draws attention to her gender distracts from management's ability to view the employee as a worker and measure worth—productivity—without regard to gender.[336]

Finally, from the perspective of male-dominated management, stereotypes are useful. At the simplest level, they permit the easy maintenance of the gender hierarchy; the employer discounts the positive value of any information actually received about a female job applicant by reference to the stereotype that informs his decisionmaking.[337] At the bottom line, stereotypes enable the employer to reduce information costs in hiring; management makes individual decisions about productivity without costly research into individual merit. The stereotype's negative valence operates ineluctably to the detriment of the female: if the man and woman look roughly equal on paper, stereotypical expectations easily tip the balance in favor of the man.[338] Moreover, the true measure of their lethal effect is that stereotypes generally operate unconsciously.[339] In short, stereotyping is a mischievous, ubiquitous, yet functional phenomenon that is incompatible with a bias-free work force.

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335. D. MCGREGOR, THE PROFESSIONAL MANAGER 23 (1967), *quoted in* Taub, *supra* note 332, at 356.

336. Taub, *supra* note 332, at 357-61. One researcher approaches the area through the "concept of marginality," which applies to individuals who live in two cultural systems that impose different standards of measurement for individual worth. In the case of women in the professions, the conflict is between a "nurturant, passive, emotional, home-oriented, and subordinate to men" standard, and the modern standard that demands "rationality, striving, and achievement in the open market." V. SAPIRO, THE POLITICAL INTEGRATION OF WOMEN: ROLES, SOCIALIZATION, AND POLITICS 5-6 (1983). The goals implicit in the standards may be mutually exclusive; " 'full realization of one role threatens defeat in the other.' " *Id.* at 6 (quoting Komarovsky, *Cultural Contradictions and Sex Roles*, 52 AM. J. SOC. 184, 184 (1946)).

337. Taub, *supra* note 332, at 353. *See* M. LEVIN, FEMINISM AND FREEDOM 70 (1987). Professor Levin attacks feminism, noting that "[i]f stereotypes were capricious, they would be dysfunctional, and if they were dysfunctional we would not be here." *Id.* A similar point is made by Browne, *supra* note 324, at 653-54. The simple response to such thinking is that it confuses the descriptive with the normative. That these stereotypes exist does not preclude our ability to challenge their usefulness in the society we would like to have. *See* Wasserstrom, *supra* note 333, at 610-11.

338. Perhaps the most common form of this phenomenon is the duplicate income syndrome: "She's just the second breadwinner anyway!" *See, e.g., supra* notes 333-34.

339. Even worse, as Wasserstrom points out, is that many members of the dominant group do not believe that sexism is unjustifiable. Wasserstrom, *supra* note 333, at 590. Many of us have viewed with collective embarrassment the pot-bellied, middle-aged man who proudly wears the sweatshirt declaring "Chauvinist Pig!" For him sexist attitudes are the natural way of the world. He has, of course, failed to make two distinctions: the first between descriptions of and prescriptions for our society, *id.* at 610-14; the second is between physiological and anatomical sex differences, which are dichotomous, and the ideal types we label "masculinity" and "femininity," which are not. V. SAPIRO, *supra* note 336, at 59.

Hopkins had significant evidence that partners expected her to conform to a gender stereotype, and that Price Waterhouse had a history of stereotyping. One male opined that he would never vote favorably for a woman candidate; others criticized a woman candidate as a "women's libber"; and two unsuccessful women candidates were referred to as "curt, brusque and abrasive" and a "Ma Barker."[340] Hopkins herself was criticized for aggressive behavior and for using profanity; characterized as a "woman manager"; and told that she lacked social grace, needed a course in a charm school, and "overcompensated for being a woman."[341]

Price Waterhouse took no measures to discourage its partners from using and relying on sexual stereotypes in its decisionmaking process.[342] The partnership claimed that her candidacy was denied because her abrasive conduct "might jeopardize morale and [make her] . . . incapable of successfully supervising staff as [she] move[d] among different locations in response to work demands."[343] Interestingly, however, there was no doubt about her productivity. Not only did she bring huge contracts into the firm, but "[s]he had no difficulty dealing with clients and her clients appear to have been very pleased with her work."[344]

Hopkins employed Dr. Susan Fiske, "a well qualified expert . . . who ha[d] done extensive research in the field of stereotyping," to explain the significance of the comments and general partnership evaluation process at Price Waterhouse.[345] Price Waterhouse never challenged her credentials.[346] Although Fiske disclaimed any ability to identify particular statements as motivated by unconscious stereotypes, she did express an opinion that "unfavorable comments by operation of male stereotyping, slanted in a negative direction by male partners, were a major factor in the firm's evaluation of the plaintiff."[347] She based her opinion on the presence of

> "convergent indicators," such as the extremely small number of female partners at the firm; the absence of any other female candidates among the 88 nominated along with Hopkins; the exaggerated and extremely intense negative reactions of Hopkins's critics to behavior that supporters perceived as positive; the ambiguous criteria the firm used to evaluate a candidate's personal qualities; the absence of complaints from Hopkins's clients; and the positive assessments of Hopkins in ar-

340. Hopkins v. Price Waterhouse, 825 F.2d 458, 476 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). The "women's libber" was made a partner. Price Waterhouse argued that because of this fact, the comment could not reflect stereotyping. As the court pointed out, Price Waterhouse missed the point: the comment reflected the pervasive attitude within the partnership system. *Id.*

341. *Id.* at 463; Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1113 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

342. 618 F. Supp. at 1117; *see* 825 F.2d at 466-68.

343. 618 F. Supp. at 1114.

344. *Id.* at 1112.

345. *Id.* at 1117.

346. 825 F.2d at 467. This is a critical fact that surely undermines the dissent's attack on the expert. *See infra* text accompanying notes 358-59.

347. 618 F. Supp. at 1117.

eas where performance could be measured objectively; (*e.g.*, business generation).

Dr. Fiske concluded that gender stereotyping tainted Price Waterhouse's partnership decision; the lower courts agreed.[348]

Some members of the Court simply dismissed or derided Hopkins's evidence of stereotyping. Justice O'Connor's treatment of the issue was brief. Gender specific comments "unrelated to the decisional process" could not affect the ultimate burden of persuasion.[349] Moreover, Fiske's testimony alone did not satisfy the direct evidence requirement and, hence, could not alone justify that burden shift.[350] Mere reference to a "lady candidate" was, in Justice O'Connor's opinion, "perfectly neutral and nondiscriminatory."[351] Nothing less than "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision" would do.[352]

Justice O'Connor's virtual dismissal of Hopkins's evidence of stereotyping is surprising. In *Watson*, she had treated stereotyping as a subjective practice, although one with unverifiable effects. In fact, the link between stereotypes and subjective employment standards was central to her conclusion that plaintiffs could use disparate impact analysis to challenge such procedures.[353] *Price Waterhouse* rested in large measure on the very evidence of "subconscious stereotypes and prejudice" that Justice O'Connor, writing just one year earlier in *Watson*, had feared might subvert Title VII.[354] Yet confronted with a case involving upper-echelon management, Justice O'Connor accorded that evidence little significance.

The plurality responded more directly to Price Waterhouse's arguments, and found more weight in the plaintiff's evidence than did Justice O'Connor. To the charge that Hopkins failed to prove that the evidence of stereotyping played a role in the decision, Justice Brennan responded that the partnership "in no way disclaimed reliance on [stereotyped] comments."[355] He found probative district court Judge Gesell's observation that the firm had failed to "sensitize" its members to the dangers of stereotyping.[356] Justice Brennan found it unnecessary to determine whether Hopkins's evidence was, standing alone, sufficient

348. 825 F.2d at 467. The trial court was ambivalent. Although Judge Gesell crafted a sensitive opinion that reflected study of the subject and an understanding that stereotyping operates in subtle, unconscious and insidious ways, he found it "impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious . . . assumptions related to sex." *Hopkins*, 618 F. Supp. at 1118. Nevertheless, he held that Price Waterhouse maintained a system that "gave weight . . . to . . . biased criticisms" and did nothing to discourage it. *Id.* at 1119.

349. *Price Waterhouse*, 109 S. Ct. at 1804 (O'Connor, J., concurring).

350. *Id.* at 1804-05 (O'Connor, J., concurring). O'Connor did suggest, however, that "stray remarks in the workplace" might be probative of sexual harassment. *Id.* at 1804 (O'Connor, J., concurring).

351. *Id.* at 1805 (O'Connor, J., concurring).

352. *Id.* at 1805 (O'Connor, J., concurring).

353. *See supra* text accompanying notes 100-02.

354. *Watson*, 487 U.S. at 990.

355. *Price Waterhouse*, 109 S. Ct. at 1794 (plurality opinion).

356. *Id.* at 1794 & n.16 (plurality opinion).

to shift the burden of proof. Given the nature of the comments about Hopkins, he stated that Dr. Fiske's testimony "was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course in charm school.' "[357]

By contrast, Justice Kennedy's view of Dr. Fiske in particular, and evidence of stereotyping in general, was hostile. He barely contained his contempt for Fiske's credentials and integrity, opining that a plaintiff who engages her "should have no trouble showing that sex discrimination played a part in any decisions."[358] In his opinion, Fiske's conclusion that the partnership engaged in gender stereotyping, a conclusion she based on various partners' descriptions of Hopkins and reached without meeting the partners or the subject of the comments, was not worthy of belief by a fact-finder.[359] For Justice Kennedy, reading anything into such comments was impossible.[360] Moreover, Title VII did not require employers to "disclaim reliance" on stereotyping behavior or impose on them a "duty to sensitize" recalcitrant personnel.[361] The whole business smacked of thought control, and of using Title VII "as an engine for rooting out sexist thoughts."[362] In his opinion, such a use of Title VII was illegitimate.

The Court's breezy opinions, and especially those of Justices O'Connor and Kennedy, stand in stark contrast with the exacting analysis of the district court. Judge Gesell was uncomfortable with the evidence of stereotyping but had done his homework.[363] He was unwilling to find that Fiske's testimony was a sufficient predicate for a determination that the refusal to promote Hopkins constituted intentional discrimination. "Congress [had not] intended to have courts police every instance where subjective judgment may be tainted by . . . unarticu-

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357. *Id.* at 1793 (plurality opinion).

358. *Id.* at 1813 n.5 (Kennedy, J., dissenting). There is surprisingly little discussion in the Court's opinion of Federal Rules of Evidence 702 and 703, which deal with expert qualifications and the bases of experts' opinions, respectively. During trial, expert Fiske's statement that she based her conclusions on information of a type that was reasonably relied upon by experts within her field was unchallenged. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 467 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). In light of its admissibility under rules 702 and 703, Justice Kennedy's objection was, in effect, not directed at her conclusion, but at the standards of her field. However, he should have realized that the issue simply was not before the Court.

359. *Price Waterhouse*, 109 S. Ct. at 1813 n.5 (Kennedy, J., dissenting). Justice Kennedy relied almost entirely on the analysis of Judge Williams, who dissented from the court of appeals' decision. *Hopkins*, 825 F.2d at 473-78.

360. Perhaps the more appropriate question is this: How can we fail to read something into the comments in light of her uniformly positive interaction with clients and her spectacular business-generation ability?

361. *Price Waterhouse*, 109 S. Ct. at 1813 (Kennedy, J., dissenting).

362. *Id.* at 1813-14 (quoting Hopkins v. Price Waterhouse, 825 F.2d at 477 (Williams, J., dissenting)). That some Justices of the Supreme Court view this evidence derisively should not be surprising. *See* Vladeck & Young, *Sex Discrimination in Higher Education: It's Not Academic*, 4 WOMEN'S RTS. L. REP. 59, 62-65 (1978) (surveying lower court cases dealing with allegations of discriminatory promotion and tenure decisions in which the trial court judges made little effort to hide their unsympathetic view of such suits). For a recent example of a suit in which the court turned stereotypes into a presumption against which women must fight, see E.E.O.C. v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). For a description and indictment of the case, see Williams, *supra* note 319, at 813-21.

363. The court cited a number of studies which document the phenomenon described in the preceding subsection. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117-18 nn.10-12 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

lated, unconscious assumptions related to sex."[364] At the same time, he understood the social science documentation of stereotyping within the employment hierarchy. "[T]he subtle and unconscious discrimination created by sex stereotyping appears to be a major impediment to Title VII's goal of ensuring equal employment opportunities."[365] Moreover, he found that Price Waterhouse consciously maintained a system "that gave weight to . . . biased criticisms" and did nothing to correct the system.[366]

Judge Gesell may have confused the intent of Congress with the weight to be accorded to evidence when he expressed skepticism that Congress wanted the courts to police illicit assumptions. Congress clearly did want to create gender-neutral conditions in the workplace. Any evidence, including evidence of stereotyping, that bears upon that goal may be relevant in a proper case. At the same time, Judge Gesell's hesitation is understandable. Judges, like most of us, probably assume that they are equally astute observers of human nature as most expert witnesses and are accordingly suspicious about explanations of human behavior based on controversial assumptions. But to deny entirely the benefit of a well qualified expert—and to belittle her contribution to the point of ridicule, as did the dissenting Justices in the Supreme Court—is spurious. In effect the dissent passed on the weight of the evidence and usurped the role of the fact-finder. To conclude that the literature on sexual stereotyping merely confirms common sense is one thing;[367] it is quite another to conclude that the information is without value.

There is a deceptive quality of activism to *Price Waterhouse*. Its rhetoric seduces the casual reader into believing that the Supreme Court fortified the individual disparate treatment case by saddling employers with the burden of demonstrating their reliance on nondiscriminatory factors whenever the plaintiff prima facie shows reliance on an impermissible one. In fact, the case does almost the opposite.

In the first place, the Court imposed the "same-decision" burden under rather limited circumstances. A bare majority, the plurality plus Justice White, would require the employer to shoulder that burden only when plaintiff's prima facie evidence of individual disparate treatment is, as Justice White wrote, "substantial."[368] Therefore, it remains to be seen if the employer persuasion burden will be triggered not just by the unusual "direct" evidence of gender stereotyping presented in *Price Waterhouse*,[369] but by the more common inferential evidence approved by *McDonnell Douglas* and *Burdine*. If Justice O'Connor's position carries the day, as it well may in the wake of Justice Brennan's resignation, the answer to that question will be negative; she would impose the "same-decision" burden on the employer only when the plaintiff's prima facie evidence is

364. *Id.* at 1118.

365. *Id.* at 1117-18 (citing Taub, *supra* note 332, at 349-61).

366. *Id.* at 1119.

367. *Id.* at 1120 n.15. That is also how we interpret Justice Brennan's "icing on the cake" statement. *See supra* text accompanying notes 356-57.

368. *Price Waterhouse*, 109 S. Ct. at 1795 (White, J., concurring).

369. *Id.* at 1801-05 (O'Connor, J., concurring).

"direct."[370]

Second, the Court's views actually represent a retreat from the posture of most intermediate federal appellate courts that have come to grips with the mixed motive question.[371] Two circuits had mandated the "same-decision" showing whenever the plaintiff's evidence showed that impermissible employer motivation played *any* part in the adverse decision.[372] Five others had found that the employer burden was triggered *either* when the discriminatory motive was a "substantial" factor, as Justice White insisted, *or* as the Supreme Court plurality would have permitted, when it was merely a "motivating" factor.[373] Further, two of these seven circuits had raised the quantum of the employer burden to "clear and convincing" evidence; even the *Price Waterhouse* plurality settled for the preponderance standard.[374] On balance, it is probably fair to say that the decision, far from advancing the typical case of individual disparate treatment, has somewhat set it back.

## VI. Of Baselines and Policies

It is surely impossible for a judge (or a law professor) to analyze a statute or a case without a commitment to a pre-existing cognitive foundation.[375] In the absence of absolute clarity, we are all called upon to make judgments against a backdrop of intensely personal experiences and communally shared tenets that inform our analysis and direct the very questions we ask.[376] In short, we are asked to determine the intent of the legislature through lenses that always filter reality; the best we can hope for is integrity and honesty; we cannot avoid discretion. Discretion, working within the loose joints of Title VII, explains the Reagan Court's responses in *Watson*, *Wards Cove*, and *Price Waterhouse*. This section defines and applies the baselines that direct the new majority's exercise of discretion in the resolution of employment discrimination cases.

### *A. Defining Baselines*

Soon after the turn of the century, the Supreme Court decided companion

370. *See id.* (O'Connor, J., concurring).

371. *Price Waterhouse*, 109 S. Ct. at 1784 n.2 (plurality opinion) (list and discussion of federal courts of appeals decisions).

372. *Id.* (plurality opinion) (citing Fadhl v. City and County of San Fransico, 741 F.2d 1163, 1165-66 (9th Cir. 1984); Bibbs v. Block, 778 F.2d 1318, 1320-24 (8th Cir. 1985) (en banc)).

373. *Id.* (plurality opinion) (citing Fields v. Clark University, 817 F.2d 931, 936-37 (1st Cir. 1987); Berl v. Westchester County, 849 F.2d 712, 714-15 (2d Cir. 1988); Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 115 (6th Cir. 1987); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983); Toney v. Block, 705 F.2d 1362, 1366 (D.C. Cir. 1983)).

374. *Id.* (citing *Toney*, 705 F.2d at 1366; *Fadhl*, 741 F.2d at 1165-66).

375. Sunstein, *supra* note 12, at 903, has addressed this issue in the context of constitutional law. We find it no less true when the courts deal with statutory issues. We are all hypothetico-deductive animals; indeed, how could we be anything else? Two excellent essays by Nobel Laureate Sir Peter Medawar cover this landscape. P. Medawar, *Induction and Intuition in Scientific Thought*, in Pluto's Republic 73 (1984); P. Medawar, *Hypothesis and Imagination*, in Pluto's Republic 1115 (1984).

376. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 Hasting's L.J. 537, 573 (1990).

cases that implicitly raised questions concerning the extent to which employer hiring preferences are subject to exogenous constraints. *Heim v. McCall*[377] sustained state labor legislation that discriminated absolutely against alien laborers in state public improvement projects. Rejecting the claim that the statute violated equal protection, the Court proceeded on the premise that the state, as employer, is little more than the aggregate of its citizens, and " 'like any other body corporate, it may enter into contracts and hold and dispose of property' . . . without incurring the condemnation of the . . . Constitution."[378] In nearly the same breath, in *Truax v. Raich*,[379] the Court struck down an Arizona criminal statute that required private employers with more than five laborers to hire at least eighty percent native born Americans. One can distinguish the cases based on the states' respective roles, namely, state as employer (*Heim*) versus state as regulator (*Truax*); however, the Supreme Court only acknowledged such a distinction in 1980.[380] More importantly, the *Truax* Court commented in 1915 that the statute deprived "the employer [of the freedom] to exercise his judgment without illegal interference or compulsion."[381]

Both decisions were consistent with, if not expressions of, the dominant ideology of the late nineteenth century. State interference with the use of private property is justifiable only when property poses the threat of injury: *sic utere tuo, ut alienum non laedas*,[382] use your property so as not to injure others. In the absence of injury, the principle of noninterference—the doctrine of laissez faire exalted by *Lochner v. New York*[383]—held sway. One commentator who frequently repaired to the principle, Christopher Tiedemann, elaborated in his 1886 opus:

> Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a government usurpation.[384]

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377. 239 U.S. 175 (1915). Its companion was Crane v. New York, 139 U.S. 195, *aff'g*, People v. Crane, 214 N.Y. 154, 108 N.E. 426 (1915). The statute was New York Labor Laws § 14 (Consol. 1909). The case is discussed in some detail in Blumoff, *The Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. U.L.J. 73, 90-91 (1984).

378. *Heim*, 239 U.S. at 188 (quoting Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892)).

379. 239 U.S. 33 (1915).

380. Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

381. *Truax*, 239 U.S. at 38.

382. *See generally* Lochner v. New York, 198 U.S. 45 (1905) (cited in Blumoff, *supra* note 377, at 96) (law that does not affect interest of public is an invalid exercise of police power).

383. *Id.*; *see also* C. TIEDEMANN, A TREATISE ON THE LIMITATIONS FOR POLICE POWER IN THE UNITED STATES vii (1886).

384. C. TIEDEMANN, *supra* note 383, at 2-3. For further elaboration of the Spencerian Law of Equal Freedom, according to which everyone has equal rights to pursue and acquire, provided that no one infringes on another's right to do same, see H. SPENCER, THE STUDY OF SOCIOLOGY (1882). *See generally* P. BOLLER, AMERICAN THOUGHT IN TRANSITION: THE IMPACT OF EVOLUTIONARY NATURALISM, 1865-1900, at 49-56 (1969) (explaining how Spencer integrated evolutionary principles into his philosophy); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 18-36 (1944) (reciting the political, social, and economic forces behind Spencer's principles).

Implicit in Tiedemann's quote is a conception of the public weal thought to have died with the *Lochner* era's demise during the New Deal. Its underlying ethos, as Professor Sunstein pointed out recently in his survey of constitutional jurisprudence, still flourishes:

> For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality . . . depended on whether the government had altered the common law distribution of entitlements.[385]

As Sunstein persuasively argues throughout the work, *Lochner*'s impulse is with us still, although understood as a set of predispositions rather than a judicial usurpation of political functions.

Given the insights of Sunstein's synthesis, perhaps the question we should now ask is essentially rhetorical. How could *Lochner*'s drive, its devotion to individual autonomy in the market, have ever failed to thrive? We began our society with a deep commitment to individualism, a commitment that carried over from the economy to politics.[386] Faith in a guiding set of largely unstated first principles is the norm. Every society orders its preferences, "admire[s] and reward[s] some abilities more than others. . . . and . . . arrange[s them] in a more or less tidy hierarchy."[387] Our preference hierarchy retains an intense fidelity to individual liberty, defined to include not only affirmative freedoms but those negative rights[388]—freedoms from—to which the *Lochner* era gave constitutional blessing. A necessary corollary of freedom from government interference

385. Sunstein, *supra* note 12, at 874.

386. In his critique of the equal opportunity model and discussion of its philosophical foundation for our individualistic ethos, Professor Schaar suggests that the model moved from the economic to the political sphere. Schaar, *Equality of Opportunity, and Beyond*, in NOMOS IX: EQUALITY 237 (1967). Our reading of John Winthrop, the founding father of the Massachusetts Bay Colony, leads to the conclusion that the marketplace, politics, and the dominant Protestant theology were inextricably tied from the beginning. *See* M. KAMMEN, PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION 145-58 (1972); E. MORGAN, THE PURITAN DILEMMA 84-100 (1958).

Professor Shapiro traced the evolution of our national philosophical commitment to that ideology. *See* I. SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 273 (1986). For a work that attempts to carry that tradition forward, see R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). We do not mean to suggest, however, that the liberal ideology stands alone. We are impressed by the work of one of our former teachers, John Pocock, as well as the work of Professor Sunstein, and the argument in favor of a tradition of civic virtue. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT 462-506 (1975); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1130-38 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-35 (1985); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690-91, 1730-32 (1984). Much of the recent scholarship is discussed and critiqued in Fallon, *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1697-1733 (1989).

387. Schaar, *supra* note 386, at 230. As Professor Levinson explains: "[I]f sociologists and anthropologists are correct, we cannot escape membership in some civil faith even if we wish to, for the alternative to organizing belief is chaos." S. LEVINSON, *supra* note 32, at 27.

388. *See, e.g.*, Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary*

with private contractual relations is the largely unregulated freedom to enter into such relationships as we see fit. The principle of neutrality thus recognizes and reinforces the existing hierarchy, by resolving doubts, for example, in favor of the free play of market forces.[389]

Among the rights so cherished was the common-law commitment to employment at will. The employment-at-will doctrine holds that the employer may discharge any employee "for good cause, for no cause or even for cause morally wrong" and escape societal sanctions.[390] This dual doctrine of neutrality and inaction found justification in our radically individualistic conception of the public good. In defending the employer's absolute rights, the Tennessee Supreme Court wrote: "May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, when I forbid? And if my domestic, why not my farm hand, or mechanic, or teamster?"[391]

This negative conception of individuality had a "freedom to" counterpart. Two Louisiana appellate courts, refusing to intervene between labor and management, gave that idea expression in 1932[392] and again in 1975.[393] The positive expression rested in part on the notion of mutuality of obligation or the presumed reciprocal benefits of the doctrine that were held to favor both labor and management. "[I]n this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself" by denying himself the right to pursue a new job at anytime in the absence of an express agreement.[394] Both the negative and positive views of the doctrine were nourished in the dominant cultural value of our marketplace. The Court in *Coppage v. Kansas*[395] explained:

> [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise

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*Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1026-29 (1987) (discussing "privacy" in constitutional law as a freedom from universalist criticism).

389. Seidman, *supra* note 388, at 1016-18; Sunstein, *supra* note 12, at 880-81.

390. *E.g.*, Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915). The employment-at-will doctrine has generated a great deal of secondary literature in recent years. On its common-law origins, see, e.g., P. WEINER, S. BOMPEY & M. BRITTAIN, WRONGFUL DISCHARGE CLAIMS: A PREVENTATIVE APPROACH 5-9 (1986); Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-19 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484-91 (1976).

391. *Payne*, 81 Tenn. at 518. On the pervasiveness of this type of *pater-familias* thinking, see Blades, *supra* note 390, at 1416-17.

392. *See* Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 69-70, 139 So. 760, 761 (1932).

393. Simmons v. Westinghouse Elec. Corp., 311 So. 2d 28, 31 (La. Ct. App. 1975).

394. *Id.* (quoting *Pitcher*, 174 La. at 69, 139 So. at 760-61); *see* Summers, *supra* note 390, at 491. *Lochner* itself identified the impermissible nature of the New York statute as its "illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor." Lochner v. New York, 198 U.S. 45, 61 (1905).

395. 236 U.S. 1 (1915).

of those rights.[396]

Although the law of *Coppage* long ago fell into disfavor when the Court realized that government inaction was itself an expression of government policy,[397] the quote above is as vital in 1990 as it was in 1915.

The same can be said about the harshly negative conception of individual freedom. Although its precise doctrinal expression, like that of *Coppage*, has fallen into disrepute, its ethos survives. The unforgiving rhetoric has been subdued and inroads have been made into at-will employment, both by the common law[398] and by statutes like Title VII. But the underlying premise, that freedom of contract remains a crucial aspect of individual liberty, remains vibrant.[399] Outside the employment context, one need look no further than the first substantive provision of the Uniform Commercial Code, section 1-102, to appreciate what its comments state unambiguously: "that freedom of contract is a principle of the Code."[400] Within Title VII, the new Supreme Court majority, a constitutive element in the Reagan Revolution, is committed to straying no further than necessary from the underlying baselines of neutrality and noninterference.[401]

### *B. The Common Law of Title VII*

At first blush, it seems almost inherently inconsistent to speak of the survival of common-law economic and political premises in light of a statutory scheme which, while stopping short of requiring just cause for discharge,[402] is an undoubted encroachment on the doctrine of employment at will. To some extent the inconsistency is patent: Title VII intrudes into the labor-management relationship in a number of ways. It prohibits (if only on a handful of specified grounds) discriminatory discharges, constructive or otherwise; limits an employer's freedom of choice in hiring, promotion and pay; and otherwise creates

396. *Id.* at 17.

397. Seidman, *supra* note 388, at 1010-17; Sunstein, *supra* note 12, at 880-81.

398. For a survey of state law, see Annotation, *Employee's Arbitrary Dismissal as Breach of Employment Contract Terminable at Will*, 62 A.L.R.3D 271 (1975 and Supp. 1989).

399. Professor Epstein expressly made the modern case for this conception in employment law without the vicious negative rhetoric of the late nineteenth century. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953-55 (1984).

400. U.C.C. § 1-102(3) comment 2 (1972 Official Text).

401. The Court's recent interpretations of the Reconstruction Civil Rights Acts clearly sustain this proposition. *See supra* notes 7-10 and accompanying text. *See also* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1003-04 (1989) (holding that severely brain damaged four-year-old child had no liberty interest in state protection after state agency received repeated reports of child abuse).

402. This conclusion is implicit in the Supreme Court's consistent failure to insist that the "legitimate nondiscriminatory reason" that will rebut the prima facie case of individual disparate treatment be related to productivity, efficiency, safety, or indeed any other business-related reason; it is sufficient if that reason is anything other than consideration of race, color, sex, religion, or national origin. *See* Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (Title VII "does not forbid employers to hire only persons born under a certain sign of the zodiac."), *cert. denied*, 449 U.S. 1113 (1981). *But see* Blumrosen, *Strangers No More: All Workers Are Entitled to 'Just Cause' Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 520 (1978). These examples are cited by Professors Zimmer, Sullivan and Richards in their casebook, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 56 (2d ed. 1988).

caution where none was necessary before. The nearly absolute freedom that the employer once enjoyed is gone.

But it is not entirely inconsistent to discuss common-law predispositions in the context of Title VII because the encroachment is limited. Title VII's scope and application, after all, are not self-executing. In the absence of explicit legislative direction, the lacunae in the statute's substance and procedure are filled by judges more or less committed to the principles that underlie marketplace activity. Moreover, almost by virtue of their very presence on our courts, federal judges hold preexisting, deeply held beliefs about the role of government with respect to the marketplace.[403]

To some degree these generative common-law baselines have long informed the Supreme Court's explication of Title VII. Its general disinclination to "restructure" private business practices, iterated by Justice O'Connor in *Watson*, was announced as early as 1978.[404] That same year the Court declined to apply the ordinary presumption that an adjudicated Title VII violator is liable for backpay, citing the resulting disruption of market expectations.[405] The year before, the Court held that an employer would suffer "undue hardship" in discharging the special statutory obligation reasonably to accommodate employee religious practices if an alternative arrangement would result in more than "de minimus" cost.[406]

Even earlier, in 1976, the Court's implicit adherence to the law of the market was reflected in its opinions about the appropriate remedies available when discrimination is found but the scarce jobs in question are already encumbered.[407] One remedy, "front pay," affords postjudgment compensation to minority or female "discriminatees" without "bumping" or otherwise penalizing white or male incumbents for the employer's discrimination. Front pay may even be the only practicable way to compensate the discriminatee because, as the Court would soon also hold, judges may not, except under vaguely defined "eq-

403. On the general question of where courts should look for guidance for filling statutory interstices with publicly held values, see Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1014 (1989) (arguing that process theorists of the 1950s were committed to neutrality principles in statutory interpretation).

404. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

405. City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 717-23 (1978). The Court found gender discrimination in the employer's practice of requiring female employees to make larger pension contributions to receive the same pension benefits as male employees. The Court's order directing gender neutral contributions was prospective only. The Court justified its refusal to uphold the lower courts' refund order in large part because of a speculative adverse effect on all pensioners since the Court assumed that the cost of compliance would fall on the pension fund rather than the employer, the City of Los Angeles. In fact, as Justice Marshall observed in dissent, further proceedings might well have led to the conclusion that the refund burden would fall on the City alone. *Id.* at 732 (Marshall, J., dissenting). More recently, but for similar reasons, the Court refused retrospective economic relief to female pensioners who had received lesser benefits than their male counterparts under an employer-sponsored pension program that required employees of both genders to make equal contributions. It reached this conclusion despite condemning the Arizona plan as a form of unlawful gender discrimination foreshadowed to some degree by the holding in *Manhart*. Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983).

406. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); *accord* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

407. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

uitable" circumstances, displace incumbents when doing so would frustrate their seniority expectations.[408] But front pay is inimical to the premises of free enterprise; alone among the possible approaches to this intractable problem, it requires the adjudicated wrongdoer, the employer, to pay twice for one job. It is hardly surprising, therefore, that only one member of the Court was prepared to endorse the remedy,[409] and so the matter stands today.[410]

Paradoxically,[411] the Court even rationalizes its indulgence of "voluntary," "benign" employer affirmative action,[412] in the face of statutory text unambiguously to the contrary,[413] as a nod toward preserving managerial prerogatives.[414] For example, reverse discrimination against white or male incumbents or applicants without fear of liability, the Court tells us, enables employers to maintain government contracts which, by law, are contingent upon minority representation in the employer's workforce that mirrors minority availability in the broader labor pool.[415] Affirmative action programs also help employers reduce the likely incidence of ordinary Title VII litigation brought by minorities. The price of both these benefits is borne for the most part by incumbent nonminority employees rather than by the employer.

We now inquire whether the Court's recent decisions simply implement its continued commitments to governmental nonintervention in the market and correlative judicial restraint, or instead record a resurgence.

### 1. *Watson* and *Wards Cove:* The Denigration of Disparate Impact

If *Watson* and *Wards Cove* reflect allegiance to legislative intent, shots taken at judicial predilections are wide of the mark. In fact, Congress gave significant indications in reports accompanying the 1972 amendments to Title VII that it approved *Griggs*-like principles of group justice.[416] Moreover, lower courts, with the virtually unanimous approval of the commentators,[417] had gen-

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

409. *Franks*, 424 U.S. at 780-81 (Burger, C.J., concurring).

410. In the void created by Supreme Court evasion of the issue, the circuit courts are undecided about the availability of front pay. *See* McKnight v. General Motors, 908 F.2d 104, 116-17 (7th Cir. 1990). As far as the Court's own jurisprudence is concerned, district judges have only two choices when faced with a discriminatee's demand to receive the job she was denied in violation of Title VII: grant the demand at the expense of an innocent incumbent, or deny it and deprive a proven discrimination victim of a remedy she must have to be made whole.

411. This indulgence is paradoxical because "reverse" discrimination is intended to serve the equal result model that the Court's recent decisions so firmly reject. *See, e.g., infra* text accompanying notes 426-28.

412. Johnson v. Transportation Agency, 480 U.S. 616 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979).

413. *See* 42 U.S.C. § 2000e-2(a)(1), (d) (1988); *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting).

414. *See Weber*, 443 U.S. at 207.

415. *Id.* at 222-23 & n.2 (Rehnquist, J., dissenting) (noting that the employer's plan was prompted by the threat that it might be barred from future government contracts for violating the "goals" and "timetables" of Executive Order 11246).

416. S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971); H.R. REP. No. 238, 92d Cong., 1st Sess. 5 (1972). *See* Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 24 & n.109.

417. *See, e.g.*, Note, *supra* note 58, at 114 n.68; Note, *supra* note 57, at 384; Comment, *supra*

erally interpreted *Griggs* and its progeny as putting both the burden of going forward and the risk of nonpersuasion on the employer.[418] Accordingly, *Watson* and *Wards Cove* are fairly read as breaching interpretive boundaries theretofore well accepted.

Nor was the Court's own precedent set on an inevitable course that the two cases simply illuminated; the Court had choices within its own jurisprudence. For example, as the law spreads into new terrain, the Court frequently finds itself in areas whose full contours are revealed only as case law expands. Still, shadows from the unfolding landscape can be seen, and in dicta the Court indicates its anticipated course. Thus, by the time the foreseen issues actually reach the Court, the decisions are fairly predictable.[419] In contrast, *Watson* represents a sharp break with the Court's own prior understanding, a break that *Wards Cove* acknowledged and enthusiastically enlarged. Justice White almost admitted as much when, reallocating the ultimate burden of proof, he noted that "some of our earlier decisions can be read as suggesting otherwise."[420] Thus, the Reagan Court was not constrained by the mandates of the political branches or the inevitable flow of prior precedent.

Moreover, the Court turned its back on presumptions and accompanying proof burdens developed in early Title VII opinions that reflected value laden preferences among possible "states of affairs."[421] *McDonnell Douglas*, for instance, held that mere proof of rejection plus job qualification and availability suffice to meet plaintiff's prima facie case and to effect a shift in the burden of production.[422] Certainly the "because of" language in Title VII did not mandate such a conclusion. The Court might as easily have held that, as in any intentional tort action, plaintiff could survive involuntary dismissal only by presenting evidence from which a fact-finder could reasonably conclude that the employer actually intended to discriminate.

Instead, the Court demarked the Title VII claim as special, as something other than a garden-variety tort. If, after the plaintiff's modest prima facie case, the employer failed to produce evidence of a legitimate business motive for the decision at issue, plaintiff prevailed.[423] In short, the Court preferred potential recovery to no recovery at all, even in the absence of direct evidence of actual intent. Although later opinions would supply inductive-probabilistic and procedural explanations for this choice,[424] when the Court first created the initial

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note 23, at 1760-61. The one exception is Gold, *supra* note 20, but his focus is on the intent of the original enacting Congress in 1964.

418. *See supra* note 147 and accompanying text.

419. The evolving jurisprudence of municipal liability under § 1983 exemplifies this tradition. Lewis & Blumoff, *Reshaping the Asymmetry in § 1983* (unpublished manuscript on file in the offices of the NORTH CAROLINA LAW REVIEW) (discussing Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989), City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)).

420. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

421. *See supra* text accompanying notes 43-44.

422. *See supra* text accompanying notes 34-41.

423. *See supra* text accompanying note 41.

424. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 255-56 (1980) (The allocation "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection"; it also

proof allocations in *McDonnell Douglas* the justification was said to lie in assuring efficient and trustworthy workmanship "through fair and racially neutral employment and personnel decisions."[425]

*Wards Cove*, through its implicit adoption of *Watson*'s normative principles and its explicit ratification of Justice O'Connor's procedural scheme, swept these earlier normative decisions aside. In fact, the opinion alluded to the norms of routine federal litigation to justify placing the risk of nonpersuasion on the challenger.[426] The most far-reaching of the *Wards Cove* conclusions not only makes recovery more difficult, but it also negates the potential of disparate impact recovery as a meaningful alternative to proof of disparate treatment. The Court must have understood that the full implications of disparate impact analysis appear to threaten the existing order, the regime of equal opportunity and its principal metaphor of colorblindness.[427]

The *Watson* plurality launched its revisionist assault on Title VII's potential achievement goal by articulating a weak version of the statute's general command to eradicate employment discrimination. Purporting merely to bring disparate impact analysis into manageable bounds, the plurality's commitment to common-law baselines is seen in its unfounded fear of quotas, unwillingness to find liability on the basis of "less evidence" than is required in a treatment case, and questionable expression of humility about judicial competence to restructure business practices. All three observations marginalize the equal achievement aim.

The fear of quotas—a central issue in the debate about equality—operates at a number of levels to undermine efforts at collective justice. At a visceral level, the phrase is emotionally loaded, harking back to times when Americans, oblivious to our national history, shut out foreign immigrants and deprived even its native born ethnic minorities of opportunities in education, industry and society.[428] The contemporary fear that floors designed to assure minimum propor-

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focuses "the factual issue with sufficient clarity so that plaintiff will have a full and fair opportunity to demonstrate pretext."). *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

425. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

426. *Wards Cove*, 109 S. Ct. at 2126 ("This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301.").

427. Equal opportunity is the historically determinative and prevailing social ethic. In other words, it

> implies prior acceptance of an already established social-moral order. Thus, the doctrine is, indirectly, very conservative. It enlists the support for established patterns of values. It encourages change and growth . . . but mainly along the lines of tendency already apparent and approved in a given society. . . . It does not advance alternatives to the existing pattern.

Schaar, *supra* note 386, at 230. The equal opportunity model is, in sum, the product of our earliest drives. In contrast, the equal achievement model that disparate impact theory reflects jeopardizes the individualistic conception that underlies equal opportunity.

428. The use of quotas as a curb on immigration is, of course, still with us. We are speaking of a more pernicious practice: the use of quotas in the late nineteenth and early twentieth centuries as part of a nativist plan to minimize foreigners whose presence might somehow taint American culture. The whole topic is brilliantly described and analyzed in J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1974). Certain groups, having labored under quotas that prevented full participation in American society, view quotas not as floors that

tional representation in America's cultural and social life will turn to ceilings that deprive otherwise qualified members of society from rightful participation haunts entire segments of the body politic. Even without the anxiety-producing transformation of floors into ceilings, the dreaded quota strikes at a level that pierces to the core of the collective justice model which disparate impact could help realize. Quotas and their twin, "reverse" discrimination, imperil equal opportunity. If, to satisfy a quota, a qualified member of the dominant white male community must step aside for a black or woman who emerges as marginally less qualified, the existing hierarchy appears besieged. A white's freedom to enter into a contract as he chooses and his freedom from government interference in the market for his labor are undermined. Quite apart from whether the implementation of the quota itself violates Title VII, the "established pattern of values" that the equal opportunity idea serves undergoes change. By engaging the neutrality principle, the Court can affect at least the rate of change.

The Court cannot remain entirely neutral in all employment decisions; Congress prohibited that institutional posture when it passed Title VII twenty-five years ago. But successive majorities can determine how much evidence is enough to enlist its support. The new majority declines to find liability "on the basis of less evidence than is required to prove intentional discrimination."[429] But the notion that impact recovery somehow requires "less evidence" than either mode of disparate treatment recovery is difficult to fathom.

In the first place, the prima facie showing that a practice has disproportionate adverse impact is *more* rigorous, especially after the new strictures of *Watson* and *Wards Cove*, than the individual plaintiff's evidence of disparate treatment. The *McDonnell Douglas* plaintiff eliminates only the absence of a vacancy and his own lack of minimum qualifications and interest as explanations for his rejection.[430] All other explanations remain alive, and the law's judgment that the real reason must have been discriminatory intent depends on a large measure of speculation and inference. The need for inference is not eliminated even when the plaintiff reveals the employer's stated legitimate reason as pretext by demonstrating its lack of plausibility.[431] This demonstration negates only one additional possible explanation for the employer's decision; it does not affirmatively point to discriminatory intent as the culprit.

By contrast, the Court tells us as a formal matter that the impact case does not require proof of employer intent.[432] We must take the Court at face value

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assure something like proportional participation, but as ceilings beyond which participation is foreclosed. It is not surprising, for instance, that the organized American Jewish community has generally opposed affirmative action. *See*, Wasserstrom, *supra* note 333, at 581 n.1. The dilemma for liberal Jews is discussed in A. VORSPAN, JEWISH CULTURAL VALUES AND SOCIAL CRISIS: A CASEBOOK FOR SOCIAL ACTION 96-102 (1974).

429. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988). That *Wards Cove* subscribes to this principle is the necessary conclusion one draws from its ratification of Justice O'Connor's new procedural scheme, the effect of which is to require more proof from — or at least increased burdens on — the plaintiff. *See supra* text accompanying note 151.

430. *See supra* texts accompanying notes 38-39 and note 38.

431. *See supra* text accompanying note 231.

432. *Wards Cove*, 109 S. Ct. at 2119; *see* text accompanying note 196.

on this if impact attacks on neutral practices are to serve any meaningful independent function.[433] The plaintiff's *probandum* in such cases is simply that a particular practice that derailed her own chances to secure an employment benefit also caused a significant disproportionate impact on her group. Even before *Watson* and *Wards Cove*, plaintiffs attacking a neutral practice generally were required to demonstrate a prima facie link between the challenged practice and adverse group impact through statistical evidence that generated a much higher degree of confidence about that link than the *McDonnell Douglas* showing ever yielded about unlawful motive. Is it really true, then, that the impact plaintiff sneaks by with "less evidence" than, say, a class attempting to prove systemic disparate treatment? The answer depends on whether we take into account the conceptual nub of plaintiff's proof and the practical consequences of a plaintiff's victory in the two kinds of cases. Systemic treatment plaintiffs seek to paint a much more dire picture than plaintiffs complaining about the impact of a particular practice. Systemic treatment plaintiffs allege that the employer routinely discriminated against an entire group through a variety of formal policies and practices or the aggregate of individual supervisory or managerial decisions. If they prevail, moreover, relief flows to all class members who sought but failed to attain the employment level at which the class has proved gross underrepresentation. By contrast, impact recovery is limited to plaintiffs who suffered an employment detriment from the particular practice shown statistically to have adversely impacted their group. Both conceptually and practically, therefore, systemic treatment plaintiffs *should* be required to offer "more evidence" than those who restrict their challenge to particular neutral practices.

The Court's "less evidence" conclusion, then, is perhaps better understood as the reflection of an unexpressed assumption about the judiciary's obligations to the employer and society. The assumption seems to be that the courts should remain neutral, thereby respecting the employer's freedom to contract with whom it pleases, in the absence of powerful evidence of some form of discrimination that in common understanding is culpable. The hostility to impact theory always has been rooted in the perception that it is simply unfair to hold the latest discriminator liable when the real "but-for" malefactor is society at large.

In this sense, the less evidence injunction serves as a metaphor for the liberty interests once protected by due process. It is as if the Court were saying:

> An interest countervailing the evil of stratification produced by our society is our devotion to individual liberty. It is unfair to hold the employer liable if there is doubt about its contribution to the disproportionate adverse impact of its practices. In such cases we will not encroach on that freedom without the functional equivalent of direct proof of subjective bad faith.

Put otherwise, the Court prefers to preserve the defendant's freedom of contract rather than commit the "false positive" error that favors the victim. This freedom is the bedrock underlying the Court's stated reluctance to restructure ex-

433. *See supra* text following note 124.

isting business practices, unless " 'mandated to do so by Congress.' "[434] For the Court, the focus of impact analysis on redress of historic group disadvantage challenges the market's premise that "individual opportunity has little relation to class or group background."[435]

2. *Price Waterhouse*: A Minimalist Concept of Disparate Treatment

If *Watson* and *Wards Cove* sought to reel in impact analysis for fear of uncontrollable assaults on employer freedom of contract and chariness about joining the judiciary as an antagonist in that battle, *Price Waterhouse* presented an opportunity to reaffirm the prevailing equal opportunity model. On its surface, the case was nothing more than an individual disparate treatment dispute, the sort least threatening to the common-law baseline of individual freedom. Beneath the surface, however, were deep-seated issues that called upon the new conservative majority to reveal the extent of its willingness to eliminate sexism from the workforce at the upper echelons that direct American enterprise. Of course, because there was no majority opinion, the future of *Price Waterhouse* is not entirely clear. If, however, one adds to Justice O'Connor's position the dissenters' and Justice White's, even this more favored proof mode lacks a bright future, at least when mixed motives are involved. The majority appears just as committed to neutrality, common-law distributions and inaction here as in the disparate impact context.

The opinions of Justice O'Connor and the dissenters reflect the neutrality and inaction baselines in these respects: the presumption of good faith the employer enjoys even *after* plaintiff satisfies the requirement of the circumstantial prima facie case; the need for "direct evidence" of impermissible motives in the mixed motive case; and the disdain for evidence of stereotyping as a form of thought control.

The tension between the settled doctrine that holds the employer liable on the basis of the highly inferential prima facie case (where, for example, the employer refuses to defend or proffers an excuse that the court deems illegitimate) and Justice O'Connor's assertion that, notwithstanding the prima facie case, the employer retains a presumption of good faith,[436] gives reason to wonder whether the Court will abandon the *McDonnell Douglas* model altogether. Justice O'Connor's direct evidence requirement may reflect nothing more than the thinness of plaintiff's prima facie case of inferential disparate treatment.[437] Alternatively, however, she insists that henceforth the burden shift in mixed motive cases must be predicated on testimonial or documentary evidence that in some mysterious way provides immediate access to the material fact of discrimination.[438] That requirement significantly reduces the likelihood of recovery and

434. Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 999 (1988) (plurality opinion) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1981)).

435. Horwitz, *supra* note 52, at 609.

436. *See supra* text accompanying notes 293-96.

437. *See supra* text accompanying note 313.

438. *See Price Waterhouse*, 109 S. Ct. at 1803-04 (O'Connor, J., concurring).

reflects a desire to preserve employer freedom in the absence of the most effective evidence that can possibly be brought to bear on an issue of discrimination—evidence that is notoriously elusive.[439]

The desire for the most effective proof possible also explains Justices O'Connor's and Kennedy's attitudes toward stereotypes. Justice O'Connor's insensitivity to this issue is evident in her conclusion that references to "a lady candidate" might be perfectly neutral; in and of itself, it has no probative value on intent.[440] Although a single similar reference may not support a change in the ultimate risk of nonpersuasion, the reference to a "lady candidate" can be genuinely neutral only when the employer alludes to gender in referring to all candidates or never refers to gender at all. Only then will gender cease to be a factor that diverts attention from the critical inquiry: the measurement of an individual's value as a productive, efficient employee.

The disdain that Justice Kennedy indulges for stereotyping evidence, however, runs to the heart of the matter. Title VII is not to be used "[to] root[ ] out sexist thoughts"[441] or, as Justice O'Connor quoted, as a "thought control" bill.[442] The alleged attack on management's thought process conjures up all types of negative images associated with the communist threat that defined our cultural reaction during the Cold War.[443] It also suggests two more immediate premises: that Congress had no intention of changing the thinking of individual employers and that it is not the Court's place to affect management's personal taste for prejudice. The Court's only role is to redress the result of that prejudice, and then only if all the conceivable evidence available proves its existence. These conclusions explain Justice Kennedy's resolution that Title VII neither requires the employer to disclaim reliance on stereotypical comments nor imposes a duty on management to be sensitive to the presence of stereotypes in the decision making process.

Title VII was part of a package whose plain import *was* to influence thinking, to affect our national morality, to make distasteful the nation's appetite for and tolerance of prejudice. The characterization of Title VII as a "thought control bill" came from an opponent of the bill who used his considerable rhetorical skills and all the devices at his disposal in an effort to kill it.[444] Senator Case responded prescriptively: "We try to persuade [the discriminator], to show him where he is wrong, to get him to do voluntarily what he should be doing."[445]

Legal restraints that influence thought trench on the negative conception of individual autonomy. Yet one need not countenance government efforts at gen-

439. *See supra* text accompanying note 319.

440. *Price Waterhouse*, 109 S. Ct. at 1805 (O'Connor, J., concurring).

441. *See supra* text accompanying note 362.

442. *Price Waterhouse*, 109 S. Ct. at 1797 (O'Connor, J., concurring) (quoting 110 CONG. REC. 7254 (1964)).

443. *See generally* T. Blumoff, Popular Fiction and the Creation of a Cold War Consensus, 1943-52, at 1-8 (1976) (unpublished doctoral thesis on file in the offices of the NORTH CAROLINA LAW REVIEW) (discussing George Orwell's *Nineteen Eighty-four).*

444. 110 CONG. REC. 7254 (1964) (statement of Sen. Ervin).

445. *Id.*

uine thought control to recognize the legitimacy of government efforts to diminish the incidence of racism and sexism in America. Invoking cold war rhetoric to justify these cramped decisions can be explained without reference to deleterious motives only if one looks to different conceptions of the economy and the Court's place within it. In *Price Waterhouse*, as in *Watson* and *Wards Cove*, the Court sought to minimize, to the considerable extent that its own rules of procedure and evidence permitted, government interference with common-law distribution of jobs and job benefits.

Two generations ago, Justice Douglas recorded the tendency of courts to make significant changes in prevailing notions about the law, and then, under the rubric of "astute political management," to "proclaim that no change is underway."[446] It is now a commonplace that procedural rules are manipulated to effect such change,[447] though they purport to leave substance unaffected. As Professor McCormick observed, the allocation of burdens of proof and the use of presumptions can serve as a means of "handicapping a disfavored contention."[448] A new conservative majority, wedded to employer control of the market place, has seized on the technique of burden allocation to impede both principal proof modes of Title VII.[449]

The Court's predisposition to abstain from interference with the market draws sustenance from recent economic thinking about discrimination and legislation aimed against it. For example, it is asserted that employment discrimination of the "statistical" or "effects" variety may be "efficient."[450] To the degree that legal rules are designed to foster efficiency, this view recommends a relatively unfriendly judicial reception for claims of disparate impact.[451] Further, even to the extent that discrimination is inefficient — the conventional wisdom about animus-based discrimination like disparate treatment[452] — the standard model assumes that over time a free market will drive out invidiously discriminatory employers more effectively than government regulation.[453] It is perhaps

446. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949), *quoted in* Belton, *supra* note 14, at 1209 n.15.

447. Professor Belton noted almost a decade ago that issues of proof were becoming the "battleground upon which some judges are attempting to repudiate the disparate impact theory of discrimination." Belton, *supra* note 14, at 1209.

448. MCCORMICK, *supra* note 42, § 337, at 950.

449. For a related recent example see Public Employees Retirement Sys. of Ohio v. Betts, 109 S. Ct. 2854, 2871 n.5 (1989) (Marshall, J., dissenting) (arguing that majority, in order to defeat the immunity provided by § 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988), improperly placed persuasion burden on plaintiff to show employer's actual discriminatory intent in adopting benefit plans with age-discriminatory provisions).

450. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987). *See* Donahue, *Further Thoughts On Employment Discrimination Legislation: A Reply To Judge Posner*, 136 U. PA. L. REV. 523, 532 (1987).

451. Professor Donahue argues that even if statistical discrimination is "profit-maximizing for the firm," it may be "inefficient for society as a whole" since it will discourage minority members from investing in their own "human capital." Donahue, *supra* note 450, at 532-33. He concludes that although prohibiting this kind of discrimination "may be inefficient in the short run, it may be efficient in the long run." *Id.*

452. G. BECKER, *supra* note 28, at 15; Donahue, *supra* note 450, at 531.

453. M. FRIEDMAN, CAPITALISM AND FREEDOM 108-115 (1962); R. POSNER, ECONOMIC ANALYSIS OF LAW § 27.1 (3d ed. 1986). Professor Donahue, taking issue with this view, contends

not entirely coincidental, then, that a Court committed to a neutral stance vis-à-vis private business arrangements has viewed Title VII so skeptically, and regulation of arguably efficient "statistical" discrimination even more so.

## VII. PROPOSALS AND VETOED LEGISLATION

### A. *Proposals*

#### 1. Impact

Since its inception, Title VII has been the battleground over competing conceptions of equality. If the legislation's only function is to justify differences based on race or gender, treatment analysis will suffice. If, on the other hand, it exists to redress the structural problems[454] that are the legacy of our peculiar institutions, Congress clearly has the authority to do so[455] by shoring up the case of disparate impact. Three measures are in order.

Congress could start to revivify the impact case by recasting the nature and quantum of the employer justification that will overcome a statistically reliable prima facie case of disproportionate adverse impact. The employer should be called on to do more than offer evidence that its practice "significantly serves" virtually any business goal.[456] That *Wards Cove* description disrespects the strength of the neutral practice/adverse impact prima facie case, especially as it has been fortified by the recent requirements of identification, causation and quantification.[457] The impact plaintiff proves much more, prima facie, than the plaintiff who shows individual disparate treatment. A practice or test that discriminates in fact should be justified only if it correlates with "important elements of work behavior,"[458] and then only if the correlation is manifest, rather than merely significant.[459]

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that antidiscrimination legislation eliminates discriminators more rapidly than the free market. Donahue, *supra* note 450, at 523-24; Donahue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1430 (1986). Judge Posner does not explicitly challenge that assertion but argues that the costs of speeding up the eradication process through regulation may outweigh the savings. Posner, *supra* note 450, at 519.

454. *See* C. MACKINNON, *supra* note 323, at 101-06.

455. The Court's conclusion in Washington v. Davis, 426 U.S. 229, 248 (1976), that it would "await legislative prescription" before holding that impact alone was sufficient to find an equal protection violation, suggests that Congress can more fully enforce the commands of the equal protection clause. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (rejecting a facial challenge to a set aside scheme in federal contracts under the "Minority Business Enterprise" provision of the Public Works Employment Act of 1977, § 105(f)(2), 42 U.S.C.A. § 6705(f)(2) (West 1983)); *see generally* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that Supreme Court, because of institutional concerns, has failed to enforce some provisions of the Constitution to their full conceptual boundaries).

456. *See supra* text accompanying notes 208-09.

457. *See supra* texts accompanying notes 115-23 (*Watson*) and 200-04 (*Wards Cove*).

458. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. § 2607.4(c) (1975) (current version at 29 C.F.R. 1607 (1989)).

459. *See* Griggs v. Duke Power Co., 402 U.S. 424, 432 (1971). We stress that we are not suggesting a return to the misguided enthusiasm of the earlier decisions that required the employer to demonstrate that its practice was "necessary" to a business goal. Still less do we propose that "necessity" be defined, as it once was, to mean essential to both safety and efficiency. That would cause the impact defense to resemble the bona fide occupational qualification defense to a facially discriminatory policy or expressly discriminatory conduct, unfairly to the employer. Further, the necessity

Congress could further resuscitate the impact case by again placing on the employer the risk of nonpersuasion as to the importance of its goal and the role of its practice in achieving that goal. For burden shifting purposes, the post-*Wards Cove* prima facie impact case has more in common with the powerful statistical systemic disparate treatment case, where the employer does assume a persuasion burden on justification, than with the inferential and anecdotal case of individual disparate treatment, which represents the analogy adopted by the Court. It plainly seems an instance of judicial overkill to require the plaintiff, even aided by discovery, to demonstrate the unimportance to the employer of the goal the employer has cited, or to bear the onus of demonstrating the absence of a strong link between the employer's chosen practice and that goal.

Last, lesser discriminatory alternatives should suffice to rebut even when they entail more than de minimis incremental cost or inconvenience. While it is difficult to quantify what level of burden is tolerable for the corresponding reduction in adverse impact, the Court's approach effectively removes lesser discriminatory alternatives from the calculus. Further, the employer should carry the persuasion burden on this issue. With the relaxed version of the defense decreed by *Wards Cove*, it is reasonable to place the persuasion burden on the party with the greatest information about alternatives, the employer. Requiring it to show persuasively that an alternative proposed by the plaintiff is not as effective as its chosen practice is little to ask of a party who has had only to produce evidence that its own practice "significantly" serves some undefined business goal.

### 2. Treatment

Even if impact analysis is to wither before its work is done,[460] the Court itself should restore disparate treatment to its earlier vigor. The straightforward equal opportunity conception advanced by disparate treatment furthers an individual's basic right to participate in the market as fully as she is able.[461] By enforcing the disparate treatment concept in a way that maximizes nondiscrimi-

standard would relieve the plaintiff of the burden it has consistently carried since *Griggs* and *Albemarle* to propose less discriminatory alternatives. *See supra* text accompanying notes 85-90.

460. The impetus for impact recovery lay in a desire to ameliorate the lingering consequences of structural economic disparities that weighed heavily on racial minorities. An exhaustive recent study by the National Research Council reports that one-third of the people of color in the United States still live below the poverty level. NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 3 (1989). Similar statistics appear in R. FARLEY & W. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA 55 (1987), and Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 662-64 (1987).

Moreover, wages associated with the low-skilled jobs in which those people are concentrated, measured in constant dollars, actually declined between 1969 and 1986. NATIONAL RESEARCH COUNCIL, *supra*, at 8. This was a period almost entirely spanned by the reign of *Griggs* and the principle of adverse impact. It is as if the underlying structural economic problems were immune to remedies that serve the rest of the economy. The study concluded that there was a "divergence between social principle and individual practice" and that "at the core of black-white relations is a dynamic tension between many whites' expectations of American institutions and their expectations of themselves." *Id.* at 5. That tension is at the core of America's belief system and it is not altogether surprising that the same tension is the motive force behind the dismantling of Title VII's impact case.

461. Schaar, *supra* note 386, at 242.

natory entry, the Court does no more than express faith in its own baselines. Two measures should suffice.

First, the employer should assume the "same decision" burden when the plaintiff proves by any mode, direct or inferential, that intentional discrimination played a part in the adverse employment decision. The employer should not escape this obligation whenever a trial court can characterize plaintiff's prima facie case as less than "substantial." The critical point is that even when she employs the inferential mode approved by *McDonnell Douglas* and *Burdine*, the plaintiff does not demonstrate intentional discrimination until well after the presentation of the prima facie case, usually by discharging her own burden to persuade that the employer's stated legitimate reason is pretextual. Such evidence of intentional discrimination is sufficiently reliable to require the employer to demonstrate that it would have taken the adverse employment action independent of the discriminatory factor.

Second, the "same decision" test itself should be modified to better reflect the ideal of nondiscriminatory treatment. To ask if the employer would have made the same decision absent a proven hostile motive presupposes a world free from prejudice, a world that Title VII assumes does not exist. A more realistic test would ask whether the employer would have made the same decision had the candidate been a member of the group most heavily represented in the at-issue job category. Phrasing the issue in that manner would encourage the employer to retain genuine records about all employees and could improve productivity by ridding the economy of prejudicial standards.[462]

### *B. Legislation*

In order to "provide more effective deterrence and adequate compensation for victims of discrimination," the Civil Rights Act of 1990[463] "respond[s] to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions."[464] The Act is sweeping in scope, tackling crucial liability and remedy issues under Title VII as well as other statutes providing for the protection of civil rights.[465] Here we discuss only the

462. It has been suggested that the *Wards Cove* insistence on better prima facie statistical evidence linking practice and effect will similarly spur employers to maintain better records about the impact of subjective neutral practices. Barrett, *supra* note 128, at 189-90.

463. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S9966 (daily ed. July 15, 1990) (President Bush vetoed the Act on Oct. 22, 1990; the Senate failed by one vote to override the veto on Oct. 24, 1990).

464. *Id.* at § 2(b)(2) and (1), respectively.

465. For example, § 12 overturns the Supreme Court's *Patterson* decision, *see supra* text accompanying notes 8-11, by providing that the right secured by 42 U.S.C. § 1981 to "make and enforce contracts" reaches ongoing terms and conditions of employment and dismissal, not just contract formation. Section 6, a response to Martin v. Wilks, 109 S. Ct. 2180 (1989), sharply limits challenges to practices that implement consent judgments and orders resolving employment discrimination claims by persons who had notice of and a reasonable opportunity to object during the underlying proceeding. Section 7 generally enlarges the Title VII statute of limitations; in particular, by overruling Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989), it assures that claims of persons attacking the application of intentionally discriminatory seniority systems are not time barred before such systems affect them personally. Section 8 for the first time affords jury trials, compensatory damages, and punitive damages for claims of intentional discrimination under Title

provisions that address the *Price Waterhouse* mixed motives problem and the *Wards Cove* approach to disparate impact under Title VII.

Section 5 of the Act clarifies that "an unlawful employment practice is established" when the plaintiff "demonstrates" that a prohibited consideration "was a contributing factor for any employment practice, even though other factors also contributed to such practice."[466] The defendant may then avoid liability for reinstatement, promotion, or damages if it "establishes that it would have taken the same action in the absence of any discrimination."[467]

The key consequence, we believe, is to confirm the plurality's approach in *Price Waterhouse* by placing the "same decision" burden of persuasion on the employer whenever the plaintiff "demonstrates" (elsewhere defined to mean "meets the burdens of production and persuasion")[468] that the consideration of a forbidden criterion infected "any" employment practice. There are no "substantial evidence" or "direct evidence" preconditions to this required employer showing of the kind outlined in the concurring and dissenting opinions. Indeed, in one respect the Act goes further than the plurality. It authorizes injunctive relief whenever the employee proves her employer partially discriminated; a successful "same decision" showing merely relieves the employer from affirmative orders and monetary relief.[469] In sum, these provisions ringingly reaffirm and expand the statute's core concern with disparate treatment.

Congress's attempt in sections 3 and 4 to revive the disparate impact case by countering the Court's decision in *Wards Cove*[470] is notably less successful. The bill makes no attempt to identify the required magnitude of the plaintiff's showing of disparate impact,[471] despite Justice O'Connor's strong suggestion in *Watson*,[472] echoed by Justice White in *Wards Cove*,[473] that the EEOC's 80%

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VII, as well as under the Americans with Disabilities Act of 1990. Section 9 strikes language from § 701(k) of Title VII which the Court in Marek v. Chesny, 473 U.S. 1 (1985), read as relieving defendants of liability to prevailing plaintiffs for certain statutory attorneys' fees under the "offer of judgment" provisions of Federal Rule of Civil Procedure 68; precludes the compulsory waiver of those fees by settlement, a practice the Court approved in Evans v. Jeff D., 475 U.S. 717 (1986); and allows prevailing plaintiffs to recover "expert fees and other litigation expenses" contrary to the apparent majority view in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987).

466. S. 2104, 101st Cong., 2d Sess. § 5(a), 136 CONG. REC. S9966 (daily ed. July 15, 1990) (adding Title VII § 703(l), 42 U.S.C. § 2000e-2(l)).

467. *Id.* at § 5(b) (amending Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1972)).

468. *Id.* at § 3(m) (adding Title VII § 701(m), 42 U.S.C. § 2000e(m) (1972)).

469. The first sentence of § 5(b) of the Act amends Title VII § 706(g) so as to include the "same decision" showing as a circumstance that relieves the employer of liability for hiring, reinstatement, promotion, or backpay. The second sentence provides that "damages" are available "only for injury that is attributable to the unlawful employment practice." *Id.* at § 5(b).

The *Price Waterhouse* plurality, in contrast, specifically held that an employer who made the "same decision" showing had not committed an unlawful employment practice at all. *Price Waterhouse*, 109 S. Ct. at 1787 n.10. Presumably, the employer was therefore not subject to an injunction.

470. In different language, both the House and Senate bills observe that the extensive definitional subsections added to § 701 of Title VII by § 3 of the Act are designed to codify *Griggs* and overrule *Wards Cove*. *Id.* at § 3(m).

471. It states only that an unlawful employment practice based on disparate impact is established prima facie when a plaintiff "demonstrates that an employment practice results in a disparate impact." *Id.* at § 4 (adding Title VII § 703(k)(l)(A)).

472. *See supra* text accompanying notes 118-20.

measure was infirm. This issue is thus left for restrictive revision by a Court conspicuously hostile to the disparate impact theory.

The Act purports to free up the prima facie case by providing that plaintiffs may demonstrate the disparate impact of a group or combination of practices without having to prove the disparate impact of the specific practices included within the group.[474] An exception, however, threatens to swallow this rule. The plaintiff *is* required to isolate the impact of specific practices "if the court finds" that the plaintiff "can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact."[475] While this provision may induce some defendants to be more forthcoming in discovery than they otherwise might be — to convince the trial court that records exist from which plaintiffs might ascertain the effect of particular practices — it may also simply further complicate discovery. On balance, then, it is unclear that the Act significantly alters the prima facie impact case as it stands after *Wards Cove*.

Congress did address the employer justification question, a primary impetus for the legislation and the focus of greatest controversy during Congressional deliberations. Under the Act, plaintiff's proof of the disparate impact of a practice or group of practices establishes an unlawful employment practice if the defendant "fails to demonstrate that such practice is required by business necessity."[476] "Business necessity," in turn, is defined to mean, in the case of selection practices, that "the practice or group of practices must bear a significant relationship to successful performance of the job." "Demonstrates" demands persuasion as well as production.[477]

While these provisions, by placing the risk of nonpersuasion on the defendant, obviously do treat the employer justification as an affirmative defense, the nature of the defense is little changed from *Wards Cove*. It is not apparent how evidence of a "significant relationship to successful performance of the job" is any more rigorous than evidence that the challenged practice "serve[], in a significant way, the legitimate goals of the employer."[478] Certainly a "significant" relationship between the practice and the job or business[479] is less exacting than a "manifest" link between the practice and "important elements"[480] of a job. The main rallying cry of Congressional opponents of the Act was that the new

473. *See supra* note 199 and accompanying text.

474. S. 2104, 101st Cong., 2d Sess. § 4, 136 CONG. REC. S9966-67 (adding new Title VII § 703(k)(1)(B)(i)).

475. *Id.* at § 4 (adding new Title VII §§ 703(k)(1)(B)(i) and (iii)).

476. *Id.* (adding Title VII § 703(k)(1)(A)).

477. *Id.* at § 3 (adding Title VII §§ 701(o) and (m), respectively, 42 U.S.C. §§ 2000e(o) and (m)).

478. *See supra* text accompanying note 209. True, the quoted statutory test focuses on traits particular to the job, rather than the employer's entire business. But an alternative statutory test for "employment practices that do not involve selection" closely tracks the *Wards Cove* formulation in requiring evidence that the practice bear "a significant relationship to a significant business objective of the employer." S. 2104, 101st Cong., 2d Sess. § 3, 136 CONG. REC. S9966 (daily ed. July 15, 1990) (adding Title VII subsection 701(o)(1)(B), 42 U.S.C. § 2000e(o)(1)(B)).

479. *See supra* note 478.

480. *See supra* note 459 and accompanying text.

impact defense would be so difficult to maintain that employers would resort to quota hiring to forestall impact litigation. In fact, the new "significant relationship" justification is less stringent in nature, and no more stringent in quantum, than most formulations of the business necessity defense that prevailed during the eighteen years between *Griggs* and *Wards Cove*.[481]

Employers will thus presumably be as able to defend prima facie cases of adverse impact under the new Act as they were before *Wards Cove*. The plaintiff's potential rebuttal of less discriminatory alternatives therefore remains vital. As noted above, *Wards Cove* severely vitiated that rebuttal by insisting that additional cost may prevent the alternative practice from being considered as "effective" as the employer's own. Yet on this critical point, as on who should bear the persuasion burden, the Act is silent.[482] The impact case is consequently even weaker under the most recent amendments to Title VII than it was before the Reagan Court's latest round of decisions.

We can conclude, then, that the Act modestly liberalizes the prima facie impact case by permitting attacks on combinations of practices. Not only is this change theoretically questionable,[483] it may prove unimportant in practice.[484] By contrast, except for returning the persuasion burden on business justification to the employer, the Act only trivially alters the employer's defense and leaves untouched the plaintiff's rebuttal, features of the impact case so badly crippled by *Wards Cove*.

## VIII. CONCLUSION

In one sense it is surprising that legislation so largely inspired by outrage in the civil rights community over the Court's dismemberment of the impact case in *Watson* and *Wards Cove* would do so little to revive it. It is equally surprising, given the same community's warm reception of *Price Waterhouse*, that the Act's prime contribution may turn out to be the enlargement of the circumstances permitting a "burden shift" to the employer in mixed motive disparate treatment cases. On reflection, however, these results might have been predicted. Equal opportunity, the motive force behind American antidiscrimina-

481. *See supra* text accompanying notes 84-90.

482. In fact, the House bill, H.R. 4000, noted that the plaintiff could overcome the business justification defense if she "demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well." § 4, proposing to add Title VII § 703(k)(1)(B)(iii)(II). By using the defined term "demonstrates" the House thus takes note, without quarrel, of the plaintiff's persuasion burden. Even more importantly, this provision says nothing about the relationship between cost and the effectiveness of an alternative practice. That the House was not intending to disturb *Wards Cove* on this issue is suggested by its observation that the definitional provisions in § 3 of the Act are intended to overrule only "the treatment of business necessity as a defense in *Wards Cove*." The conference committee managers recommend retaining the House bill's reference to less discriminatory alternatives in proposed § 703(k)(1)(B)(iii)(II), asserting only that it expresses a test that "governed before the decision in *Wards Cove* and is restored by this legislation." Joint Explanatory Statement of the Committee of Conference, paragraph 4 (9/25/90). It is hard to see how a test that limits alternatives to those that serve the employer's needs "as well" as the employer's original, chosen practice restores anything. Indeed it ratifies the "equality as effective" notion of *Wards Cove*.

483. *See supra* text accompanying notes 128-29.

484. *See supra* text following note 127.

tion legislation and the disparate treatment theory, is still the prodigal son; equal achievement, the theoretical fuel for disparate impact, remains at best a troublesome stepchild.