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Watson v. Fort Worth Bank and Trust: A Plurality's Proposal to Alter the Evidentiary Burdens in Title VII Disparate Impact Cases

The disparate impact theory of employment discrimination received its judicial imprimatur in *Griggs v. Duke Power Co.*[1] In *Griggs* the United States Supreme Court held that Title VII of the Civil Rights Act of 1964[2] forbids any employment practice which, although neutral on its face, operates to deny job opportunities to persons protected by Title VII unless the employer can show that the practice is "related to job performance."[3] Although *Griggs* was decided in 1971, courts remain in disagreement over both the proper scope of the theory and the allocation of the evidentiary burdens of proof and production. In *Watson v. Fort Worth Bank and Trust*,[4] a unanimous Supreme Court decided that disparate impact analysis could be applied to subjective or discretionary employment practices which have a discriminatory effect on protected groups.[5] This holding extended the scope of the theory, which had traditionally been applied only to standardized employment tests.[6] Responding to defendant's contention that the practical effect of such an extension would be to force employers to adopt quota systems, a plurality of the Court[7] argued that henceforth the burden of proof should be on the plaintiff to show that the discriminatory employment practice was not justified as a business necessity.[8] This Note focuses primarily on the evidentiary standards proposed by the plurality. It demonstrates that the probable effect of these evidentiary standards, which stand in stark contradiction to past Supreme Court and federal appellate formulations, is that future plaintiffs will find it virtually impossible to prevail on a disparate impact claim. The Note concludes that although additional safeguards may well be necessary to protect employers from a profusion of expensive litigation, shifting the burden of justification to the plaintiff is not an acceptable solution to the problem.

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1. 401 U.S. 424 (1971).
2. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
3. *Griggs*, 401 U.S. at 431.
4. 108 S. Ct. 2777 (1988).
5. *Id.* at 2786-87.
6. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (rule against employing drug addicts); Washington v. Davis, 426 U.S. 229 (1976) (written test of verbal skills); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude tests); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma and written aptitude test).
7. Justice O'Connor wrote for the plurality and was joined by Justices White and Scalia, and Chief Justice Rehnquist. Justice Kennedy had not yet been seated at the time of oral argument (January 20, 1988) and thus took no part in the consideration or decision of the case. Confronted with the same question in a future case, however, Justice Kennedy might well join the *Watson* plurality to make new law. In a more recent employment discrimination case, Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (per curiam), Justice Kennedy joined Justices O'Connor, Scalia, and White, and Chief Justice Rehnquist to grant a rehearing of Runyon v. McCrary, 427 U.S. 160 (1976), even though neither party in the case requested reconsideration. A 7-2 majority in *Runyon* held that 42 U.S.C. § 1981 "prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 168.
8. *Watson*, 108 S. Ct. at 2790.

In 1973 Fort Worth Bank and Trust hired Clara Watson, a black female, as a proof operator.[9] The Bank promoted Watson to the position of motor bank teller in 1976.[10] In 1980 Watson applied for two supervisory positions which had recently been vacated. Though she was considered for the positions, Watson received neither promotion. Mr. Richard Burt, a white male who had been the supervisor of the bookkeeping department, became supervisor of tellers in the main lobby.[11] Pat Cullar, a white female, became supervisor of the motor bank.[12] Watson was promoted, however, to commercial teller and informal assistant to Burt. Watson again applied for the position of supervisor of tellers in the main lobby when the Bank promoted Burt. Cullar was selected to fill this vacancy. Watson then applied for the position vacated by Cullar, but Kevin Brown, a white male teller in the motor bank, received this promotion.[13]

After exhausting her administrative remedies with the Equal Employment Opportunity Commission, Watson filed suit on October 21, 1981, in the United States District Court for the Northern District of Texas. She alleged that the bank had discriminated against her and other persons similarly situated on the basis of race in violation of the Civil Rights Acts of 1866 and 1964.[14] The district court first disposed of the class claims.[15] It then proceeded to consider

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9. *Id.* at 2782.

10. *Id.*

11. Brief for Respondent at 2, *Watson* (No. 86-6139). Mr. Burt, who also had experience in the general ledger department and as a credit analyst, received his bachelor of arts degree in banking and finance shortly after his promotion. *Id.*

12. *Watson*, 108 S. Ct. at 2782. Cullar had been the assistant to the main lobby supervisor prior to her promotion. In addition, she had eighteen years of banking experience. Brief for Respondent at 2, *Watson* (No. 86-6139).

13. Watson v. Fort Worth Bank and Trust, 798 F.2d 791, 794 (5th Cir. 1986), *vacated*, 108 S. Ct. 2777 (1988). The bank had not developed formal criteria for evaluating applicants for the four positions Watson unsuccessfully sought. *Watson*, 108 S. Ct. at 2782. The supervisor over the open job position had the responsibility for interviewing each of the applicants and filling the position according to his or her best judgment. Each of the supervisors who denied Watson's applications for promotions was white. *Id.*

Burt testified that he considered supervisory experience, leadership ability, and the ability to get along with others as primary factors in his decisions. Brief for Respondent at 2, *Watson* (No. 86-6139). Burt further testified that he considered Cullar better qualified than Watson because there was resentment among the other tellers who had been under Watson's supervision during the time she was Burt's assistant. *Id.* at 3. Further, Burt testified that he preferred Brown over Watson because of Watson's inability to get along with others. *Id.*

14. 42 U.S.C. § 1981 (1982); 42 U.S.C. §§ 2000e to 2000e-17 (1982); *see Watson*, 798 F.2d at 794. In particular, Watson alleged discrimination against blacks in "hiring, compensation, initial placement, promotions, terminations, and other terms and conditions of employment." *Watson*, 108 S. Ct. at 2782.

The elements of a discrimination claim under § 1981, which is the codified version of a portion of the Civil Rights Act of 1866, parallels those of a claim under Title VII. Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 CARDOZO L. REV. 549, 553 n.11 (1986). For a comparison of § 1981 and Title VII, see Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207 (1979).

15. Initially the district court "certified a class consisting of 'blacks who applied to or were employed by [respondent] on or after October 21, 1979 or who may submit employment applications to [respondent] in the future.'" *Watson*, 108 S. Ct. at 2782 (quoting *Watson*, 798 F.2d at 794). After considering this evidence at trial, however, the district court decertified this broad class because no common question of law or fact united the groups of applicants and employees. *Id.* at 2782-83. After splitting the broad class into two classes, one for employees and the other for applicants, the court then decertified the class of black employees because it failed to meet the numerosity

Watson's individual claims under the evidentiary standards applicable to disparate treatment cases.[16] The court found that Watson had established a prima facie case of discrimination, but that the bank had met its burden of persuasion in each instance by articulating legitimate, nondiscriminatory reasons for each of the promotion decisions.[17] Concluding that Watson had failed to carry the burden of persuasion that the bank's articulated reasons were a pretext for discrimination, the district court dismissed the action.[18] On appeal Watson argued that the district court should have also considered her claim under the disparate impact analysis set forth in *Griggs v. Duke Power Co.*[19] Affirming the district court's judgment,[20] a 2-1 majority of the United States Court of Appeals for the Fifth Circuit held that promotion systems which use discretionary or subjective criteria are properly analyzed on the disparate treatment model, not the disparate impact model.[21]

Recognizing a conflict between the courts of appeals on the question of whether disparate impact analysis should be applied to subjective employment

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requirement of Federal Rule of Civil Procedure 23(a). *Id.* at 2783. Further, the court found that Watson was not an adequate representative of the class of applicants because her claims of discrimination in promotion were not typical of members of that class. *Watson*, 108 S. Ct. at 2783.

16. In a disparate treatment action the plaintiff-employee attempts to show that he is the victim of intentional, yet covert, discrimination on the part of the defendant-employer. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment under Title VII of the Civil Rights Act of 1964 after* Beazer *and* Burdine, 23 B.C.L. REV. 419, 419 (1982). The evidentiary burdens of such cases were first enunciated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First the plaintiff must establish a prima facie case by showing:

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

Id. at 802. The burden of production then shifts to the employer to articulate some legitimate, nondiscriminatory reason for rejecting the plaintiff. *Id.* If the employer meets this burden of production, the plaintiff then carries the ultimate burden of proving that the employer's stated reason for rejecting the applicant was in fact a pretext for intentional discrimination on the basis of race. *Id.* at 804.

17. *Watson*, 108 S. Ct. at 2783.

18. *See Watson*, 798 F.2d at 792. In the three instances in which Burt and Cullar were promoted over Watson, the court credited the bank's assertion that Watson had less banking and supervisory experience than the chosen applicants. The court was more troubled with the promotion of Brown, who had less experience than Watson. The court relied on Brown's experience of supervising summer employees at Six Flags Over Texas and his strong performance as a teller to uphold his promotion. *Watson*, 798 F.2d at 799; *see also supra* note 13 (discussing the process by which the bank made promotion decisions).

19. 421 U.S. 424 (1971); *see Watson*, 798 F.2d at 797.

20. The court of appeals did not find any abuse of discretion in the district court's decertification of the two classes. It did, however, vacate the portion of the judgment regarding the black applicants and remanded to the district court with instructions to dismiss those claims without prejudice. *Watson*, 798 F.2d at 799.

21. *Id.* at 797. The court here relied exclusively on Fifth Circuit precedent to reach this decision. *See, e.g.*, Lewis v. National Labor Relations Bd., 750 F.2d 1266, 1271 & n.3 (5th Cir. 1985); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188 (5th Cir. 1983); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 620 (5th Cir. 1983); Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982). *But see* Page v. U.S. Indus., 726 F.2d 1038, 1046 (5th Cir. 1984) (district court properly applied disparate impact analysis to discretionary promotion system). The *Watson* court suggested that it would have decided in accordance with *Page* if this were a case of first impression and thus not "constrained by *Pouncy* and its progeny." *Watson*, 798 F.2d at 797 n.12.

criteria,[22] the United States Supreme Court granted Watson's petition for a writ of certiorari[23] and vacated the judgment of the court of appeals.[24] Justice O'Connor, delivering the opinion of the Court, found that disparate impact analysis may be applied to discretionary or subjective employment practices.[25] While recognizing that the Court had typically analyzed discretionary criteria under the disparate treatment model,[26] O'Connor asserted that the effectiveness of disparate impact analysis in evaluating the discriminatory effects of facially neutral, objective criteria "could largely be nullified" if the analysis were restricted to the appraisal of objective criteria.[27] Selection systems that combine both objective and subjective criteria would have to be considered "subjective in nature."[28] Thus, an employer who included at least one subjective criterion in her selection system and avoided making the objective criteria "absolutely determinative" could effectively isolate the entire system, including the objective criteria, from disparate impact analysis.[29] Moreover, the Court noted that disparate treatment analysis is inadequate in some cases to prevent the discriminatory effects of subjective criteria.[30] According to the Court, employers often do not intend to discriminate when they use subjective criteria in their selection process, but "subconscious stereotypes and prejudices" sometimes produce discretionary decisions skewed against individuals and groups protected by Title VII.[31] O'Connor concluded, "If an employer's undisciplined system of subjec-

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22. Seven circuits have applied disparate impact analysis to subjective criteria. *See, e.g.*, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (separate hiring channels); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (multicomponent promotion process); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (postal office promotion practices based on subjective evaluations); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) (challenging work assignment and promotion practices), *cert. denied sub nom.* Meese v. Segar, 471 U.S. 1115 (1985); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (professor tenure decision); Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983) (fire department promotion activities); Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88 (6th Cir. 1982) (refusal to rehire following layoff).

The Fourth and Fifth Circuits typically have not applied disparate impact analysis to subjective criteria. *See, e.g.*, E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982) (refusing to apply impact analysis). *But see, e.g.*, Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986) (applying impact analysis but only implicitly discussing subjectiveness); Page v. U.S. Indus., 726 F.2d 1038 (5th Cir. 1984) (applying impact analysis).

The Seventh and Eighth Circuits have reached such incongruous results that their typical approach cannot be determined. For the Seventh Circuit, see, *e.g.*, Griffin v. Board of Regents, 795 F.2d 1281 (7th Cir. 1986) (refusing to apply impact analysis). *Contra* Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir.) (applying impact analysis), *cert. denied*, 459 U.S. 873 (1982). For the Eighth Circuit, see, *e.g.*, McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987) (refusing to apply impact analysis), *vacated on other grounds sub nom.* Turner v. McIntosh, 108 S. Ct. 2861 (1988); Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983) (same), *cert. denied*, 466 U.S. 952 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (same). *Contra* Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (applying impact analysis), *cert. denied*, 466 U.S. 972 (1984).

23. Watson v. Fort Worth Bank and Trust, 107 S. Ct. 3227 (1987).

24. *Watson*, 108 S. Ct. at 2779.

25. *Id.* at 2787.

26. *See supra* note 16.

27. *Watson*, 108 S. Ct. at 2786.

28. *Id.*

29. *Id.*

30. *See id.*

31. *Id.* These subconscious stereotypes and prejudices were a "lingering form of the problem that Title VII was enacted to combat." *Id.* In this case, for instance, one supervisor told Watson

tive decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."[32]

Defendant objected that application of disparate impact analysis to subjective criteria would leave employers who cannot afford the considerable expense of defending such practices with equally uninviting choices. First, employers could eliminate all subjective criteria from their systems.[33] Success at many jobs, however, depends in great measure on qualities that cannot be measured through standardized tests, such as common sense, good judgment, and the ability to cooperate with coworkers.[34] Most employers, then, would "find it impossible to eliminate subjective selection criteria" while remaining committed to hiring the best available employees.[35] Second, defendant argued, employers could rely on surreptitious quota systems to guarantee that no plaintiff could establish a statistical prima facie case.[36] In drafting Title VII, however, Congress explicitly refused to require employees to hire by quota in order to protect against liability.[37]

A plurality of the Court[38] found merit in defendant's contentions. In an attempt to protect employers from this potential Hobson's choice, the plurality offered a "fresh and somewhat closer examination" of the evidentiary standards applicable in disparate impact cases.[39] To establish a prima facie case, the plaintiff must make three showings. First, a plaintiff must present adequate statistical evidence to demonstrate a disparity in the employer's work force.[40] Second, the plaintiff must isolate and identify a specific employment practice allegedly responsible for the disparity.[41] Third, the plaintiff must prove causation through statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[42]

If the plaintiff carries the burden of proving a prima facie case, the burden of production shifts to the defendant, who must produce evidence that "its employment practices are based on legitimate business reasons."[43] Although *Griggs* had stated that the employer had the "burden of showing that any given requirement must have a manifest relationship to the employment in ques-

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that a supervisory teller position was a big responsibility "with a lot of money . . . for blacks to have to count." Brief for Appellant at 7, *Watson* (86-6139).

32. *Watson*, 108 S. Ct. at 2786-87.
33. Brief for Respondent at 38, *Watson* (86-6139).
34. *Watson*, 108 S. Ct. at 2787.
35. *Id.*
36. *Id.*
37. *See* 42 U.S.C. § 2000e-2(j) (1982).
38. *See supra* note 7.
39. *Watson*, 108 S. Ct. at 2788.
40. *Id.*
41. *Id.* Defendants are free to attack this statistical evidence in a number of ways; for example, if the data pool is too small, or contains the wrong individuals or "inadequate statistical techniques." *Id.* at 2790.
42. *Id.* at 2788-89.
43. *Id.* at 2790.

tion,"[44] the plurality in *Watson* stated that "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of [proof] ... remains with the plaintiff at all times."[45] Finally, after the defendant meets this burden of production, the plaintiff must " 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' "[46] Proving the existence of a less discriminatory alternative selection device, the plurality noted, would be "relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment."[47]

Refusing to join in the plurality opinion, Justice Blackmun asserted that the plurality's discussion of evidentiary standards applicable in disparate impact cases "is flatly contradicted by our cases."[48] Blackmun stated that although the plaintiff bears the burden of proof with regard to the prima facie case, a plaintiff who successfully carries this burden and establishes a prima facie case "shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity."[49] Noting that the plurality's suggested allocation of evidentiary burdens closely resembled those established for disparate treatment cases,[50] Justice Blackmun suggested that crucial differences between the two types of claims should effectuate different evidentiary standards.[51] A prima facie case of disparate treatment, which raises only an inference of discrimination,[52] does not "*require* a trial court to presume, on the basis of the facts establishing a prima facie case, that an employer intended to discriminate."[53] A prima facie case of disparate treatment, then, shifts the burden of production to the defendant, but is insufficient to shift the burden of proof.[54] A prima facie case of disparate impact, on the other hand, "*directly* establish[es]" that the employment practice has a disparate effect on a protected group.[55] In disparate impact cases, therefore, "[t]he plaintiff . . . already has proved that the employment practice has an improper effect; it is up to the em-

44. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

45. *Watson*, 108 S. Ct. at 2790.

46. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

47. *Id.* at 2790. In other words, if a less discriminatory alternative practice was available to the defendant, which the defendant failed to adopt, then the defendant must have been using the more discriminatory practice as a pretext for intentional discrimination. *See infra* note 119.

48. *Id.* at 2792 (Blackmun, J., joined by Brennan and Marshall, JJ., concurring). Justice Stevens agreed that disparate impact analysis should be applied to subjective criteria but did not think it wise or necessary to formulate a new set of evidentiary standards. *Id.* at 2797 (Stevens, J., concurring).

49. *Id.* at 2792 (Blackmun, J., concurring).

50. *See supra* note 16.

51. *Watson*, 108 S. Ct. at 2792-93 (Blackmun, J., concurring).

52. *Id.* at 2793 (Blackmun, J., concurring); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors").

53. *Watson*, 108 S. Ct. at 2793 (Blackmun, J., concurring).

54. *Id.* (Blackmun, J., concurring).

55. *Id.* at 2794 (Blackmun, J., concurring).

ployer to prove that the discriminatory effect is justified."[56] Blackmun concluded that allowing an employer merely to articulate, rather than to prove,[57] a legitimate, nondiscriminatory justification "is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate."[58]

Title VII prohibits employers from "discriminat[ing] against any individual with respect to [his employment] because of such individual's race, color, religion, sex, or national origin."[59] In *Griggs v. Duke Power Co.*[60] the United States Supreme Court announced that this prohibition extended to facially neutral employment practices which, although "fair in form," are "discriminatory in operation."[61] The thirteen black plaintiffs in *Griggs* succeeded in showing that defendant's requirement of a high school diploma for transfer to higher-paying departments denied significantly more blacks than whites the opportunity of transfer.[62] Plaintiffs' statistical proof sufficed to establish a prima facie case of discrimination and convinced the Court to shift the burden to defendant to jus-

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56. *Id.* (Blackmun, J., concurring).

57. Blackmun took issue with the plurality's concern that the impossibility of validating subjective criteria as "job-related" with mathematical certainty would force employers to adopt quotas. The proper means of validation, Blackmun stated, will vary with the type of job and the size and type of business. *Id.* at 2795-96 ("Courts have recognized that the results of studies, the presentation of expert testimony, and prior successful experience, can all be used, under appropriate circumstances, to establish business necessity." (citations omitted)) (Blackmun, J., concurring).

58. *Id.* at 2794 (Blackmun, J., concurring); *see also id.* at 2796 ("[T]he bald assertion that a purely discretionary selection process allowed respondent to discover the best people for the job, without any further evidentiary support, would not be enough to prove job-relatedness.") (Blackmun, J., concurring).

59. 42 U.S.C. § 2000e-2(a)(1) (1982).

60. 401 U.S. 424 (1971).

61. *Id.* at 431. The Court stated that the primary purpose of Congress in enacting Title VII was the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* Furthermore, plaintiffs should not have to prove that the discrimination was intentional: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432; *cf.* Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299-1310 (1987) (Legislative history and statutory language demonstrate that Congress identified nonintentional, pretextual discrimination as a problem, but left the federal courts to design a solution. *Griggs* was a first attempt at a judicial solution.). *But cf.* Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 497-503 (1985) (Title VII intended only to prohibit intentional discrimination, similar to constitutional prohibition against discrimination).

For arguments that the *Griggs* Court did not intend to create a separate conceptual definition of discrimination, see Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1, 35 n.139.

62. *Griggs*, 401 U.S. at 430. Duke Power, a power company in North Carolina, had openly discriminated against blacks prior to the enactment of Title VII. All black workers had been summarily restricted to the labor department, regardless of qualifications. Beginning July 2, 1965, the day on which Title VII became effective, the company instituted a new policy allowing employees to transfer from the labor department to higher-paying jobs if the employee had both a high school diploma and achieved a passing score on two professionally prepared aptitude tests. *Id.* at 428. Duke Power insisted that the requirements were added to "improve the overall quality of the work force." *Id.* at 431. Plaintiffs' statistical evidence revealed, however, that while 34% of all white males in North Carolina had completed high school by 1960, only 12% of black males had done so. Similarly, while 58% of all white males passed the two intelligence tests, only 6% of blacks had done so. *Id.* at 430 n.6.

tify its practices.[63] Chief Justice Burger, writing for a unanimous Court, described the defendant's evidentiary burden in several ways. "The touchstone is business necessity. If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."[64] Also, the defendant must show that the practice "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[65] Finally, the defendant has "the burden of showing that any given requirement must have a manifest relationship to the employment in question."[66] Despite offering these varying formulations, the Court did not state explicitly whether the employer's burden was one of proof or of production.[67]

Two subsequent Supreme Court decisions made clear that the defendant's burden of rebutting the plaintiff's prima facie case was a burden of proof. In *Albemarle Paper Co. v. Moody*,[68] a disparate impact case decided in 1975, the Court stated that when a plaintiff establishes a prima facie case,[69] the employer must "meet the burden of *proving* that its tests are 'job-related.' "[70] In *Washington v. Davis*[71] the Court explained that meeting a burden of production would not suffice to rebut a plaintiff's evidence of disparate impact.

> [I]t is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance. . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives . . . .[72]

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63. *Id.* at 431-32.

64. *Id.* at 431.

65. *Id.*

66. *Id.* at 432.

67. *Cf.* Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) ("[W]ords such as 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending on the context in which they are used.").

68. 422 U.S. 405 (1975).

69. As the Court made plain, the burden of proof does not shift to the defendant unless and until the plaintiff first carries the burdens of production and proof on the issue of discriminatory effect: "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425. Curiously, the Court here cites McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a disparate *treatment* case, in support of this proposition. *See supra* note 16.

The defendant may initially defend itself by attacking the plaintiff's statistical evidence. To this end, the defendant can, for example, dispute the accuracy of the plaintiff's statistics, *see, e.g.*, Robinson v. Union Carbide Corp., 538 F.2d 652, 657-58 (5th Cir. 1976), *cert. denied*, 434 U.S. 822 (1977), or argue that the plaintiff's evidence does not accurately reflect the labor market, *see, e.g.*, Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235, 1245 (7th Cir. 1980). *See generally* Note, *supra* note 14, at 561-62 (suggesting employers' defenses to plaintiff's prima facie case).

70. *Albemarle*, 422 U.S. at 425 (emphasis added).

71. 426 U.S. 229 (1976).

72. *Id.* at 247 (footnote omitted). Lower appellate courts have also interpreted *Griggs* as shifting a burden of proof to defendant. *See, e.g.*, McCosh v. City of Grand Forks, 628 F.2d 1058 (8th Cir. 1980); Horace v. City of Pontiac, 624 F.2d 765 (6th Cir. 1980); Ramirez v. Hofheinz, 619 F.2d 442 (5th Cir. 1980); Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980); Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978); Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973).

The Court's next disparate impact case was *Dothard v. Rawlinson.*[73] In *Dothard* plaintiff was denied employment as a correctional counselor (prison guard) because she failed to meet the 120-pound weight and five-foot-two-inch height requirements established by the state of Alabama for all law enforcement officers.[74] The Court's majority opinion, following *Albemarle* and *Griggs,* agreed that when the plaintiff establishes discriminatory impact the burden of proof shifts to defendant to demonstrate the job-relatedness of the practice.[75] In *Dothard* defendant argued that the height and weight requirements were predictive of the strength of the applicant, an attribute essential to job performance as a prison guard.[76] The Court rejected this argument, stating that defendant's purpose could be achieved by "adopting and validating a test for applicants that measures strength directly."[77] In concurrence, however, Justice Rehnquist for the first time suggested that the defendant need only meet a burden of *production* to rebut a prima facie case: "Appellants [defendants], in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification."[78] The standard propounded by Rehnquist here would reduce the defendant's burden significantly, for the difference between demonstrating a relationship between an employment practice and job performance *by an offer of proof,* and merely *asserting* that such a relationship exists is profound.[79]

In 1981 the Court clearly limited the defendant's evidentiary burden in disparate treatment cases. In *Texas Department of Community Affairs v. Burdine*[80] the Court stated that although the defendant needed to produce some legitimate, nondiscriminatory reason for plaintiff's rejection, the defendant "need not persuade the court that it was actually motivated by the proffered reasons."[81] In light of the *Burdine* decision, defendants in disparate impact cases began to argue that the evidentiary burdens in such cases should parallel the burdens in

73. 433 U.S. 321 (1977).

74. *Id.* at 323-24. The district court found that these height and weight requirements would exclude over 41% of all women but less than 1% of all males. *Id.* at 329-30.

75. *Id.* at 329.

76. *Id.* at 331. At trial, however, defendant produced no evidence correlating these requirements to the requisite amount of strength considered necessary for effective performance as a prison guard. *Id.*

77. *Id.* at 332.

78. *Id.* at 339 (Rehnquist, J., concurring). In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), another disparate impact case, Justice Rehnquist again implied that the defendant had to meet a burden of production: "[W]e agree with the District Court in this case that since there was no proof of any business necessity adduced with respect to the policies in question, that court was entitled to 'assume no justification exists.'" *Id.* at 143. Of course, if the defendant had the burden of *proving* business necessity but offered no evidence in this regard, the district court would not have merely been "entitled" to assume no justification exists; it would instead have been *required* to find for plaintiff.

79. Furnish, *supra* note 16, at 430. In *Dothard* Justice Rehnquist cited McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the seminal case on disparate *treatment,* to support his proposed evidentiary standard. *Dothard,* 433 U.S. at 339 (Rehnquist, J., concurring). In *McDonnell Douglas* the Court held that a defendant may rebut plaintiff's prima facie case of disparate treatment by "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas,* 411 U.S. at 802; *see supra* note 16.

80. 450 U.S. 248 (1981).

81. *Id.* at 254.

disparate treatment cases.[82] In *NAACP v. Medical Center, Inc.*[83] the United States Court of Appeals for the Third Circuit accepted this argument. The NAACP and other minority organizations brought suit against the Wilmington (Delaware) Medical Center, alleging that a relocation of the medical center to the suburbs would have a discriminatory effect on minorities.[84] Although the suit involved a claim under Title VI of the Civil Rights Act of 1964,[85] the court of appeals relied exclusively on Title VII disparate impact and disparate treatment cases, including *Burdine*, to reach its decision. The court found that "[d]isproportionate impact or effect is simply an additional method of demonstrating impermissible discrimination under Title VII."[86] Accordingly, the court concluded that under either theory of discrimination defendants bear only a burden of production: "All things considered, uniformity in the procedural aspects of impact and intent cases is highly desirable and should not be sacrificed on the dubious theory that plaintiffs advance here. Although we need not worship at its shrine, symmetry is not always sinful."[87]

In contrast, the other eleven federal circuits did not alter the allocations of burdens of proof in disparate impact cases in response to *Burdine*.[88] For exam-

82. *See, e.g.*, Vuyanich v. Republic Nat'l Bank of Dallas, 521 F. Supp. 656, 660 (N.D. Tex. 1981) ("The Bank understandably reads much into the *Burdine* decision."), *vacated on other grounds*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984).

83. 657 F.2d 1322 (3rd Cir. 1981).

84. *Id.* at 1324-25.

85. 42 U.S.C. § 2000d (1982).

86. *NAACP*, 657 F.2d at 1334.

87. *Id.* at 1336. For a discussion of this case, see Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 388-90 (1982).

In Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981), the Third Circuit applied this same principle in a Title VII action: "As with claims of discriminatory intent, the burden of persuasion remains at all times with the plaintiff. Thus, the defendant need only come forward with evidence to meet the inference of discrimination raised by the prima facie case." *Id.* at 991 (citation omitted).

In more recent disparate impact cases, the Third Circuit has ignored its *Croker* decision not to place a burden of proof on the defendant. In Green v USX, 843 F.2d 1511, 1521 (3d Cir. 1988), defendant had the burden of "demonstrating the business necessity of each of the criteria that it uses." The court in *Green* explained that "[d]isparate impact analysis is best understood as a burden-shifting device that fairly and reasonably apportions the burdens of proof between the parties in a manner that is best suited to achieve the desired goals of Title VII." *Id.* at 1522-23; *accord* Massarsky v. General Motors Corp., 706 F.2d 111, 120 (3d Cir. 1983).

88. *See, e.g.*, Oliver v. Digital Equip. Corp., 846 F.2d 103, 111 (1st Cir. 1988); Washington v. Elec. Joint Apprenticeship and Training Comm., 845 F.2d 710, 715 (7th Cir.), *cert. denied*, 109 S. Ct. 371 (1988); Beard v. Whitley County REMC, 840 F.2d 405, 409 (4th Cir. 1988); Wislocki-Goin v. Mears, 831 F.2d 1374, 1380 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1113 (1988); Falcon v. General Tel. Co., 815 F.2d 317, 322 (5th Cir. 1987); Thomas v. Metroflight, Inc., 814 F.2d 1506, 1508 (10th Cir. 1987); Lujan v. Franklin County Bd. of Educ., 779 F.2d 51 (6th Cir. 1985); Lowe v. City of Monrovia, 775 F.2d 998, 1010 & n.10 (9th Cir. 1985); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 572 (4th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Robinson v. Polaroid Corp., 732 F.2d 1010, 1016-17 (1st Cir. 1984); Walker v. Jefferson County Home, 726 F.2d 1554, 1556-57 (11th Cir. 1984); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1301 (9th Cir. 1982); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982); Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 752 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); Coe v. Yellow Freight Sys., 646 F.2d 444, 448 (10th Cir. 1981); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1252 (6th Cir. 1981); Teal v. Connecticut, 645 F.2d 133, 136 n.5 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982); Guardians Ass'n of New York v. Civil Serv. Comm'n, 633 F.2d 232, 235 (2d Cir. 1981); McCosh v. City of Grand Forks, 628 F.2d 1058, 1062 (8th Cir. 1980); Kirby v. Colony Furniture Co., 613 F.2d 696, 703 n.5 (8th Cir. 1980).

ple, the United States Court of Appeals for the Fifth Circuit remanded *Johnson v. Uncle Ben's, Inc.*[89] to the district court with orders to determine whether the defendant had met its burden of proving that its educational requirements were a justified "business necessity."[90] On appeal, however, the United States Supreme Court remanded to the court of appeals for reconsideration in light of *Burdine*.[91] Rejecting the Court's implicit invitation to establish parallel evidentiary burdens for impact and intent cases,[92] the Fifth Circuit stated that the burden on a disparate impact defendant differs from the burden placed on a disparate treatment defendant because distinct prima facie cases must be established by the respective plaintiffs.[93] A prima facie case of disparate treatment raises an inference of intentional discrimination which the defendant can rebut by articulating a legitimate business reason for the challenged conduct.[94] To establish a prima facie case of disparate impact, on the other hand, the plaintiff cannot rely on a mere inference of discriminatory effect;[95] he must prove, using statistical evidence, that the questioned practice has an actual discriminatory effect.[96] The court stated, "It is not part of the plaintiff's burden to prove absence of a legitimate business reason for the challenged practice. Knowledge of a legitimate business reason is uniquely available to the employer who is accordingly required to persuade the court of its existence by a preponderance of the evidence."[97] The court of appeals again remanded the case to the district court, concluding that the evidentiary burdens in disparate impact cases were "unaffected by *Burdine*."[98]

In *Watson* the plurality allocated the burdens of production and proof in a

89. 628 F.2d 419 (5th Cir. 1980), *vacated and remanded*, 451 U.S. 902 (1981).

90. *Id.* at 427 (quoting *Griggs*, 401 U.S. at 431).

91. Johnson v. Uncle Ben's, Inc., 451 U.S. 902 (1981).

92. In a disparate impact case following *Burdine*, the Supreme Court itself did not reduce the defendant's evidentiary burden to that of an intent case. Connecticut v. Teal, 457 U.S. 440, 446-47 (1982). When a plaintiff establishes a prima facie disparate impact case, "the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination." *Id.* (quoting *Griggs*, 401 U.S. at 432).

93. Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 752-53 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

94. *Id.* at 753 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

95. *Id.* In a disparate treatment case the dispositive issue is the defendant's intent; the defendant tries to rebut directly the inference of intentional discrimination raised by plaintiff's prima facie case. In a disparate impact case, on the other hand, the defendant's business necessity argument does not attempt to rebut evidence of a discriminatory effect, but is an affirmative defense: the defendant admits that the practice has a discriminatory effect, but contends that the practice is nevertheless justified as a business necessity. *See* Smith, *supra* note 87, at 392-96.

96. *Uncle Ben's*, 657 F.2d at 753. The *Burdine* Court explicitly warned against transposing the disparate treatment analysis to disparate impact cases: "We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Burdine*, 450 U.S. at 252 n.5; *see, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 (1977).

97. *Uncle Ben's*, 657 F.2d at 753.

98. *Id.* The court of appeals noted that the "respective burdens in a disparate impact case are . . . governed by clear and recent Supreme Court precedent unaltered by *Burdine*." *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321 329 (1971)). In a strong dissent, District Judge Daniel Thomas, sitting by designation, argued that if the Supreme Court had not intended to alter the evidentiary burdens in disparate impact cases through *Burdine* it would not have remanded this case for reconsideration in light of *Burdine*. *Id.* at 754 (Thomas, J., dissenting).

scheme similar to the model articulated by the Third Circuit in *NAACP v. Medical Center, Inc.*[99] The plaintiff first must prove that the challenged employment practice has a statistically significant discriminatory effect. In rebuttal the defendant must produce evidence that it uses the discriminatory practice for some legitimate business purpose.[100] To prevail, the plaintiff must then show that a less discriminatory alternative selection process exists.[101] This set of evidentiary standards represents a fundamental change from the model formulated in *Griggs* and *Albemarle* and followed in the overwhelming majority of subsequently decided cases.[102] It must be remembered, however, that the *Griggs-Albemarle* line of cases typically concerned *objective* employment practices. The plurality revised the allocation of the burdens of production and proof as a response to its fears that extension of the disparate impact analysis to subjective criteria might force employers to adopt quota systems or to engage in preferential treatment.[103] The issue, then, is whether quotas and preferential treatment are a likely result of the extension of impact analysis to subjective criteria, and if so, whether this possibility justifies the plurality's proposed evidentiary standards.

The plurality suggests two reasons why extension of impact analysis to subjective criteria increases the risk that employers will be forced to adopt quotas or engage in preferential treatment. First, because a plaintiff can establish a prima facie case by using "bare statistics," any imbalance in the employer's work force would be a potential source of Title VII liability.[104] Since it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad innocent causes that may lead to statistical imbalances," employers' response would be to adopt quotas "to ensure that no plaintiff can establish a statistical prima facie case."[105] This argument, however, rests on the faulty premise that extension of impact analysis to subjective criteria would make it *easier* for plaintiffs to establish prima facie cases. To establish a prima facie case, a plaintiff must isolate and identify the *specific* employment practice allegedly responsible for the observed disparity.[106] As the *Watson* plurality admits, although satisfying this requirement "has been relatively easy to do in challenges to standardized tests,"

99. 657 F.2d 1322 (3d Cir. 1981); *see supra* notes 83-87 and accompanying text.

100. *Watson*, 108 S. Ct. at 2790.

101. *Id.*

102. *See supra* notes 59-98 and accompanying text.

103. *Watson*, 108 S. Ct. at 2788-91.

104. *Id.* at 2787.

105. *Id.*

106. *Id.* at 2788; *see also* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482 (9th Cir. 1987) (listing as an element of the plaintiff's prima facie case the identification of specific subjective employment practices); *cf.* Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982) ("The discriminatory impact model . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."). *But cf.* Green v. USX Corp., 843 F.2d 1511, 1524 (3d Cir. 1988) ("Applying disparate impact analysis to this employer's hiring 'system' and measuring the disproportionate 'effects' on minority hiring that result may impose a difficult burden upon the employer, but not an unfair one."); Griffin v. Carlin, 755 F.2d 1516, 1524 (11th Cir. 1985) ("'[O]ur disparate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group.'" (quoting Connecticut v. Teal, 457 U.S. 440, 458 (1982) (Powell, J., dissenting))).

it can impose a heavy burden on plaintiffs when the employer's selection process includes subjective criteria.[107] If anything, then, extending disparate impact analysis to subjective criteria would appear to make it more difficult for a plaintiff to establish a prima facie case, and, accordingly, less likely that employers would be pressured to adopt quota systems.

Second, employers might adopt quotas because the inefficiency and expense of justifying each subjective criterion would be prohibitive. The plurality contended that although objective tests and criteria can be justified through formal validation studies which measure whether a given selection criterion accurately predicts on-the-job performance, " 'validating' subjective selection criteria in this way is impracticable."[108] The plurality also recognized, however, that employers are *not* required to produce formal validation studies even to justify the use of objective criteria.[109] Courts have allowed employers to use other methods to prove the job-relatedness of a specific selection criterion, including independent national studies,[110] presentation of expert witnesses,[111] and prior successful experience.[112] Elsewhere in its opinion, the plurality insisted: "In the context of subjective or discretionary employment decisions, the 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.' "[113] Again, however, it is unclear why extending disparate impact analysis to include subjective criteria would increase the pressure on employers to adopt quotas if justifying subjective criteria as job-related is *easier* than justifying objective criteria.

The primary effect of the plurality's proposed evidentiary standards would be that future plaintiffs would find it virtually impossible to prevail on a claim of disparate impact. This is true for at least two reasons. First, when the defendant's burden of justifying its practice is reduced from one of proof to one of production, it is the plaintiff who must bear the burden of persuasion on the

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107. *Watson*, 108 S. Ct. at 2788 ("The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue.").

108. *Id.* at 2787. Justice O'Connor continued:

> Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling.

Id.

109. *Id.* at 2790-91; *see* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Washington v. Davis, 426 U.S. 229, 250 (1976).

110. *See* Davis v. City of Dallas, 777 F.2d 205, 218-19 (5th Cir. 1985) (nationwide studies and commission reports of job-relatedness of college degree requirement for police officer), *cert. denied*, 476 U.S. 1116 (1986).

111. *See id.* at 219-22 (four expert witnesses testify as to the correlation between performance of police officer and college degree).

112. *Watson*, 108 S. Ct. at 2795-96 (Blackmun, J., concurring); *see* Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2nd Cir. 1984) (generations of experience reflecting job-relatedness of decentralized decisionmaking structure based on peer judgments in academic setting can be used to show business necessity).

113. *Watson*, 108 S. Ct. at 2791 (emphasis added).

issue of job-relatedness. In other words, in order to prevail a plaintiff must prove both that the practice in question has a discriminatory effect *and* that the practice is unjustified because it does not predict on-the-job performance. In the vast majority of instances, however, plaintiffs simply do not have the access to resources and information necessary to carry this latter burden. When justification requires formal validation studies, employees will typically lack the financial resources necessary to have these studies carried out.[114] Even in those instances in which formal validation studies are not required, an adequate showing of the job-relatedness of the challenged practice requires a detailed understanding of the position, the knowledge and skill required to perform its duties, and the probable consequences of the employer's having to make future selections without using the criterion.[115] This information is uniquely available to the employer, not the employee.[116]

Second, even if a given plaintiff could successfully carry its burdens of proof on the issues of discriminatory effect and job-relatedness, under the plurality's proposed evidentiary standards this plaintiff would still have to show the existence of a less discriminatory alternative.[117] As initially conceived in *Albemarle Paper Co. v. Moody*,[118] a plaintiff's showing of a less discriminatory alternative "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination."[119] Consequently, the *Albemarle* Court shifted this burden to

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114. Smith, *supra* note 87, at 396.

115. *Id.* at 395.

116. Even with the sophisticated use of discovery devices, because this knowledge would have to be obtained from the employer's supervisors, of whom some might not be particularly forthcoming in response to a plaintiff's deposition or interrogatory questioning, an employee's ability to prevail would be "drastically undercut." Smith, *supra* note 87, at 395-96.

117. *Watson*, 108 S. Ct. at 2790. The plurality in *Watson* maintained that "when the defendant has met its burden of producing evidence . . . , the plaintiff *must* 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.'" *Id.* (emphasis added) (quoting *Albemarle*, 422 U.S. at 425).

118. 422 U.S. 405 (1975).

119. *Id.* at 425. There has been some disagreement about whether the less discriminatory alternative issue is a part of the larger issue of business justification or instead is an opportunity for plaintiff to prove that the challenged practice was a pretext for *intentional* discrimination. In Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982), the court stated that an employment practice cannot be justified if plaintiff has made a showing of a less discriminatory alternative.

> A practice that is unjustifiable in race and sex neutral business terms is not always the product of intentional discrimination. The decision makers may simply have missed a less discriminatory option. In such an event we could speak of "negligent discrimination."

Id.; *accord* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1335 (3d Cir. 1981); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

A careful reading of *Albemarle*, however, demonstrates that a showing of a less discriminatory alternative goes directly to the question of intentional discrimination. The Court cited *McDonnell Douglas* as authority for the relevance of such a showing in impact analysis, intimating that the question of intentional discrimination also has a place in disparate impact cases. Smith, *supra* note 87, at 402-04; *see supra* note 16. Moreover, in New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979), the Court did not even give the plaintiff an opportunity to demonstrate a less discriminatory alternative: "The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination." The *Beazer* Court thus makes clear that an employment practice successfully justified as job-related can nevertheless be found discriminatory only if plaintiff proves that the employer maintained the

the plaintiff *only* if the defendant first proved that the challenged practice was job-related.[120] In *Watson*, on the other hand, the burden arises as soon as the defendant produces any evidence of job-relatedness.[121] Safely assuming that defendants will be able to articulate at least one legitimate business purpose to support its practice,[122] henceforth every plaintiff would have to show a less discriminatory alternative in order to prevail.

On a theoretical level this conclusion plainly contradicts the assertion in *Griggs* that employment practices which operate to exclude minorities are strictly prohibited unless they can be shown to be related to job performance.[123] The *Watson* plurality would allow an employer to maintain employment practices proven by plaintiff to be both discriminatory in operation and unjustified by business necessity *unless* the plaintiff can simultaneously offer the employer an alternative practice equally suited to her needs.[124] Arguably this arrangement is entirely too solicitous of employers' interests. On a practical level, requiring plaintiffs to show a less discriminatory alternative would make it virtually impossible for a plaintiff to prevail on a disparate impact theory. Although the *Albemarle* Court articulated the "less discriminatory alternative" defense over thirteen years ago, a review of the voluminous case law reveals that *no plaintiff has ever successfully demonstrated a less discriminatory alternative to a challenged practice.*[125]

The plurality in *Watson* properly recognized that traditional disparate impact analysis sometimes imposes too weighty a burden on defendants. Some

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job-related practice for the purpose of intentionally excluding persons protected by Title VII. *See* Smith, *supra* note 87, at 404.

120. *Albemarle*, 422 U.S. at 425. Although few cases have comprehensively considered this aspect of the analysis, courts have consistently held that plaintiffs bear the burden of proof for this issue, and the burden does not arise unless the defendant has met its burden of proof on the issue of job-relatedness. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 447 (1982); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Davis v. City of Dallas, 777 F.2d 205, 209 (5th Cir. 1985), *cert. denied*, 476 U.S. 116 (1986); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 (9th Cir. 1981); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1261 n.9 (6th Cir. 1981). *But see* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3(B) (1988) ("[w]henever a validation study is called for by these guidelines, the user should include, as a part of the validation study, an investigation of suitable alternative selection procedures").

121. *Watson*, 108 S. Ct. at 2790.

122. Smith, *supra* note 87, at 395.

123. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

124. Because a showing of a less discriminatory alternative goes principally to the intent of the employer to engage in pretextual discrimination, requiring plaintiffs to make such a showing in effect requires plaintiffs to prove intentional discrimination. *See supra* note 119. This conclusion strongly supports the thesis of one commentator who has argued that a merger of disparate impact theory and disparate treatment theory is inevitable. Furnish, *supra* note 16, at 440.

125. This is true at least in reported cases. The only possible contrary example might be Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378 (N.D. Cal. 1975) ("this court finds it inappropriate to use [the agility] test since no evidence of its validity has been presented"). *See generally* Rothschild and Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. LEG. STUD. 261, 272-73 (1982) (issue of whether a less discriminatory alternative exists has "rarely, if ever, been reached in a testing case"); Lamber, *supra* note 61, at 44-45 n.168 (no cases reported where plaintiff had demonstrated less discriminatory alternative); Rutherglen, *supra* note 61, at 1326 (in practice, plaintiff almost never carries this burden); Booth and MacKay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 190 (1980) ("There have been no cases in which a plaintiff has demonstrated acceptable alternatives to the use of a validated test.").

courts have required and continue to require defendants to prove that the challenged practice is absolutely necessary to proper operation of the business.[126] Setting such remarkably high standards might well force employers to adopt quotas or engage in preferential treatment in order to avoid expensive litigation.[127] In future cases the Court should make it clear that defendants can meet the burden of proof on the issue of job-relatedness without demonstrating that forbidding the challenged practice would seriously damage the business.[128] The Court should not, however, adopt the set of evidentiary standards proposed by the *Watson* plurality. The *Griggs* Court declared that the goal of Title VII was the "removal of artificial, arbitrary, and unnecessary barriers to employment."[129] Relieving employers of the burden of justifying selection practices proven to affect adversely the employment opportunities of minorities does not advance efforts to reach this goal, but instead disserves Title VII by discouraging legitimate claims. Since the employer established and maintained the challenged practice, the employer, not the employee, should bear a reasonable burden to defend it if it turns out to be discriminatory.

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126. *See, e.g.*, Blake v. City of Los Angeles, 595 F.2d 1367, 1377 (9th Cir. 1979) ("business necessity" defense is "very narrow," especially on a motion for summary judgment), *cert. denied*, 446 U.S. 928 (1980); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (requirements of "business necessity" doctrine are not met when discriminatory transfer and seniority policies serve "legitimate management functions," since necessity "connotes an irresistible demand").

127. Justice Blackmun, concurring in the judgment in *Albemarle*, stated: "I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." *Albemarle*, 422 U.S. at 449 (Blackmun, J., concurring); *accord* Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting).

128. *See, e.g.*, Contreras v. City Of Los Angeles, 656 F.2d 1267, 1277 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). On the other hand, the defendant's burden should require the introduction of independent evidence that the practice accurately predicts on-the-job performance. In a concurring opinion, Justice Blackmun pointed out that "the bald assertion that a purely discretionary selection process allowed respondent to discover the best people for the job, without any further evidentiary support, would not be enough to prove job-relatedness." *Watson*, 108 S. Ct. at 2796 (Blackmun, J., concurring).

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