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The Future of the Disparate Impact Theory of Employment Discrimination After *Watson v. Fort Worth Bank*

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In *Watson v. Fort Worth Bank & Trust Co.*[1] the Supreme Court held that the disparate impact theory of employment discrimination under Title VII of the Civil Rights Act[2] is applicable to subjective employment criteria. On this relatively narrow point, the Court, with the possible exception of Justice Kennedy who did not participate, was unanimous.[3] However, the Court split on the additional questions of the function of the impact model and the structure of litigation under it. A plurality opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices White and Scalia, would substantially narrow the scope of the theory and limit the employer's burden of proof under it.[4] A dissenting opinion, written by Justice Blackmun and joined by Justices Brennan and Marshall, would retain the open-ended character of the theory and the heavy burden of justification imposed on employers.[5]

Because a similar split in views characterizes the Court's earlier opinions,[6] *Watson* may be treated as simply another in-

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1. 108 S. Ct. 2777 (1988).
2. 42 U.S.C. § 2000e (1982).
3. 108 S. Ct. at 2782-87.
4. *Id.* at 2787-91 (plurality opinion).
5. *Id.* at 2791-97 (dissenting opinion).
6. *Compare* Connecticut v. Teal, 457 U.S. 440 (1982) (majority opinion) (rejecting bottom line defense) *with id.* at 456 (Powell, J., dissenting) (advocating bottom line defense); *compare* New York Transit Auth. v. Beazer, 440 U.S. 568, 582-87, 587 n.31 (1979) (majority opinion) (requiring precision in establishing disparate impact and invoking relaxed version of business necessity defense) *with id.* at 593-602 (White, J., dissenting) (advocating general showing of impact and strict version of business necessity defense); *compare* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975) (majority opinion) (following EEOC version of job relatedness) *with id.* at 451-52 (Burger, C.J., concurring in part, dissenting in part) (advocating more relaxed version of job relatedness); *compare* Washington v. Davis, 426 U.S. 229, 248-52 (1976) (majority opinion) (invoking relaxed version of job relatedness) *with id.* at 266-70 (Brennan, J., dissenting) (advocating strict compliance with EEOC position).

stance of the fundamental dispute on the Court about the meaning of disparate impact theory. *Watson* is important, however, for three reasons: First, it resolves the subjective criterion issue that had divided the lower courts;[7] second, the plurality and dissenting opinions articulate with greater precision the nature of the dispute over the meaning of the impact theory and the implications of competing resolutions of that dispute; third, the plurality opinion presages a significant shift in the thrust of the model if but one other justice may be convinced to subscribe to it.[8] As the Court will review a case raising issues both of the scope of the model and the employer's burden of justification in the 1988 term,[9] the plurality will soon have an opportunity to effect this shift.

This article has three objectives: First, to articulate the points of doctrinal disagreement evidenced in *Watson* and the functional implications of these disagreements; second, to assess the impact of *Watson* on continued use of subjective criteria; and third, to assess the version of the impact theory advocated in Justice O'Connor's plurality opinion. The thrust of this assessment is that, while the plurality's version is preferable to the alternative advocated by the *Watson* dissent, the plurality's version nevertheless remains an inadequate resolution of the functional meaning of impact theory; the fundamental ambivalence of the theory will remain even if the plurality's version is accepted.

I. Some Background: The Structure and Implications of Alternative Title VII Liability Theories.

For present purposes, there are three theories of liability assertable under Title VII: disparate treatment, systematic disparate treatment and disparate impact. The disparate treatment and disparate impact theories are distinct theories of liability in

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7. *Compare* Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (subjective criteria not subject to impact theory) *and* Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982) (same) *with* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (subjective criteria subject to the theory) *and* Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (same) *and* Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981) (same).

8. Justice Stevens concurred in the judgment in *Watson*, but declined to address the questions raised by the plurality opinion. *Watson*, 108 S. Ct. at 2797. Justice Kennedy did not participate. Either or both justices are therefore candidates for a fifth vote.

9. *See* Atonio v. Wards Cove Packing Co. 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (No. 87-1387).

the sense that, as formally articulated, they contemplate distinct legal obligations, distinct understandings of legally cognizable injury, distinct conceptions of the evil of discrimination and distinct understanding of justice. The systematic disparate treatment theory is, again formally, merely one instance of disparate treatment theory. All three theories, however, are also means of articulating distinct evidentiary routes to a liability determination; they are stated as alternative structures of proof.

A. Disparate Treatment

Disparate treatment is intentional discrimination that occurs when an employer uses a proscribed status in making an employment decision.[10] Conceptually, the disparate treatment theory prohibits illicitly motivated employer action since neither race nor gender may "cause" an employment action.[11] The express use of a race or gender classification, even if the rationale for such a use does not reflect prejudice and even if the rationale can be said to be fair or laudatory, therefore fits within at least the formal boundaries of the theory. So, too, does the use of race and gender neutral criteria as a pretext for discrimination. Thus the legal obligation imposed by the disparate treatment theory is the negative obligation to refrain from use of illicit bases of distinction. The cognizable harm contemplated is the denial of an employment opportunity or benefit on the basis of the individual's status. The conception of discrimination is that of a wrongdoer breaching a duty and thereby causing, rather directly, harm to another. The understanding of justice implicit in the theory is corrective: if A causes harm to B, A must compensate B.

Viewed as a proof construct, the disparate treatment theory is unexceptional. The plaintiff has the initial burden of producing evidence sufficient to raise a plausible inference that proscribed criteria were used in an employment decision.[12] The defendant then must rebut this inference by articulating a legitimate non-discriminatory reason for its action.[13] This means only that the employer must present credible evidence of a race and gender neutral reason for its challenged action; it need not

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10. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

11. P. Cox, Employment Discrimination ¶ 6.01 (1987).

12. *Burdine*, 450 U.S. at 252-53.

13. *Id.*

justify this reason or establish the objectively superior qualifications of the person it actually selected for a position. If this rebuttal is successful, the plaintiff may seek to establish that the reason assigned is pretextual.[14] The plaintiff retains a burden of persuasion.[15] If it is established that race or gender was "a cause" of an employment action, the defendant may nevertheless present a "but for" causation defense: the same decision would have been reached even if race or gender had not been considered.[16] It should be noticed that this scheme is compatible with the individualistic thrust of the disparate treatment theory's conceptions of discrimination and of justice; a privately formulated status quo is to be judicially upset only upon proof of a breach of duty causing cognizable harm to another.[17]

B. Disparate Impact

As formally articulated by the Supreme Court, disparate impact theory does not require intentional discrimination.[18] The theory does not target use of race and gender based criteria; it targets use of race and gender neutral employment criteria which correlate with race or gender. More specifically, use of a neutral criterion, such as an employment test or an educational degree requirement is proscribed if (1) such use has a disparate adverse effect on a protected group (in the sense that a substantially larger proportion of that group is excluded or disqualified than the proportion of a non-protected group) and (2) the defendant fails to justify the criterion.[19] The defendant may seek to justify the criterion by establishing a "business necessity" for its use, a requirement often said to entail proof of a "manifest relationship" between the criterion and a legitimate business interest.[20]

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14. *Green*, 411 U.S. at 804.

15. *Burdine*, 450 U.S. at 253.

16. *See, e.g.*, Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985) (however, this causation question is in issue in Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988)).

17. Cox, *The Supreme Court, Title VII and "Voluntary" Affirmative Action—A Critique*, 21 IND. L. REV. 767, 772-85 (1988).

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

19. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). The plaintiff may rebut the justification by establishing that an alternative criterion with lesser impact would satisfy the employer's needs. *Id.* at 425.

20. New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979). The meaning of "manifest relationship" is problematic. *See infra* notes 21, 22.

There is a fundamental ambiguity to impact theory best seen in alternative interpretations of the business necessity defense. It is possible to treat the defense as requiring proof that a defendant's challenged practice is essential and that performance on an employee selection criterion is highly correlated, in the formal statistical sense, with a relatively precise and objective measure of job performance.[21] It is also possible, however, to interpret the defense as requiring only a plausible or reasonable relationship between the challenged practice and business needs.[22] The second interpretation implies that the impact theory is merely an extension of disparate treatment theory designed to capture pretextual use of race and gender neutral employment criteria.[23] Alternatively, the second interpretation implies that disparate impact theory is an overenforcement theory: as there is a risk of pretextual use of neutral criteria, and as pure disparate treatment theory cannot easily identify pretext, use of neutral criteria will be prophylactically prohibited where disparities evidence realization of this risk. The distinction between these alternative implications is that the former is retrospective (was the criterion pretextually used) and the latter is prospective (is there a risk that the criterion will be pretextually

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21. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (requiring adherence to EEOC guidelines, which require showing of correlation for criterion validity); Vulcan Pioneers v. New Jersey Dep't of Civil Serv., 832 F.2d 811 (3d Cir. 1987), *aff'g*, 625 F. Supp. 527 (D.N.J. 1985) (relatively strict application of EEOC guidelines); EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986) (emphasizing necessity); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (emphasizing essentiality). The EEOC uniform guidelines on employee selection procedures, 29 C.F.R. § 1607 (1988), express this strict version of the defense. A strict application of the guidelines would preclude use of all criteria, as few if any criteria would be successfully validated under them. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); COMMITTEE ON ABILITY TESTING OF THE BEHAVIORAL AND SOCIAL SCIENCES, NATIONAL RESEARCH COUNCIL, ABILITY TESTS: USES, CONSEQUENCES AND CONTROVERSIES 105-07 (A. Wigdor & W. Gardner eds. 1982). The current guidelines are, however, less strict than the 1970 guidelines applied by the Court in *Albemarle*. *See generally* Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121 (1980).

22. *See, e.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (reasonable relationship test of necessity); Washington v. Davis, 426 U.S. 229, 250 (1976) (reasonable relationship standard of job relatedness); Aguilera v. Cook County Police and Corr. Merit Bd., 760 F.2d 844 (7th Cir.), *cert. denied*, 474 U.S. 907 (1985) (reasonable relationship standard); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (relaxed application of EEOC guidelines).

23. P. Cox, *supra* note 11, ¶ 7.06[3]. *See generally* Rutherglenn, *Disparate Impact Theory Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

used). As the second interpretation has been invoked in some cases, it will here be labeled the "weak form" of impact theory.

The first interpretation suggests that the theory is employed for reasons altogether different than attacking suspected disparate treatment. Viewed as a structure of proof, impact theory first requires that a plaintiff prove disparate impact. This means that a plaintiff excluded under a challenged criterion fails to make out a prima facie case unless she can establish group harm. Once group harm is established, a burden of justification is imposed on the defendant. In most lower court opinions, this is a burden of persuasion.[24] If the first interpretation of the business necessity defense noticed above is entertained, this initial emphasis upon group harm, in combination with the heavy burden of justification imposed on defendants, implies characteristics of the impact theory that fundamentally distinguish it from disparate treatment theory. The legal obligation imposed is to either refrain from the use of criteria that produce group harm or to shoulder the burden of justification. In combination, the obligation is therefore to utilize only those criteria that can be successfully justified. The cognizable harm contemplated is group harm in the sense of disproportionate exclusion from employment opportunity. The conception of discrimination implied is that of disproportionate distribution of employment among race and gender groups. The conception of justice implied is distributional equality among race and gender groups.[25] This interpretation has also been judicially invoked. It will here be labeled the "strong form" of impact theory.

There are two further ambiguities within the strong form version of impact theory. First, if the theory is applicable to all criteria that produce disparities, a general objective of distributional equality is implied. If the theory is instead confined to those particular criteria that perpetuate past discrimination, a more limited objective is implied. The original justification for the theory was that education and testing requirements perpetuate societal discrimination in the allocation of educational opportunity.[26] If confined to that justification, so that some evidence of perpetuation were required, the theory would pursue

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24. *See, e.g.*, Craig v. Alabama State Univ., 804 F.2d 682, 689 (11th Cir. 1986); EEOC v. Rath Packing Co., 787 F.2d 318, 328 (8th Cir. 1986), *cert. denied*, 479 U.S. 910 (1986); *contra* Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981).

25. Cox, *supra* note 17, at 786-90.

26. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

distributional goals for the limited purpose of partially redressing past societal discrimination.

Second, it is possible to interpret strong form impact theory as concerned not merely with the objective of distributional equality, but also with substantive regulation of "merit." To the extent that an employment selection criterion fails to measure talents or capacities relevant to job performance, its use may be said to be incompatible with an objective of distributing employment by reference to merit. If such a distribution is a Title VII objective, strong form impact theory may be viewed as the means of enforcing that objective. This interpretation may be particularly appropriate for subjective criteria. Consider a criterion of "leadership ability." Arguably, the risk inherent in use of this criterion is not only that it will be disparately applied on illicit grounds, but that the concrete meaning assigned to it will reflect cultural bias. If there are distinct cultural or sexual understandings of "leadership ability," and if employers utilizing the criterion seek to identify traits common to a white male conception of leadership, they will presumably not select persons whose traits are common to a minority or female conception of leadership.[27] Notice, however, that this possibility requires both strong assumptions about the existence of diverse cultural and sexual conceptions and, if impact theory is invoked to regulate selection criteria on this ground, a conclusion that employers may not utilize criteria reflecting merely their cultural or sexual conception.

C. Systematic Disparate Treatment

Conceptually, the systematic disparate treatment theory is merely an alternative proof structure for establishing intentional discrimination.[28] If a plaintiff establishes that there is a substantial and statistically significant disparity between the race or gender composition of a workforce or subset of a workforce on the one hand and the race or gender composition of the qualified labor pool from which the workforce is drawn on the other, a prima facie case is established.[29] The disparity is said to justify an inference of intentional discrimination on the facially plausible, but by no means unchallengeable, supposition that a

27. *See infra* text accompanying notes 139-50.

28. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

29. *Id.*; Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

workforce randomly selected with respect to race or gender will reflect the race and gender composition of the population from which it is drawn.[30] The employer rebuts the prima facie case by refining the statistics: it introduces evidence of the effect of race and gender neutral considerations (such as qualifications not considered in the prima facie case and the effect of self-selection by applicants) on the disparity disclosed by plaintiff's proof.[31] The employer, therefore, in effect "articulates legitimate nondiscriminatory reasons" for the disparity.[32]

Although this rationale is compatible with a prohibition of intentional discrimination, the method of proof suggests that the theory's objective is race and gender balance in the workforce. The suggestion is present because there is substantial judicial discretion inherent in allocating burdens of production of evidence of the race and gender composition of qualified and available populations.[33] As reliable data about these populations is difficult and expensive to come by, the allocation of the burden of production can be outcome-determinative.[34]

Moreover, it should be noticed that employers have a choice between ensuring a balanced workforce (as balance would be understood within the suppositions of a plaintiff's prima facie case) or incurring litigation costs and risks. There is therefore an incentive generated by the theory to engage in affirmative action efforts designed to deny plaintiffs evidence sufficient to make out such a case.[35] The Supreme Court appears to have legitimated that incentive (and therefore implicitly to have recognized it) in predicating the "voluntary affirmative action" excep-

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30. International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977). The supposition is questionable because qualifications are not, in fact, randomly distributed among race and gender groups. Social and economic phenomena, some discriminatory in the intentional sense and some not, ensure that such qualifications are unequally distributed. T. SOWELL, ETHNIC AMERICA 273-96 (1981); Meir, Sacks & Zabell, *What Happened in* Hazelwood: *Statistics, Employment Discrimination, and the 80% Rule*, 1984 AM. B. FOUND. RES. J. 139, 154-56; Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33, 42.

31. *Hazelwood*, 433 U.S. at 310-13.

32. *See, e.g.*, Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984).

33. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385 (1986) (plaintiffs need not account for all relevant variables in multiple regression analysis).

34. P. Cox, *supra* note 11, ¶ 18.06.

35. *See* EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 351-53 (7th Cir. 1988) (affirmative action a factor in rebutting inference of discrimination). *See generally* P. Cox, *supra* note 11, ¶¶ 8.03[1][c], 1304.

tion to disparate treatment theory upon a disparity between workforce and minimally qualified external populations.[36]

Finally, the disparate impact and systematic disparate treatment theories operate in combination to virtually compel employer pursuit of race and gender balance. The primary "defense" to a systematic disparate treatment theory is to establish that the disparity disclosed in a plaintiff's prima facie case is explained by qualification requirements not considered in establishing that case. Such a "defense," however, simultaneously rebuts the prima facie case of systematic disparate treatment and establishes a prima facie case of disparate impact.[37] If the qualification requirement explains a disparity, it is a fair inference that the requirement disproportionately excludes a protected group. On this view, the systematic disparate treatment theory is a kind of discovery device for detecting disparate impact.

D. The Relationship Between Disparate Treatment and Disparate Impact Theory

As a functional matter, disparate treatment theory and disparate impact theory are incompatible with each other. In some contexts, this incompatibility is quite clear, because a failure to utilize race or gender as criteria for decisions (a failure mandated by the disparate treatment prohibition) inevitably generates disparities in the allocation of employment opportunities or benefits. The best known examples are those of the failure to utilize gender as a criterion in pension funding[38] and pregnancy-related benefits.[39] In a broader sense, the theories are also incompatible because disparate impact theory, particularly when

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36. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).

37. *See* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 115 (1985); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985).

38. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); *see generally* Brilmayer, Heckeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); Freed & Polsby, *Privacy, Efficiency and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RES. J. 583; Kimball, *Reverse Discrimination:* Manhart, 1979 AM. B. FOUND. RES. J. 83.

39. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (rejecting disparate treatment theory to attack discrimination based on pregnancy in preemption context). *Compare* General Elec. Co. v. Gilbert, 429 U.S. 125, 137-40 (1976) (invoking impact theory and rejecting use of disparate treatment theory to attack discrimination on basis of pregnancy) *with* Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (invoking disparate treatment theory to attack discrimination on basis of pregnancy).

considered in combination with systematic disparate treatment theory, generates strong employer incentives to engage in preferential treatment of minorities and women to assure race and gender balance in workforces.[40] Formally, the disparate treatment theory would preclude such preferences. This is the reason that the Supreme Court has recognized an exception to the theory: "voluntary" affirmative action is not prohibited even though it conceptually constitutes disparate treatment.[41]

The tension between the two theories is also revealed by their inconsistent assumptions.[42] The assumption underlying disparate treatment theory is that qualifications for employment (as these are privately formulated by employers) *are* equally distributed among race and gender groups.[43] Upon this assumption, allocation of employment predominantly to whites or males is illicit because the allocation may be inferentially explained by use of race or gender as a "qualification." In the individual disparate treatment case, the factual issue therefore typically boils down to the question of the relative qualifications of the plaintiff and of the person selected for employment. In the systematic disparate treatment case, the battle lines are drawn over competing statistical definitions of qualified populations. The assumption underlying disparate impact theory, on the other hand, is that qualifications *are not* equally distributed among race and gender groups, perhaps because past intentional discrimination has distorted the distribution of qualifications.[44]

It is possible to argue that these distinct assumptions are compatible in the sense that two distinct evils are targeted, so employers have obligations *both* to refrain from utilizing protected status as a criterion (at least where such use disfavors minorities or women) *and* to contribute to a redistribution of employment among groups by refraining from the use of criteria that perpetuate a maldistribution of qualifications.[45] There re-

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40. P. Cox, *supra* note 11, ¶ 13.04.

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

42. Laycock, *Statistical Proof and Theories of Discrimination*, 49 Law & Contemp. Probs. 97, 98-99 (Autumn 1986).

43. *Id.*

44. *Id.*

45. *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 Ind. Rel. Law J. 429, 433 (1985) (sole question under impact theory is whether employment practice selects blacks and whites in numbers proportionate to their repre-

mains, however, two difficulties with this reconciliation. First, the postulated obligations point in two directions, toward two quite incompatible positions on questions of political morality.[46] The disparate treatment obligation assumes a function for law that is transactional and historical in focus and individualistic and narrowly corrective in conception. The underlying conception is that the status quo as privately formulated is to be respected except to the extent that a particular past wrong is to be corrected by means of a limited governmental intrusion. The disparate impact (and, functionally, the systematic disparate treatment) obligation assumes a function for law that is systematic and prospective in focus and collective and distributional in conception. The underlying conception is that a desired end-state is to be achieved: a just distribution of employment among race and gender groups.[47]

Second, the distinct obligations imposed by the two theories generate substantial boundary problems.[48] Given that both obligations are extant, which is to be complied with in contexts in which they would compel incompatible employer behavior? It would seem necessary that one obligation be preferred to another in such contexts, and this is precisely what has occurred. Under Supreme Court precedent, the disparate treatment theory obligation is preferred in those contexts in which minorities or

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sentation in available workforce).

46. By "political morality" is meant some version of the proper function of the state, and therefore of law, in regulating human affairs. This tension between the theories has been repeatedly noticed by commentators. *See generally* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981); Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345 (1980); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

47. The distinction between these views is explored at greater length in Cox, *supra* note 17. That the fundamental distinction exists and is influential is suggested, for example, by B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); Gjerdingen, *The Politics of the Coase Theorem and its Relationship to Modern Legal Thought*, 35 BUFFALO L. REV. 871 (1986); Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L.J. 1129 (1983).

48. Cases entailing express recognition of boundary problems include the following: Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988); Lynch v. Freeman, 817 F.2d 380 (6th Cir. 1987); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981).

women are conceived to be harmed by the use of race or gender as criteria for decision.[49] The disparate impact obligation, as is evidenced by the affirmative action cases, is preferred in contexts in which (1) whites or males are conceived as not unacceptably harmed by the use of race or gender, (2) minorities or women are conceived as not harmed by such use, and (3) invocation of the obligation advances its distributional goals.[50] This choice is not merely a matter of "whose ox is gored." There are plausible, albeit controversial rationales for it. The present point, however, is that it constitutes a choice.

Nevertheless, the choice does not resolve the contradiction. The contradiction reappears in the form of choice of the theory of liability, particularly given that there is considerable overlap in the evidence that will make out a case under the theories. Is there discretion to apply either theory (and, therefore, either obligation) or is there some basis for distinguishing factual patterns that will support one, but not the other theory? The question is crucial because the proof structures of the two theories, in keeping with their quite distinct and incompatible premises in political morality, are themselves quite distinct. Assume, for example, that an employer's workforce exhibits a racial imbalance when compared with a plausibly relevant population external to that workforce. If the employer is required to respond to a disparate treatment theory, it must present evidence of a nonrace based explanation of the disparity sufficient, at least, to raise an issue of fact. The burden of persuasion remains on the plaintiff. If the employer is instead required to respond to a disparate impact theory, it must first identify the race-neutral element of its employment system that generated the disparity, and second justify that element. The burden of persuasion, at least under lower court interpretations of the impact theory, is on the employer.

On practical terms, then, the inconsistent premises and obligations of the two theories raise questions about the impact theory: (1) To what criteria does the theory apply?[51] (2) Which

49. *See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

50. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979). It should be noticed that these assessments require a conception, often controversial, of that which constitutes harm. *See* California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

51. Before *Watson*, the Supreme Court had suggested a limited answer to the question. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 n.6 (1978) (tests and particularized requirements only).

party is obliged to identify challenged criteria and with what degree of precision? (3) What is the appropriate measure of disparate impact (for example, are protected group representation rate disparities sufficient or must there be evidence of selection or potential selection rate disparities between the majority group and the minority group)?[52] (4) What causation element is appropriate (a question implied by the choice of measures)? (5) Which party has the burden of persuasion regarding the above questions? (6) What is the appropriate standard for assessing employer justification? (7) Which party has the burden of persuasion regarding the question of justification? Despite the fact that the impact theory was first recognized some 17 years before *Watson* was decided, the Court has failed to provide definitive answers to these questions. The questions, nevertheless, are crucial. Their answers determine the question of boundary. They determine, as well, the functional thrust of the impact theory, whether it is a means of reaching suspected disparate treatment or a means of achieving proportional distribution of employment among groups. They are the questions again raised, and only partially answered, in *Watson*.

II. The Subjective Criteria Imbroglio

Just what is a "subjective" employment criterion? According to the Supreme Court in its *Watson* opinion, a non-subjective employment criterion is a standardized test or criterion that

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52. *Compare* Fudge v. City of Providence Fire Dept., 766 F.2d 650 (1st Cir. 1985) (plaintiff must establish disparate effect on population) *and* Thomas v. Metroflight, Inc., 814 F.2d 1506 (10th Cir. 1987) (plaintiff must establish statistical significance of disparity) *and* Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983) (plaintiff must prove causal relationship between challenged criteria and disparity) *with* Dothard v. Rawlinson, 433 U.S. 321 (1977) (relying on representation rate and selection rate disparities) *and* Shidaker v. Tisch, 833 F.2d 627 (7th Cir. 1986), *cert denied*, 108 S. Ct. 2900 (1988) (relying on representation rate disparities) *and* Atonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (representation rates in different job categories of workforce).

This question raises four related issues: (1) Is the relevant disparity that between some population and the workforce (the pure imbalance possibility) or between majority group and minority group success or failure rates under a particular challenged criterion? (2) If the latter, are success or failure rates crucial? (3) Is impact on persons actually subjected to the challenged criterion or probable effect "in the long run" on either all possible applicants or the subset of the population likely to be applicants relevant? (4) If measured by reference to minority populations generally, is impact relevant if it falls primarily upon some subset of the minority group displaying characteristics not typical of that group generally (i.e., if the challenged criterion excludes a subgroup disproportionately composed of minorities)? *See generally* P. Cox, *supra* note 11, ¶ 7.02.

does not require exercise of personal judgment.[53] A subjective criterion is therefore presumably one requiring exercise of discretionary judgment on the part of an employer agent, even if this judgement relies in part upon an applicant's or employee's performance under "objective" criteria. This distinction, however, seems artificial. Not only are there degrees of objectivity and subjectivity, even facially objective criteria are subjectively created (in the selection, for example, of test questions and cut-off scores for an employment examination). What is needed in the matter of definition is identification both of the evil thought to be generated by subjectivity and of the respects in which this evil is thought to be distinct from or similar to that presented by "objective" criteria. In fact, the "subjective criteria" label has been judicially attached to a number of distinct phenomena, and these distinct phenomena generate distinct evils, or, at least, risks of evil.

A. Standardless Delegation

The first subjective criteria case entails employer delegation of decision-making or selection authority without specifying standards for its exercise. For example, the employer instructs a supervisor to select the "best worker" for promotion. Notice that the missing standard could be subjective. The evil or risk of evil may be the absence of a precise target to which a plaintiff might address herself, so the plaintiff with a burden of proof is disadvantaged by what is in effect a defendant's general denial. If the somewhat vague assertion that the person chosen for an employment opportunity was the "best candidate" is acceptable, there is arguably no real substance to judicial review of the credibility of that assertion.[54] The evil or risk may also be that the absence of a reviewable criterion permits operation of prejudice. Undetected disparate treatment is rendered more probable if an employer is permitted to explain a decision by reference to a generality such as "the best candidate," especially if one entertains the hypothesis that tendencies to engage in disparate treatment are widespread.

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53. 108 S. Ct. at 2785.

54. *See* Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985) (reference to subjective standard not sufficient to rebut prima facie case of disparate treatment); *but see* Verniero v. Air Force Academy School Dist. No. 20, 705 F.2d 388 (10th Cir. 1983) (reference to subjective standard sufficient rebuttal).

A motivation for invoking disparate impact theory in this context may therefore be that the structure of proof invocable under disparate treatment theory is thought to be too confining. Under that structure, the employer need only "articulate" a non-discriminatory reason to generate an issue of fact,[55] and a trial court's judgment about the "fact" of discrimination is not subject to an appellate court's second-guessing.[56] The disparate treatment category therefore generates both the possibility of vague, albeit "articulated," rationales for challenged decisions and a delegation of substantial discretion to the trial court. An appellate court distrustful of employer motivation would have far more flexibility within the context of an impact theory.

B. Discretionary Criteria

The second subjective criteria case entails employer use of inherently subjective criteria, requiring discretionary judgment in application, that are nevertheless commonly thought to have plausible content. An example is identification of such elusive qualities as "craftsmanship," or "judgment," in an attorney. Few would deny that there are such qualities as poor craftsmanship or good judgment, but further reduction of these qualities, except by means of citing specific examples, is difficult. Even resort to examples such as craftsman-like conduct, although they give meaning to the characterization, are appeals to a kind of subjectivity; they ask the listener to agree to the characterization as applied to the facts of the example. The evil or risk here is not that the plaintiff and court cannot respond to or assess the defendant's claim; rather, it is that prejudice will intrude in the exercise of discretion.

C. Entire Systems

The third subjective criteria case treats the entire employment system as a subjective criterion. A plaintiff might seek to attack a multi-component employee selection process by treating the process, considered as a whole, as an employment criterion subject to the impact theory.[57] The subjective criterion label

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

56. Anderson v. City of Bessemer, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

57. *See, e.g.*, Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3123 (U.S. Oct. 23, 1988) (No. 88-141); Griffin v. Carlin, 755 F.2d 1516

would here seem inapposite: the process may have both subjective and objective components, and even if all of its components are subjective in one or the other of the senses noted above, the plaintiff has not identified which of these she attacks. Nevertheless, attacks on "systems" are a subspecies of the line of cases generally thought to entail subjective criteria, and the system cases arguably entail evils or risks of evil resembling those noted above. Specifically, it may be difficult for a plaintiff to challenge particular components of a multicomponent system because the effect of a given component on selection rates is not immediately observable. This is the case where an employer considers multiple criteria, without giving preclusive effect to any, so the choice among applicants is said to be the product of a balance of considerations of relative advantage or disadvantage.[58] In such a case, the problem faced by a plaintiff in challenging, and a court in assessing, the employer's selection practices resemble those inherent in the standardless delegation case. There is also, of course, the risk that an undisclosed component of the process will be prejudice.

D. Common and Distinct Evils

The above discussion of three subspecies of the subjective criteria problem have thus far omitted an evil or potential evil common to all three. A necessary part of disparate impact theory is disparate effect. All three versions of subjective criteria can produce such disparities. The three subspecies therefore have in common both with each other and with objective criteria subject to impact theory the evil of such disparities. It is possible that disparity, as such, is the relevant evil.

There is a second evil or risk present in the three subjective cases that is at least similar to an evil or risk present in the objective case. Objective criteria are said to be justified under the impact theory if they are relevant to some legitimate business need. Thus, an employment test used as a selection device is justified if it accurately predicts job performance.[59] An explanation

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(11th Cir. 1985); Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981). *But see* Atonio v. Wards Cove Packing, Inc., 810 F.2d 1477 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988) (impact theory applicable to subjective criteria, but may not be applied to general selection system without identification of specific practice challenged).

58. *See* BALDUS & COLE, STATISTICAL PROOF OF DISCRIMINATION § 6.313 (1980).

59. *See, e.g.*, Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert.*

of this justification is that relevance establishes necessity: the adverse impact of the test is outweighed by the poor employee performance costs that would be incurred if the test were banned. An alternative explanation of the justification is that Title VII regulates the content of "merit;" the relevance of the test to job performance establishes that the qualities measured by the test are meritorious.[60] Indeed, the process of validation of objective criteria requires inquiry into the nature of merit, because it requires analysis of job content, and therefore of the skills, behaviors or talents necessary to good job performance.[61] It should be apparent that this analysis is necessarily subjective: it requires a judgment both in identification of skills, behaviors or talents and a judgment about good and poor performance of job tasks.

A similar explanation of objections to subjective criteria is possible in each of the three cases postulated: standardless delegation of decision-making authority is an evil if it permits choice on non-meritorious bases. Subjective criteria such as craftsmanship, judgment or leadership may be suspect if they permit incorporation of cultural or sexual bias in concrete definitions of these qualities.[62] A multiple-component system in which various factors are balanced is an evil if meritocracy requires that explicit weights be assigned criteria of relative advantage or disadvantage. Notice that this version of evil assumes that the content of "merit" is judicially regulated.

What distinguishes the subjective criteria cases from objective criteria cases, however, are two factors: First, the difficulty of identification and assessment present in the first and third

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denied, 455 U.S. 1021 (1982).

60. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971) ("History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas and degrees."). The regulation of merit explanation is further suggested by Judge Sneed's concurring opinion in Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1486-94 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988). Under that opinion, impact theory is applicable "whenever the plaintiff claims that the employer has articulated an unnecessary practice that makes the plaintiff's true qualifications irrelevant." *Id.* at 1490. Such an understanding requires, of course, governmental formulation of "true" and "untrue" qualifications. Governmental assessment of merit is perhaps a more narrow understanding of impact theory than redistribution. Nevertheless, it is an assessment triggered by group disparities, and is therefore likely in practice to be difficult to distinguish from a redistributional policy, at least unless assessment occurs under standards highly tolerant of the employer's version of "true" qualifications.

61. 29 C.F.R. §1607.14i (1988).

62. *See supra* text accompanying note 27; *infra* text accompanying notes 141-52.

subjective case and second, the risk of intrusion of prejudice, and therefore of pretextual disparate treatment present in all three cases. Objective criteria are conspicuous and therefore easily identified. So, too, are their effects. Disparate treatment in the application of objective criteria is improbable (and easily observed if it occurs).

III. The Stakes

What is at stake in the choice between disparate treatment theory and disparate impact theory in the three subjective criteria cases? Most obviously the choice determines the nature of the issue a defendant must address in rebuttal and the allocation of the risk of nonpersuasion. There is, however, far more to the choice than this.

A. The Employer's Incentives

First, both the nature of the issue in rebuttal and the burden of persuasion affect the *ex ante* cost-benefit analysis of employers as a class. If employers must both justify subjective criteria and bear a burden of persuasion, the costs thus imposed may outweigh the employee performance benefits thought to be yielded by use of such criteria. As the alternative to justification is avoiding evidence of disparities, thus denying prospective plaintiffs a prima facie case, the choice affects the incidence of formal voluntary affirmative action and of surreptitious use of informal quotas.[63]

The effect of the choice on the cost-benefit incentives of employers is even more pronounced in the "entire system" case. If multicomponent systems are attackable under the impact theory because they yield race or gender disparities at the "bottom line," justification costs are raised dramatically. It is, for example, not clear whether the employer in such a case must seek to justify the entire system or is obliged instead to identify the components that produce disparities and then seek to justify those components.[64] If the entire system must be justified, it is

63. *See generally* P. Cox, *supra* note 11, ¶¶ 7.05, 8.03.

64. *See* Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (impact theory applies to bottom line result of multi-component system). *Compare* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1293 (1988) (employer must justify specific practice identified by plaintiff) *with* Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (employer may identify particular practice causing disparity and justify same).

not clear how this would be done, except by proof that there is no alternative system that would serve the employer's needs. This proof, in the unlikely event that it is possible, is expensive. If components must be identified and justified, both identification and justification are costly. Moreover, uncertainty about these matters is itself a cost.[65]

B. The Burden of Identification

The choice, at least in the contexts of the standardless delegation case and the entire system case, affects the evidentiary burdens faced by litigants. This is less so in the standardless delegation case because contentless standards can often be accommodated under disparate treatment theory. A claim that the "best candidate" was chosen is arguably an insufficient articulation of a legitimate nondiscriminatory reason, so such a claim will not suffice as rebuttal of a prima facie case of disparate treatment.[66] The entire system case is different. If disparate treatment is the available theory, a plaintiff attacking a system must at least establish disparities in representation rates between a minimally qualified minority population and a relevant part of an employer's workforce.[67] While it is true that subjective and unarticulated criteria often need not be accounted for in the plaintiff's prima facie case,[68] the plaintiff must still produce a plausible statistical showing that the population data relied upon reflect a qualified labor pool.[69] The plaintiff therefore incurs costs of identification, even if these are partially alleviated through discovery.

From the defendant's perspective, the difficulty inherent in applying impact theory to a system is the absence of notice: the plaintiff's attack on bottom line disparities provides no notice of

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65. Uncertainty is a cost because the estimated values of alternatives must be discounted by a factor reflecting uncertainty.

66. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (defendant's explanation must be clear and reasonably specific).

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

68. *See, e.g.*, DeMedina v. Reinhardt, 686 F.2d 997, 1009 nn.7-8 (D.C. Cir. 1982); Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979); *cf.* Bazemore v. Friday, 478 U.S. 385 (1986) (plaintiff need not account for possible variables in prima facie case based on regression analysis).

69. *See, e.g.*, Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983); Pegues v. Mississippi State Employment Serv., 699 F.2d 760 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1984); EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980).

precisely what practice is being challenged.[70] Arguably, the defendant has relatively better access to information and should therefore have the burden of identifying subcomponents of a system responsible for disparate effects, but this argument suggests a further litigation consequence for the choice between theories: the utility of impact theory as a discovery device.[71]

C. *Allocation of Judicial Authority*

The choice between disparate treatment theory and disparate impact theory has consequences both for the continued viability of disparate treatment theory and for the allocation of decision-making authority between circuit courts of appeal and district courts. Between 1978 and 1985, the Supreme Court expended substantial effort in both limiting the scope of disparate treatment theory and in insisting on the fact-finding discretion of the district courts under that theory.[72] If impact theory is available to attack subjective decisions and entire systems, the more onerous burdens it imposes on employers will render it the theory of choice for plaintiffs capable of mustering evidence of group disparities. The treatment theory will therefore recede in importance. Moreover, appeals courts have relatively more flexibility in reviewing a case predicated on an impact theory than a case predicated on a treatment theory. The latter entails a question of fact about employer motivation. The former entails complex questions of the character and substantiality of a disparity and the nature and degree of justification.

D. *The Definition of Disparate Effect*

The choice also has implications for the meaning of disparate impact. It is not clear whether a disparity must be established by evidence of the effect of a criterion upon the persons actually subjected to it or, instead, by evidence that the criterion would have such an effect "in the long run" on the minority or female populations generally.[73] Nor is it clear whether impact is to be understood as a disparity between majority group and mi-

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70. Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982).

71. *Cf.* Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986).

72. *See* Anderson v. City of Bessemer, 470 U.S. 564 (1985); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

73. P. Cox, *supra* note 11, ¶ 7.02.

nority group success or failure rates under a criterion or, instead, as a disparity between the minority representation rate in a population and a minority representation rate in the pool of persons who were successful under a criterion.

1. Actual and long-term effect

With respect to the question of actual effect versus projected long-term effect, the relevant measure would seem to be the effect on persons actually subjected to a criterion if the question is disparate treatment or suspected disparate treatment. On that assumption, the issue is whether the employer was illicitly motivated on the occasion or occasions on which the criterion was used. If the assumption is instead that disparities in the distribution of employment are not to be tolerated, a focus on long-term effect is plausible.[74] In this event, disparate effect among actual applicants may not be representative and, therefore, may not reflect disparities in distribution.

The difficulty in the context of a subjective criterion is that the typical subjective criterion is not generally susceptible to a long-term disparate effect hypothesis[75] because such an assertion risks being characterized as racist or sexist. Consider "leadership ability," "judgment" and "craftsmanship." To assert that such criteria have a disparate effect on a protected group as a whole is to say that these qualities are not randomly distributed among race or gender groups (that minorities or women disproportionately lack them). If the relevant disparity is a long-term disparity on protected groups generally, and if impact theory is to be applied to subjective criteria, it is necessary to claim that cultural or sexual bias infects such criteria, such that, while leadership ability is randomly distributed among groups, white male conceptions of this quality are not.[76]

The alternatives of long-term effect and actual effect are partially reflected in the question whether a test of statistical significance should be utilized in assessing evidence of a disparity in actual data. For example, if 70% of male applicants and 60% of female applicants were hired on a particular occasion,

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74. *See* Fudge v. City of Providence Fire Dep't, 766 F.2d 650 (1st Cir. 1985); P. Cox, *supra* note 11, ¶ 7.02.

75. Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982).

76. *See* Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988).

inquiry into the statistical significance of that disparity may be interpreted as inquiry into the long-term effect of the criterion.[77] However, it is also possible to interpret such an inquiry as an inquiry into causation: if the disparity is not significant, the disparity may be attributed to "chance," rather than to the criterion.[78] The latter inquiry is consistent with a disparate treatment interpretation of the impact theory, because of a criterion that appears to produce disparities is not suspect if the disparities can be attributed to random variation.

This ambiguity in the use of tests of significance serves to point out an ambiguity in reliance upon disparities in actual applicant data. Although a focus upon the actual effects of a criterion (rather than upon its hypothetical long-term effects) is consistent with a disparate treatment interpretation of impact theory, it is also consistent with a mandated affirmative action interpretation of the theory. If disparities in actual data render the criterion generating that data presumptively illicit, and if the presumption is difficult and expensive to overcome, the functional mandate implied is that of modifying employment criteria so as to preclude evidence of disparities. Notice that this version of a functional affirmative action mandate emphasizes race and gender proportion in hiring or in workforce composition rather than elimination of criteria that generate long-term disparities.

2. *Selection rates and representation rates*

With respect to the question of selection rates versus representation rates, it is first necessary to distinguish the alternatives. A representation rate comparison for present purposes is a comparison of the minority (or female) representation rate in some population (such as a minimally qualified labor pool) with the minority or female representation rate in an employer's workforce, or a subset of the workforce. Such a comparison mea-

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77. *See* Fudge v. City of Providence Fire Dep't, 766 F.2d 650 (1st Cir. 1985).

78. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). Given a frequency interpretation of probability, the two interpretations of tests of statistical significance noted in the text are consistent: if the observed disparity is infrequent (not statistically significant), there is both no hypothetical disparity in the long run and an inability to exclude chance as an explanation of the disparity. Nevertheless, the emphasis in the first interpretation is upon long-term impact on the protected group considered as a whole and the emphasis in the second interpretation, at least when related to conceptual categories familiar to the law, is upon causation.

sures "underrepresentation" or "imbalance." A selection rate comparison for present purposes compares minority group (or female) success or potential success rates with majority group (or male) success or potential success rates. For example, a comparison of the percent of female applicants hired, with the percent of male applicants hired on a particular occasion, is a selection rate comparison. So, too, is a comparison of the percent of the black population holding high school diplomas with the white population holding high school diplomas.[79] The latter comparison, if used to determine the effect of a high school diploma requirement, measures potential selection rates.

Inferences of intentional discrimination may arise from both forms of comparison, although the inference is typically stronger in the case of selection rate comparisons.[80] Moreover, there is an obvious relationship between the comparisons: a substantial difference in selection will presumably lead to a substantial difference in representation rates. Nevertheless, representation rate comparisons are blunt instruments, particularly if the workforce representation rate is measured at the "bottom line;"[81] they do not indicate the cause of a disparity. Causation may be inferred from selection rate comparisons because the comparison is predicated on an identification of the criterion or event under or at which selection occurs.[82] Representation rate comparisons provide direct information about distribution of employment to the minority group in question; selection rate comparisons provide information about comparative treatment of majority and minority groups. A representation rate comparison is therefore most relevant if the legal objective is to ensure a desired end-state distribution; selection rate comparisons are most relevant if the legal objective is to assess the legitimacy of the process of selection.

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79. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971).

80. If an employer's reputation for discrimination deters applicants, a selection rate comparison founded upon actual applicant data will, however, fail to detect the effect of the reputation and, therefore, understate the inference. *See* Mister v. Illinois Cent. Gulf R.R., 832 F.2d 1427, 1436 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1597 (1988); Kilgo v. Bowman Transp. Inc., 789 F.2d 859, 868-69 (11th Cir. 1986).

81. By "bottom line" is meant evidence of disparity, particularly in representation rates, in the workforce resulting from a selection process. Bottom line measurement is to be contrasted with measurement of disparities resulting from a particular component of a process. *See* Connecticut v. Teal, 457 U.S. 440 (1982) (rejecting "bottom line" defense to disparate impact theory).

82. 3 LARSON & LARSON, EMPLOYMENT DISCRIMINATION § 74.41 (1987).

Finally, the alternative comparisons imply alternative allocations of the burden of identification. If a plaintiff may establish a prima facie case with "bottom line" representation rate comparisons, the burden of identifying (and then of justifying) the component of a system that "caused" impact is placed on the defendant.[83] If the plaintiff must instead establish impact by reference to selection rate comparisons, the burden of identification is more likely to be the plaintiff's. It is, of course, apparent that a selection rate comparison can be constructed at the bottom line by treating a multi-component system as a single selection criterion and comparing selection rates at the bottom line. However, if disparate impact is defined as a substantial difference in selection or potential selection rates, the plaintiff is more likely to be forced to engage in a relatively precise identification in the effort to generate data evidencing a disparity.

E. The Function of Impact Theory

Finally, the choice has implications for the meaning and function of impact theory. Recall that impact theory may be viewed either in its weak form, as an approximated disparate treatment or overenforcement theory, or in its strong form, as an engine for redistributing employment among groups. The choice between disparate treatment theory and disparate impact theory is thus followed by a choice between versions of impact theory if impact theory is to be applied to subjective criteria.

A primary evil or risk of evil generated by subjective criteria, at least as identified above, is the risk of disparate treatment. If impact theory is to be applied to subjective criteria, that evil or risk implies that weak form impact theory is the appropriate interpretation.[84] It implies, as well, that a relatively relaxed version of the business necessity defense should be applied and, as indicated above, that either impact among actual applicants or investigation of culturally biased meaning assigned subjective criteria is appropriate.

A second evil or risk of evil identified above was, however, disparity as such. if this is the relevant evil of subjective criteria, the strong form of impact theory is indicated. Nevertheless, applications of a strong form of impact theory would render the

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83. *See* Shidacker v. Tisch, 833 F.2d 627 (7th Cir. 1986), *cert. denied*, 108 S. Ct. 2900 (1988).

84. *See generally* Rutherglenn, *supra* note 23.

employer's duty of equal allocation of employment among groups, always implicit in that interpretation, quite explicit. In the first place, it is not clear whether subjective criteria can ever be validated under strong form validation standards.[85] In the second place, the implausibility of proof of long-term effects of subjective criteria on protected groups renders it probable that disparities in the actual application of such criteria will not be tolerated. If disparities in actual application of a subjective criterion are viewed, not as raising an inference of disparate treatment, but, rather, as presumptively illicit, race and gender preferences would then seem directly mandated.[86]

Recall, however, that there is a third potential function of impact theory: regulation of merit criteria.[87] Such regulation is implicit in validation requirements for objective criteria because these directly address the question of the relevance of such criteria to job performance, and some judicially approved understanding of both relevance and good job performance is necessary to the assessment. The application of this understanding to subjective criteria implies, however, a substantially greater degree of governmental intrusion into the process of private formation of merit criteria than is the case for objective criteria. This is because it is difficult to distinguish a subjective criterion used as an employee selection device from the definition of good job performance adopted by an employer.

Consider the question of leadership ability. An employer might view such an ability essential to the job of supervisor. The ability, however, is both a criterion used in selection and a descriptive element of the job. Moreover, the concrete understanding of leadership ability adopted by the employer also has this dual character and may be controversial. Assume that the employer views aggressiveness as a proxy for leadership ability. It is conceptually true that aggressiveness, understood as a selection criterion, is to leadership ability, understood as a measure of work performance, as speed of typing on a typing test is to typ-

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85. *Compare* Rutherglenn, *supra* note 23, at 1342 (formal criterion validation implausible given necessity of establishing correlation between the subjective assessments) *with* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 987-88 (1982) (subjective criteria are subject to formal validation). The American Psychological Association took the position, as amicus curiae in *Watson*, that subjective criteria are assessable under validation procedures. *Watson*, 108 S. Ct. at 2795 n.5 (Blackmun, J., concurring and dissenting).

86. *See supra* text following note 78.

87. *See supra* text accompanying notes 60-62.

ing performance as a typist; both aggressiveness and typing test performance are proxies. But the matter is more complex than this. Although aggressiveness in the hypothetical is a proxy (or some more concrete proxy for aggressiveness is a proxy for leadership), it may also be the employer's understanding of leadership in the employer's conception of the job in issue. That understanding is controversial; many would argue that aggressiveness (however this quality is more concretely defined) is not an appropriate understanding of leadership. If a court is to regulate merit, it must resolve this controversy.[88]

Perhaps a similar controversy must be resolved in validation of objective criteria, but the presence of an objective criterion in a selection process illustrates the distinction in degree argued here. The presence of such a criterion implies that the employer sought a quantifiable proxy for a subjectively understood quality of job performance. The absence of an objective criterion implies that the employer engages in direct, subjective measurement of that subjective quality. While it is conceptually possible to distinguish proxies from qualities in both cases, it may not be possible to do so in the subjective criterion case without a rather direct challenge to the employer's conception of the job in issue. Perhaps this is the point. If subjective criteria are at risk under impact theory, the risk may encourage resort to objective proxies.

IV. On the Meaning of Impact Theory: The *Watson* Opinions

A. *The Applications of Impact Theory to Subjective Criteria*

The Supreme Court unanimously concluded in *Watson v. Fort Worth Bank and Trust* that the impact theory applies to subjective criteria.[89] It is not clear from the portion of the plurality opinion unanimously subscribed to which of the three postulated cases of subjectivity are subject to this conclusion. This question divided the Court and is discussed below. The immediate question of interest is the rationale for the conclusion.

The primary rationale was that employers would abandon objective criteria in favor of subjective criteria if the latter were exempted from operation of the theory. This explanation is un-

88. *See supra* text accompanying notes 75-76.

89. 108 S. Ct. 2777, 2786-87 (1988).

helpful. Would such a shift be undesirable because (1) objective criteria are preferred to subjective criteria, (2) plaintiffs would as a consequence of such a shift generally face a more onerous burden in proving discrimination (because disparate treatment would then be the available theory), or (3) the function of the impact theory would be then undermined? Each of these alternative explanations is related to the common and distinct evils or risks of subjective and objective criteria identified earlier. If objective criteria are preferred, is the preference because objective criteria are more likely to measure meritorious qualities or because subjective criteria risk undetected disparate treatment? If plaintiffs should face a less onerous burden than that generated by disparate treatment theory, is this because of the difficulties of identification and assessment inherent in standardless delegation and multi-component systems? If so, what justifies continued retention of pure disparate treatment theory, given that the availability of impact theory will dictate a shift to the latter? If the function of impact theory would be undermined, what is its function? In particular, is it designed to capture suspected disparate treatment (in which case, the risk of disparate treatment inherent in subjective criteria is relevant) or to ensure proportional allocation of employment among groups (in which case, the disparities generated by both subjective and objective criteria are relevant)?

Perhaps answers to these questions may be found in the Court's explanation of impact theory. That explanation, again subscribed to unanimously, had three components: first, the theory is not limited to perpetuation of past discrimination,[90] second, the ultimate legal issue in both disparate treatment and disparate impact theory is the same[91] and third, disparate impact theory attacks employment practices that "in operation [are] functionally equivalent to intentional discrimination."[92] The first component helps to answer the question of function. If the theory is not limited to criteria that perpetuate past discrimination (and, in particular, historical societal discrimination), a means of limiting the theory's function to a redress rationale is precluded. Adverse effects are material to function apart from the unfairness of a contest for employment opportunity that

90. *Id.* at 2785.
91. *Id.*
92. *Id.*

gives present effect to discriminatorily allocated resources. But the elimination of this rationale for the theory merely raises again the question whether effects are important as evidence of pretextual disparate treatment or are instead themselves the evil targeted by impact theory.

The two remaining components merely restate this question. If the "same" legal issue is entailed under both theories, is that issue disparate treatment or disproportionate allocation of opportunity? Functional equivalence[93] is also ambiguous: is disparate effect functionally equivalent where the combined facts of disproportion and irrelevant or unnecessary criteria suggest pretextual use of such criteria? Or is disparate effect functionally equivalent in the general sense that the consequence both of disparate treatment and of the use of a neutral criterion with disparate effect is disproportionate disqualification of protected groups?

That the Court's rationale fails to resolve these fundamental questions is apparent in comparing the plurality and dissenting opinions in *Watson*. All justices subscribed to the three noted components, but the two opinions manufacture quite distinct understandings of them. Consider the plurality's understanding. For the plurality, "employers are *not* required to avoid 'disparate impact' as such . . . ."[94] The plurality's chief example of a subjective case appropriate to impact theory was the standardless delegation case and its rationale for that example was the risk of disparate treatment and intrusion of "unconscious stereotypes and prejudices."[95] In short, the plurality's version of functional equivalence is suspected disparate treatment.

Consider, now, the dissent's version. In arguing that the defendant should have a burden of persuasion in justifying chal-

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93. The best known "functional equivalence" rationale for impact theory is articulated in Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971). Under this version, the use of a neutral criterion is the "functional equivalent" of disparate treatment if (1) the criterion is more likely to deny employment opportunity to minorities than whites and (2) the criterion is unrelated to productivity. *Cf.* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 551-53 (1977) (pretextual use of neutral criterion as functionally equivalent); Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 35 (1976) (perpetuation of societal discrimination sufficiently analogous to illicit motivation to fall within antidiscrimination principle). Another version of functional equivalence is advocated in P. Cox, *supra* note 11, ¶ 7.06[2] (functional equivalence where neutral criterion has close nexus to past societal discrimination so that redress rationale is invocable).

94. 108 S. Ct. at 2777.

95. *Id.* at 2786.

lenged criteria, the dissent characterized impact theory as follows: "[U]nder *Griggs* and its progeny, an employer, no matter how well intended, will be liable under Title VII if it relies upon an employment-selection process that disadvantages a protected class, unless that process is shown to be necessary to fulfill legitimate business requirements."[96] The emphasis on this characterization is upon effects on protected groups, not upon risks of disparate treatment.

B. The "Evidentiary Standards" that Should Govern Impact Theory Cases

The plurality in *Watson* went on to discuss what it termed the "evidentiary standards" that should govern impact theory cases.[97] The occasion for this discussion was predicated on the special problems of subjective criteria. According to the plurality, extension of impact theory to subjective criteria creates incentives to adopt surreptitious quotas to avoid evidence of disparate effects, so the limits of the theory should be articulated. Nevertheless, the plurality's conclusions regarding these limits were not confined to subjective criteria. The plurality instead advocated "evidentiary standards" applicable to impact theory generally.

1. Multicomponent selection systems and standardless delegation

Under the plurality opinion, a plaintiff must identify the specific criterion challenged.[98] An impact theory attack on the bottom line results of a multi-component selection process would therefore seem to be precluded, although an attack on a subjective judgment itself founded upon multiple considerations of relative advantage or disadvantage may not be precluded. The judgment, once identified, is a subjective criterion. Less clear is whether the plurality would permit impact theory attacks on standardless delegation of hiring or promotion authority. Arguably, the act of delegation, or the failure to provide a standard for the exercise of delegated authority, are specific criteria that may be challenged. The dissent in *Watson* appears to have assumed as much, because it argued that subjective criteria, understood

96. *Id.* at 2795 (dissenting opinion).
97. *Id.* at 2787 (plurality opinion).
98. *Id.* at 2788.

as standardless delegation, would not be easier to justify than objective criteria.[99] According to the dissent, "the bald assertion that a purely discretionary selection process allowed [the employer] to discover the best people for the job, without any further evidentiary support, would not be enough to prove job-relatedness."[100]

The multicomponent system case and standardless delegation case are distinct in that the former is composed of identifiable criteria and the latter is not. They are similar in that a potential plaintiff may face initial difficulties in identifying the source of bottom line disparities. The problem of identification is moderated if the plurality opinion is viewed as requiring plaintiffs to specify and to direct their proof to the particular criterion challenged *at trial.* So long as plaintiffs are not required to initially specify the precise practice challenged, the discovery process and information gleaned from the EEOC investigation of the administrative charge of discrimination should generally enable identification.[101] On this view, the plurality's position is sound; employers should be entitled to reasonably specific notice of the practice or practices challenged but should not be entitled to hide behind a plaintiff's ignorance of the complexities of an employment process known to the employer. Moreover, the standardless delegation case can be easily accommodated within the plurality's scheme. The thrust of the plurality opinion is that the disparate impact theory reaches conduct functionally equivalent to disparate treatment. The standardless delegation case is the clearest example and most narrowly confined understanding of functional equivalence. Indeed, the line between disparate treatment theory and disparate impact theory is very fine in the context of standardless delegation. Disparities between majority group and minority group selection rates generated by such a delegation raise a inference of disparate treatment. An employer's justification of such disparities in terms of "vague generalities" may be characterized as insufficient "to prove job relatedness," but may also be characterized as an in-

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99. *Id.* at 2996-97 (dissenting opinion).

100. *Id.* at 2796.

101. *Cf.* Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986) (impact theory should not be dismissed at early stage of proceedings). An administrative charge of discrimination and EEOC investigation are prerequisites to suit. 42 U.S.C. § 2000e-5 (1982). The charging party has access to the EEOC investigation. EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981).

sufficient articulation of a legitimate non-discriminatory reason for the disparities.

2. Causation

According to the plurality, the plaintiff must establish "causation."[102] This conclusion is related to the requirement of identifying specific criteria; reference to bottom-line results of a selection process will not establish a prima facie case. Rather, proof of the disparate effect of a discrete criterion or practice is required. Moreover, statistical disparities must be quantitatively substantial and statistically reliable.[103] It is possible to read the last of these requirements in the plurality's opinion as suggesting that plaintiffs must establish the statistical significance of a disparity or, at least, that employers may successfully discredit evidence of disparity on the basis that it is not statistically significant.

Here the plurality introduces an ambiguity in its analysis. Recall that it is possible to understand a test of statistical significance in this context as merely eliminating "chance" (random variation) as the possible cause of disparity.[104] On this understanding, a statistical significance requirement is compatible with the plurality's conception of impact theory as closely analogous to disparate treatment theory: if chance can be eliminated as an explanation of a disparity, the inference of discrimination as a cause of the disparity is enhanced. Recall, also, however, that there is an alternative understanding. It is that tests of significance are used to ensure that the results of applying a challenged criterion to a "sample" composed of actual applicants for employment is representative of what would occur in the "long run" if many such "sample" results were examined.[105]

The difficulty is that this latter understanding is not plausi-

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102. 108 S. Ct. at 2788-89.

103. *Id.* at 2789-90.

104. *See supra* text accompanying notes 74-78.

105. *See supra* text accompanying notes 74-78; *see also* Fudge v. City of Providence Fire Dept., 766 F.2d 650, 658 (1st Cir. 1985). *Compare* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978) (advocating tests of significance for impact cases) *and* Shoben, *In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn*, 55 IND. L.J. 515 (1980) (same) *with* Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 IND. L.J. 537 (1980) (actual applicants are not a "sample") *and* Cohn, *Statistical Laws and the Use of Statistics in Law: A Rejoinder to Professor Shoben*, 55 IND. L.J. 537 (1980) (same).

bly applied to subjective criteria if the relevant evil or risk of evil inherent in such criteria is disparate treatment. Specifically, the "long run effect" understanding tests the "null hypothesis" that there is no disparity between majority group and minority group selection under a challenged criterion. In the plaintiff's hands, the technique is, in fact, utilized to prove an alternative hypothesis: that there is a long-run disparity. It is, however, not plausible that there is a disparity between the majority population and minority population in the possession of the qualities typically identified by subjective criteria. At least it is not plausible unless we interpret the plaintiff's test of significance as an effort to prove that a cultural "conception" of the quality measured infects the subjective "concept" invoked by the criterion.[106] That possibility aside for the moment,[107] the problem with subjective criteria is the risk that they will be misused. It is that risk that is suggested by the plurality's functional equivalence theory. The risk of misuse assumes, however, that qualities subjectively measured are randomly distributed with respect to race or gender.[108] The function, in litigation, of the "long run effect" understanding of statistical significance is to prove that qualities are not, in fact, randomly distributed. If the plurality is serious about giving a more precise content to impact theory, it must make up its mind whether it seeks to prohibit misuse (upon an assumption of random distribution) or use (upon an assumption of non-random distribution) of subjective criteria. Invoking a test of significance for the limited purpose of assessing causation is compatible with a prohibition of misuse.

3. *Burden of Persuasion*

Under the plurality opinion, the ultimate burden of proof, apparently of persuasion, remains on the plaintiff. Specifically, the plaintiff must prove "that discrimination against a protected group has been caused by a specific employment practice."[109] If a plaintiff successfully establishes a prima facie case of disparate impact, the defendant has only a "burden of producing evidence that its employment practices are based on legitimate business

106. *See supra* text accompanying note 27.
107. *See infra* text accompanying notes 141-52.
108. Laycock, *supra* note 42, at 98.
109. *Watson v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 2790 (1988).

reasons."[110] This apparently means that plaintiffs have the risk of nonpersuasion on the question whether a challenged criterion has a "manifest relationship" to the employer's business interest. If the employer produces sufficient evidence to raise an issue of fact on that question, the plaintiff may satisfy the burden of persuasion by establishing that alternative criteria without disparate effect would be "equally as effective as the challenged practice in serving the employer's legitimate business goals."[111]

On this point the dissent registered its strongest objection to the plurality's analysis. According to the dissent, the defendant has a burden of persuasion with respect to the business necessity defense.[112] Significantly, the dissent noted that the plurality was borrowing the allocation of proof from disparate treatment precedent appropriate to the issue of intentional discrimination.[113] This is an accurate observation, but one that reinforces the point that the plurality seeks to confine impact theory to a suspected disparate treatment theory.

4. The nature of the business necessity "defense"

The plurality stated that "employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance.[114] This apparently means that at least some objective criteria may be defended as facially valid—that is, as having a sufficient "common sense" relevance to business needs to satisfy the employer's burden of production. The plurality indicated that facial validity will often be the appropriate standard for assessing subjective criteria, at least for managerial, professional and other relatively elite job categories.[115]

The dissent rejected the plurality's version of the defense. According to the dissent, "while common sense surely plays a part . . . a reviewing court may not rely on its own, or an employer's, sense of what is 'normal' . . . as a substitute for a neutral assessment of the evidence presented."[116] The dissent suggested, but stopped short of stating that it would require, formal

110. *Id.*
111. *Id.*
112. *Id.* at 2792-95 (dissenting opinion).
113. *Id.* at 2792 (dissenting opinion).
114. *Id.* at 2790 (plurality opinion).
115. *Id.* at 2791.
116. *Id.* at 2796 (dissenting opinion).

validation of subjective criteria.[117] It instead recognized that "neutral assessment" could be undertaken by a variety of means.[118] Nevertheless, the dissent clearly would not accept a test of necessity that required only a reasonable relationship between a subjective criterion and job performance.

C. *A Characterization of the Plurality's Conception of Impact Theory*

Taken together, the plurality's "evidentiary standards" reinforce the interpretation of "functional equivalence" advanced above: the plurality conceives of disparate impact theory as suspected disparate treatment theory. The plurality's requirements that a specific practice be identified and that causation be established shifts the focus of analysis from bottom line disproportion to the particular results of a particular practice on the persons actually subjected to that practice. Although the plurality's references to statistical reliability may suggest a concern with prospective long-term effects, those references are best read as an insistence upon viable proof of causation. On this reading, the plurality's focus is historical and transactional, in keeping with disparate treatment theory.[119]

The plurality's positions on the burden of persuasion and meaning of business necessity are also compatible with disparate treatment as the paradigmatic evil targeted by Title VII. The allocation of proof invoked in Justice O'Connor's opinion was directly borrowed from disparate treatment precedent. Moreover, it is an allocation consistent with the premise of limited governmental function upon which that precedent is built: the party seeking to overturn a privately formulated status quo by invoking judicial intervention has the burden of justifying that intervention.[120] A "common sense" version of business necessity is closely analogous to, if not functionally synonymous with, the credibility inquiry inherent in disparate treatment analysis. An employer must articulate a legitimate, nondiscriminatory reason for its actions under that analysis, but its articulated reason need not be believed by the trier of fact. It is therefore in the employer's interest to articulate a plausible reason. A "common

117. *Id.* at 2795 n.5.
118. *Id.* at 2795.
119. *See supra* text accompanying notes 11-12, 47.
120. *See supra* text accompanying notes 11-12, 47.

sense" or "reasonable relationship" conception of business necessity is functionally similar to credible articulation of race and gender neutral reasons for employment decisions.

V. An Assessment of the Plurality's Conception of Impact Theory

The *Watson* plurality's weak form version of impact theory will here be assessed in terms of three questions: (1) To what extent does the weak form theory resolve the question of boundary lines between "pure" disparate treatment theory on the one hand and disparate impact theory as suspected disparate treatment theory on the other? (2) Given that the plurality's stated rationale for a weak form version was that the strong form version of impact theory yields race and gender quotas, how effective will the weak version be in limiting the quota phenomenon and how is the weak version related to the Court's treatment of the phenomenon in its recent affirmation action cases? (3) Does the weak version prohibit cultural bias in the formulation of conceptions of the qualities defined by subjective criteria?

A. Weak Form Disparate Impact and the Boundary Problem

There is a sense in which the plurality's weak form version of impact theory would resolve, and a sense in which it would exacerbate, the problem of boundary between disparate impact and disparate treatment theories. The weak version would resolve the boundary problem if it portends a convergence of the two theories. It moderates the problem to the extent, at least, that disparate treatment is the governing understanding of discrimination under both theories, so that direct pursuit of distributional equality is precluded under both. The weak version exacerbates the problem in the sense that *Watson* renders disparate impact theory, with its at least formally greater justification requirement, invocable in a wide variety of cases and, therefore, generates the possibility that both theories will be asserted simultaneously to challenge a given employment decision or set of decisions. There is a boundary problem if this possibility materializes because distinct results remain possible under the two theories. A court may well conclude that a plaintiff failed to establish discrimination under the relatively strict standards of a pure disparate treatment theory and then nevertheless conclude that the plaintiff successfully established discrimi-

nation under *Watson*.[121] Suspected disparate treatment is not disparate treatment.

Whether this possibility will materialize would seem dependent upon the answer to a question the *Watson* plurality failed to definitively address: to what extent may a plaintiff hold impact theory in reserve pending employer identification of a rationale for its actions? Consider two hypothetical cases. In the first, the plaintiff relies initially upon a systematic disparate treatment theory and establishes a prima facie case with proof of a disparity in minority representation rates, taking into account minimum objective qualification requirements. The defendant responds with evidence of a "subjective" qualification, not accounted for in the plaintiff's case, that explains the disparity. May the plaintiff now attack the subjective qualification on a weak-form impact theory? In the second case, the plaintiff relies initially upon an individual disparate treatment theory; she claims she was, individually, the victim of discrimination on a particular occasion. The employer "articulates" a non-discriminatory, but subjective reason for its action. May the plaintiff, assuming she has evidence of group disparities caused by this subjective reason, attack the person on a weak-form impact theory?

The *Watson* plurality concluded that plaintiffs have the burden to specify the criterion or practice they challenge; it did not indicate the occasion on which this specification must occur. Perhaps what was meant was that a plaintiff may not attack a bottom line disparity in selection or representation rates on an impact theory, thus shifting a burden of justification to the employer. A plaintiff may, however, attack bottom line disparities on a systematic disparate treatment theory, at least if minimum objective qualifications are accounted for. The formal difference is that a burden of articulation, rather than of justification, is then shifted to the employer under the systematic disparate treatment theory. If the plaintiff need not specify challenged criteria before trial, but may treat the employer's articulation of a nondiscriminatory reason as the occasion for challenging that reason on a weak form impact theory, the effect is to convert the articulation of nondiscriminatory reasons rebuttal in disparate treatment cases into a justification of articulated reasons rebut-

121. *See* Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981).

tal.[122] The effect, also, is that disparate treatment theory is converted into a discovery mechanism for identifying issues of disparate impact.

Recall, however, that the issue of disparate impact contemplated by the *Watson* plurality is weak form disparate impact. At issue under that form is whether the employer's reasons for action generating disparities are reasonable. The contemplated scenario therefore has all the makings of a convergence and integration of theories: whatever the initial labels, the ultimate question of "discrimination" would be resolved within weak form impact theory where the plaintiff relies upon group disparities in the results generated by an employment system.[123] The individual disparate treatment proof structure would, on a convergence hypothesis, be reserved for instances where group disparities are not present (or, at least, are not presented as evidence).

B. Weak Form Disparate Impact Theory and "Voluntary" Affirmative Action

As the plurality recognized in *Watson*, disparate impact theory generates incentives to adopt quotas. Indeed, the phenomenon of "voluntary" affirmative action may be explained as largely the product of these incentives. What is striking about the plurality opinion in *Watson* is its compatibility with one of two competing versions of "voluntary" affirmative action in the Court's recent pronouncements on that phenomenon.

The competing versions are as follows. In the first, identifiable with the dissenters in *Watson*, affirmative action is justified by representation rate disparities, as such.[124] No evidence of "past discrimination" on the part of the employer engaging in affirmative action is necessary.[125] In the second, identifiable with Justice O'Connor and with some of the justices joining the plurality, affirmative action is justified by past discrimination on

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122. *See* Segar v. Smith 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

123. *Cf.* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982) (predicting convergence of two theories).

124. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 631-32 (1987).

125. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 303-06 (1986) (Marshall, Brennan, Blackmun, JJ., dissenting).

the part of the employer adopting it.[126] Although contemporaneous findings, proof or admission of such discrimination is unnecessary under the second version,[127] evidence sufficient for a prima facie case of systematic disparate treatment on the part of the employer would be necessary.[128]

These competing versions often yield the same result in cases in which affirmative action plans are attacked by whites or males dispreferred under them. Nevertheless, they imply quite distinct understanding of the phenomenon of "benign" race and gender preference linked to distinct understandings of the incentive structure faced by employers adopting such preferences. Specifically, the first version implicitly sees "voluntary" affirmative action as the natural and perhaps intended product of liability theories that compel employer policies of distributional equality. The second version implicitly sees "voluntary" affirmative action as the natural product of uncertainty.

Uncertainty is inherent in the disparate treatment prohibition because illicit motivation is generally difficult to detect. A potential judicial response, suggested both by systematic disparate treatment and weak form disparate impact theories, is overenforcement of the disparate treatment prohibition. Thus, disparities in the selection or representation rate consequences of the operation of employment systems are treated as prima facie evidence of discrimination. The effect of this judicial response on employers is, however, to produce costs of rebuttal and costs of internal control. There are substantial costs of rebuttal because responses to a prima facie case are expensive and because successful rebuttal is uncertain. There are costs of internal control because managers of the bureaucratic organizations that are large employers in this society will seek to enhance the chances of successful rebuttal by limiting the discretion of subordinate officials and, perhaps, to obviate the need for rebuttal by eliminating disparities.[129] In short, the predictable response of man-

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126. *Wygant*, 476 U.S. at 276-79 (Powell, Burger, Rehnquist, JJ., plurality); *Id.* at 288 (O'Connor, J., concurring); *Johnson*, 480 U.S. at 664 (Scalia, Rehnquist, White, JJ., dissenting).

127. *Wygant*, 476 U.S. at 289-90 (O'Connor, J., concurring).

128. *Id.* at 293-94 (O'Connor, J., concurring); *Johnson*, 480 U.S. at 652-53 (O'Connor, J., concurring).

129. *Cf. Affirmative Action and Federal Contract Compliance: Hearing Before Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. 1st Sess. 114-18 (1985) (statement of George P. Sape, V.P. of Organizational Resources, Inc.) (large companies would use numerical goals and timetables as necessary

agers to the threat of liability predicated on disparities is to eliminate or control disparities. This phenomenon can be characterized as a process of self-policing, but the predictable bureaucratic form this policing takes is that of a goal and timetable. The phenomenon has been so described by Justice O'Connor:

> [T]he use of a rigid quota turns a sensible rule of thumb into an unjustified conclusion about the precise extent to which past discrimination has lingering effects, or into an unjustified prediction about what would happen in the future in the absence of continuing discrimination. The imposition of a quota is therefore not truly remedial, but rather amounts to a requirement of racial balance, in contravention of [Section 703(j) of Title VII's] clear policy against such requirements.
>
> To be consistent with § 703(j), a racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminate the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions.[130]

The interesting aspect of this understanding of "voluntary" affirmative action is that it sharply distinguishes a "goal" from a "quota." It should be apparent that both goals and quotas entail race and gender preferences; they both require disparate treatment. What distinguishes them in Justice O'Connor's view is that a "goal" operates only at the margin, *after* privately formulated qualifications requirements have been satisfied and then

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means of management even absent governmental compulsion).

It is no accident that employers are cast in the role of defendants in the voluntary affirmative action cases. Given the incentive structure generated by the Court's liability theories, it is in the self-interest of employers to adopt and implement a system of preference designed to reduce or limit disparities.

130. Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 494-95 (1986) (O'Connor, J., concurring in part, dissenting in part). *Local 28* concerned the question of the remedial authority of federal courts to order racial preferences. One issue is whether § 703(j), which defines prohibited discrimination to *not* include race or gender imbalance in a workforce, constrained that authority. The Court concluded that the section did not constrain such authority; Justice O'Connor concluded that it did.

Section 703(j) is not an impediment to voluntary affirmative action under United Steelworkers v. Weber, 443 U.S. 193 (1979). Nevertheless, Justice O'Connor's understanding of permissible preferences in *Local 28* is consistent with her understanding in the voluntary affirmative action cases. *See Johnson*, 480 U.S. at 654 (O'Connor, J., concurring) (preference in issue a goal rather than a quota); *Wygant*, 476 U.S. at 293-94 (O'Connor, J., concurring) (preferences justified by past discrimination must take form of a flexible goal).

only as a kind of self-policing reminder not to disfavor minorities. The goal, in short, is a natural response of an introspective bureaucratic organization to the disparate treatment prohibition.

The relevance of Justice O'Connor's understanding of "voluntary" affirmative action to the weak form of impact theory invoked by the plurality in *Watson* is that they are different sides of the same coin. A prima facie case of systematic disparate treatment consists of proof of minority or female underrepresentation in a workforce given that minimum objective qualifications are satisfied in identifying the available minority or female labor pool.[131] Employer rebuttal is typically in the form of identifying alternative minority labor pools defined by qualification requirements not considered in the prima facie case.[132] Weak form impact theory is arguably available to assess disputed qualifications requirements, including subjective criteria. In the case of minority challenges to employer systems, the systematic disparate treatment and weak form disparate impact theories operate in combination to assess and weed-out the risk of disparate treatment inferred from disparities. In the context of "voluntary" affirmative action, the employer assessment that is supposed to underlie adoption of an affirmative action plan operates for the same purpose. The rationale, in both contexts, is overenforcement of the disparate treatment prohibition, in the sense that risks of disparate treatment, rather than disparate treatment itself, are moderated or eliminated. Obviously, the effect is overinclusive prohibition. Conduct constituting disparate treatment formally understood is eliminated, but conduct not constituting formal disparate treatment is also precluded. Nevertheless, the rationale for the scheme remains, approximately, a disparate treatment prohibition.

The point may be made more sharply by comparing the O'Connor scheme with the alternative advocated by Justices Brennan, Marshall and Blackmun. Under the latter scheme, disparities, quite apart from and question of past discrimination, justify "voluntary" affirmative action[133] and qualifications crite-

131. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

132. *Id.* at 310-13. A similar process occurs where regression is utilized as a statistical technique; the employer submits a model utilizing additional or amended independent variables. *See* Bazemore v. Friday, 478 U.S. 385 (1986); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985).

133. *Johnson*, 480 U.S. at 633 n.10; *Wygant*, 476 U.S. at 303-06 (Marshall, Brennan,

ria that might be used to define relevant labor pools more narrowly than by reference to general population data are subjected to the more stringent requirements of a strong form of impact theory.[134] In combination, these elements focus upon disparity, as such, as the object of prohibition. The emphasis is not upon an approximated or operational definition of disparate treatment, but, rather, upon ensuring equality of distribution.[135]

It is possible to dispute whether these distinctions make for large differences in result.[136] Both schemes yield similar conclusions in many cases.[137] Nevertheless, the distinct rationales for the scheme can yield distinct results in marginal cases.[138] Moreover, the disparate treatment rationale is more in keeping with the understanding of discrimination most plausibly attributable to the Congress that enacted Title VII.[139] Finally, the disparate treatment rationale for weak form disparate impact theory may give some content to the purported distinction between a "flexible goal" and a "rigid quota" in affirmative action plans.

Although both quotas and goals entail race and gender preferences and, indeed, compel formally defined disparate treatment,[140] there is a distinction between a preference implemented simply to ensure proportional distribution of employment among groups and a preference implemented as a benchmark for detecting the possible presence of disparate treatment directed against minorities or women. The former preference is concerned only with the consequences of an employment process and is intolerant of deviations from the preferred consequence of proportionality. The latter preference is concerned with conse-

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Blackmun, JJ., dissenting).

134. *Watson*, 108 S. Ct. at 2792-95 (Blackmun, Brennan, Marshall, JJ., dissenting).

135. *But cf.* Connecticut v. Teal, 457 U.S. 440 (1982) (rejecting bottom line defense). *Teal* may be viewed as inconsistent with a distributive equality objective. *See* Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99 (1983). However, it is also possible to view *Teal* as rejecting an approximated disparate treatment rationale for impact theory. Evidence of "bottom line balance" suggests that a particular criterion having disparate effect was not used as a pretext for intentional discrimination. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978).

136. *See Johnson*, 480 U.S. at 662-64 (Scalia, J., dissenting).

137. *See, e.g., Johnson*, 480 U.S. 616, 647-48 (O'Connor, concurring).

138. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); *cf.* City of Richmond v. J. A. Croson Co., 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989) (affirmative action in context of minority business set-aside program).

139. Cox, *supra* note 17 at 852-73.

140. *Johnson*, 480 U.S. at 662-64, 667 (Scalia, J., dissenting).

quences as a means of detecting bias in process and is at least in theory tolerant of deviations from preferred consequence where justifications for those deviations appear independent of bias.

The empirical question is whether employers, understood as bureaucratic organizations, actually operate on the basis of these distinctions. It is at least possible that the behavior of a goal-directed organization, whatever the rationale for the goal, will emphasize the goal rather than the rationale. If so, the merits of the distinction break down in practice. Goals may become "quotas" within the context of employer practice under affirmative action plans even if that practice is not functionally compelled by weak form disparate impact theory.

C. Subjective Criteria and Cultural Bias

Under the plurality opinion in *Watson*, the application of impact theory to subjective criteria is in part justified as a means of capturing "subconscious stereotypes and prejudices."[141] That justification raises the possibility that the cultural bias hypothesis earlier postulated here can be entertained under *Watson*.[142]

There are a number of alternative formulations of the cultural bias hypothesis. For example, it has been said that racism is so pervasive in American society that apparently race-neutral acts may in fact be racist and appear neutral only because racism infects capacity to perceive and characterize such acts.[143] It has also been said that, while a decision-maker adopting a criterion may not consciously desire to exclude minorities or women, he may be "selectively indifferent" about the consequences of the criterion, such that he would not adopt the criterion if its adverse effect falls on whites or males.[144] Finally, it has been said that purportedly neutral "merit" criteria are infected with racist or sexist bias in the sense that the concrete understanding or conception employed in applying the relatively abstract merit concept in issue is inherently a white or male conception.[145]

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

142. *See supra* text accompanying notes 27, 106-07.

143. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

144. *See* Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982).

145. The suggestion is express in that strand of feminist scholarship that both seeks to identify differences between male and female perspectives, values or "voice" and seeks

The formal disparate treatment prohibition may be conceptually capable of accommodating these possibilities. Disparate treatment is use of race or sex to cause an allocation of employment, whatever the rationale for such use.[146] A racially or sexually biased act, even if not undertaken from the conscious desire to harm, is therefore plausibly characterized as an act of disparate treatment.[147] The difficulty is that the litigation process cannot accommodate these possibilities without sacrificing the features of the individualistic version of political morality that inform it.[148] Specifically, the possibilities postulate that there are either no neutral criteria, or that it is not possible to safely

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to obtain legal recognition of such differences without thereby adopting a "male" perspective on difference. *See, e.g.*, Finley, *Transcending Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118, 1152-81 (1986); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1393-99 (1986); Freedman, *Sex Equality, Sex Difference, and the Supreme Court*, 92 YALE L.J. 913, 947-49, 966-67 (1983); *see generally Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFFALO L. REV. 11 (1985). The argument is implicit in the more general equal treatment/special treatment debate, especially as it relates to pregnancy. *Compare* Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (equal treatment position) *with* Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983). It should be noticed that the "special treatment" position rejects the formal disparate treatment prohibition both on the ground that it is inadequate to overcome "subordination" and on the ground that the equality postulated by the prohibition is non-neutral. It would seem clear that at least the latter of these claims has merit. The disparate treatment theory essentially requires that like cases be treated alike *given* that race and gender may not be used as criteria of difference. The likeness or unlikeness of cases requires, however, a normative baseline for assessment. The baseline is necessarily non-neutral, as it is consciously or unconsciously formulated by a choice between alternative baselines. *See generally* Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). The question raised by non-neutrality, however, is who will make the choice of baseline. The suggestion noted in the text is that government shall do so. The position underlying at least the formal disparate treatment prohibition is that the choice will be made privately. Of course, to the extent that a preference for private decision is thought to preclude governmental choice, it is possible to attack both that preference and the private-public dichotomy.

146. P. Cox, *supra* note 11, at ¶ 6.01[1].

147. Absent facial disparate treatment (the explicit use of race or sex), the disparate treatment concept is generally thought to be that of illicit motivation. *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979). If "unconscious bias" means that no thought of race or gender entered the mind of the actor, an illicit motivation would not seem to be present. However, the thrust of the contemplated possibilities is that some purportedly race and gender neutral factor that concededly *did* enter the mind of the actor is properly characterized as in fact a race or gender factor. On this latter supposition, illicit motivation would seem to be present. Nevertheless, it is implausible that this distinction could be sharply drawn in the litigation process.

148. *See supra* text accompanying notes 11-12, 47.

characterize any criterion as neutral or that all purportedly neutral criteria are at least so suspect as to require a "neutral" justification untainted by a preference for majority group values. If there are no neutral criteria or if safe characterization is impossible, all employer conduct is presumptively disparate treatment, perhaps irrebuttably so. If all "neutral" criteria are to be presumed tainted by majority group values, justifications must include the implausible task of establishing their value-free character.[149] The notion that the disparate treatment prohibition is a limited governmental intrusion into the realm of private exchange is necessarily sacrificed in these circumstances.

Moreover, that notion is sacrificed even if the burden of persuasion is allocated to plaintiffs. The judicial inquiry contemplated by the possibilities is fundamentally distinct from the inquiry heretofore commonly undertaken into stereotyped classifications. The latter inquiry asks either whether an explicit race or gender classification is prohibited because it reflects a stereotype or whether a facially race or gender neutral criterion was differently applied by reason of assumptions about the capacity of minorities or women to satisfy the criterion.[150] The contem-

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149. The task is implausible because no formulation in language of a merit criterion can be value free in the practice of using that formulation. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 193-98 (G. Anscombe ed. 1963).

150. *See, e.g.*, Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1975); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). The formal disparate treatment theory would prohibit express classification even where not traceable to a stereotype. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). Arguably, a case in which an employer adopts a gender-specific rule (such as sexual attractiveness as a prerequisite for employment of females) entails inquiry into the stereotypical character of the criterion. *See* Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986). But such criteria rather clearly contain gender components (sexual attractiveness in practice is explicitly gender-specific); analysis does not require problematic characterizations of the gender-specific nature of a conception, in practice, of a facially gender-neutral merit criterion.

Consider the criterion of "leadership ability." It is possible that, like the criterion of sexual attractiveness, leadership ability has a stereotypically gender-specific connotation in practice. Nevertheless, leadership ability is distinct from sexual attractiveness in two respects. First, sexual attractiveness is expressly a function of sexual behavior and, therefore, expressly invokes dominant and identifiable cultural role-definitions for sexual behavior according to gender. The hypothesis that there is a gender-specific understanding of leadership ability requires inquiry into the substantially less apparent character of dominant cultural role definitions for leadership behavior. Second, sexual behavior criteria typically require sexual behavior compatible with dominant cultural understandings of appropriate gender role. In the contemplated case of leadership ability, what is required is behavior compatible with a hypothesized male form of behavior, in short, with a mode of behavior that does not exclude women as such, but, rather (and by reason of the hypothesis that the behavior is non-female) is inconsistent with an alternative (fe-

plated inquiry asks whether a facially race and gender neutral criterion in fact reflects white or male perspectives or values.[151] It is doubtful in the extreme that the judiciary is capable of answering such a question with any precision. It is more probable that there would be resort to characterizations founded upon the consequences of such a criterion: if the criterion produces disparities, it must be tainted by bias.[152] In short, entertaining the cultural bias hypothesis may lead, functionally, to the legal regime contemplated by the *Watson* dissent: a legal engine for ensuring proportional distribution of employment.

There is a more fundamental incompatibility between the cultural bias hypothesis and the suppositions of a disparate treatment model. It is that the values (apart from the illicit value of a taste for race or gender *qua* race or gender) that inevitably inform the practice of using facially neutral subjective criteria are to be subjected to governmental regulation. The bias hypothesis contemplates such regulation explicitly: the permissible meaning of "leadership" or "craftsmanship" or "judgment" is to be governmentally supplied. It is, of course, arguable that such meanings should in this context be governmentally supplied, but the argument is not plausibly made within the limited conception of the antidiscrimination principle contemplated by the *Watson* plurality.

VI. Conclusion

This article argues that the interpretation of disparate im-

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male) conception of valued behavior. Apart from the obvious question of the viability of this hypothesis, the leadership ability case does not exclude women as such; it excludes a competing and allegedly female-specific conception of valued behavior.

To be distinguished from the two contemplated cases is the case in which "leadership ability" has in practice two meanings, both of which are gender-specific. *See* Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988). That case is analogous to the sexual behavior case; it entails an express gender classification compelling distinct behavior of persons of distinct gender.

151. *Cf.* Hopkins v. Price Waterhouse, 825 F.2d 458, (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988) (excessive aggressiveness in candidate for partner disfavored by employer was stereotype). *Hopkins* may be read as compatible with the common inquiry noted in the text, because the employer could be viewed as establishing distinct criteria for male and female candidates for partner (males may be aggressive; females may not be aggressive). The inquiry contemplated by the bias hypothesis would be best illustrated by a hypothetical in which aggressiveness, of a type associated with stereotypical male behavior, was demanded of women.

152. *Cf.* Hopkins v. Price Waterhouse, 825 F.2d 458, 477 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988) (dissenting opinion) (recounting expert testimony to effect that intensity of employer's adverse reaction evidences stereotyped criterion).

pact theory invoked by the plurality opinion in *Watson* is an approximated disparate treatment theory. If the argument is correct, and if a majority of Justices ultimately adopt the plurality's position, the result would be a theory of discrimination much narrower in scope than was implied by earlier Court opinions, despite *Watson's* extension of impact theory to subjective criteria. More importantly, the result would be a theory distinct in function from that earlier implied. The theory would overenforce the core disparate treatment understanding of the discrimination prohibition rather than serve directly redistributional objectives. Finally, however, the result would be functional integration of disparate treatment and disparate impact theories, such that the pristine prohibition of disparate treatment will decline in relative importance. The weak form impact theory that emerges from this integration is, of course, both broader in scope and more intrusive in its effect on private transactions in employment that would be possible under the pristine version of the disparate treatment prohibition. Moreover, it is a theory that may continue to exhibit the ambivalencies of function that have marked the history of impact theory.